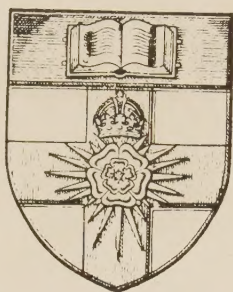


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CORRIGENDA

[1946] 2 All E.R.

P. 720. MINISTER OF PENSIONS *v.* CHENNELL. Counsel: for "*H. L. Parker*" read "*Stephen Chapman*."
P. 440. POPE *v.* ST. HELEN'S THEATRE, LTD. Case referred to No. 4: for "1944 1 All E.R. 438" read
"1944 1 All E.R. 696."

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P. 101. OUZMAN *v.* KENNEDY. Delete line E.1.

P. 102. OUZMAN *v.* KENNEDY. Solicitors: for "*R. Raymond Pollard & Co.*" read "*Pollard, Cooper & Thoroughgood*."

P. 111. *R. v. BODMIN JUSTICES*. Line B.4: for "defende to co so" read "defence to do so."

P. 125. HOLLORN *v.* MINISTER OF PENSIONS. Delete lines E.5 and 6.

P. 177. I.T.P. (LONDON), LTD. *v.* WINSTANLEY. Line D.5: for "subsequently" read "consequently."

P. 215. APLEY ESTATES *v.* DE BERNALLES. Line H.8: for "plaintiffs have released" read "plaintiffs have not released."

P. 228. NEWCASTLE CORPN. *v.* WOLSTANTON, LTD. Line F.4: for "reasons" read "reasoning."

P. 317. RE DICKER, DEC'D. Counsel: for "*McMullan*" read "*McMullen*."

P. 361. KIMBER *v.* WILLIAM WILLETT, LTD. Line G.2: the word "of" should be transferred to the end of the line instead of the beginning.

P. 435. ROMAN *v.* ROMAN. Solicitors: for "*Herbert Oppenheimer, Nathan & Vandyk*" read "*L. A. Hart*."

P. 578. CHRISTIE *v.* LEACHINSKY. Line B.3: for text as printed read "from the private citizen, save in some exceptional cases. No such doubt can be justified today."

P. 605. INLAND REVENUE COMRS. *v.* AUSTRALIAN MUTUAL PROVIDENT SOCIETY. Line A.3: for "total British income" read "total income."

P. 705. SMITH'S POTATO ESTATES *v.* BOLLAND. Case referred to: for "p. 000, *ante*" read "p. 699, *ante*."

THE
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LAW REPORTS
ANNOTATED

Distinguished. LANCASTER v. L.P.
T.B. [1948] 2 All E.R. 796.

GRAHAM (or MILLER) v. GLASGOW CORPORATION.

[HOUSE OF LORDS (Viscount Simon, Lord Thankerton, Lord Macmillan, Lord Simonds and Lord du Pareq), November 15, December 16, 1946.]

Master and Servant—Common employment—"Common work"—Electric trams in collision on highway—Injury to conductress.

The defence of common employment depends on the theory that the contract of employment between workman and employer contains an implied term that the workman will not hold his employer liable for an injury due to the negligence of a fellow-servant engaged in common employment with him. To make good the defence it is not enough that the plaintiff was a fellow-servant of the person by whose fault he was injured, but it is also necessary that the two should have been engaged at the time of the injury in a "common work," a phrase which is not limited to the sharing of the same task, but covers the case where the work of one is so related to the work of the other that the risk of injury to the one, due to the carelessness of the other, is not merely fortuitous, but is a special risk involved in the relationship itself, so that that risk must be deemed to have been in contemplation of the injured servant when he entered into his contract of service.

The decision in *Radcliffe v. Ribble Motor Services, Ltd.* (3) does not support the broad proposition that the defence of common employment is never available when two vehicles driven by fellow-servants of the same employer collide on the highway. If the risk of collision between them is merely the ordinary risk arising from contiguity in traffic, *i.e.* the risk of being run into by another vehicle, whoever is its driver, then the injured party has no special interest in the skill and caution of a driver who is his fellow-servant. The risk he runs is a mere risk of the road in the sense that he might equally well be run into by anyone else driving in his vicinity, but, if the relation between the work of the two fellow-servants is such that one of them depends for his safety from harm in a special degree on the care and skill of the other, then they are engaged in a "common work" and the term in the contract of employment exonerating the common employer from liability has to be implied. Each case must be judged on its own facts.

The appellant was engaged in her employment as conductress of one of the respondents' electric tramcars which was about to travel up a steep incline at a short distance from another of the respondents' tramcars, both cars being on the same line of rails and forming part of the same shuttle-service, each with its appropriate timetable. The electric system of the leading car became overloaded while mounting the hill, a contact breaker came into operation, and as a result the car was left on the slope without electric motive power. The duty of the driver in such circumstances was promptly to apply his brakes and thus hold the car stationary. He negligently failed

to do so and the car ran backwards down the hill, and in the collision which resulted the appellant sustained personal injuries :

HELD : the doctrine of common employment applied since (i) the circumstance that tramcars cannot avoid an impending collision by lateral movement and that a common path is prescribed for them by the rails on which they travel necessarily creates a greater risk than the ordinary risk arising from contiguity in traffic, (ii) the crews of the two tram cars were carrying out a "common work," and (iii) the appellant's contract of employment was rightly regarded by the court below as including the implied term exonerating the respondents from liability for the negligence of her fellow-servant.

Decision of the Second Division of the Court of Session, 1946 S.C. 109, affirmed.

[AS TO THE DOCTRINE OF COMMON EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 191—194, paras. 322—328; and FOR CASES, see DIGEST, Vol. 34, pp. 207—220, Nos. 1697—1824.]

Cases referred to :

- (1) *Priestley v. Fowler* (1837), 3 M. & W. 1; Murp. & H. 305; 7 L.J.Ex. 42; 34 Digest 202, 1647.
- (2) *Bartonhill Coal Co. v. Reid* (1858), 3 Macq. 266; 31 L.T.O.S. 255; 22 J.P. 560; *Bartonhill Coal Co. v. McGuire* (1858), 3 Macq. 300; 31 L.T.O.S. 258; 34 Digest 126, 972.
- (3) *Radcliffe v. Ribble Motor Services, Ltd.*, [1939] 1 All E.R. 637; [1939] A.C. 215; 108 L.J.K.B. 320; 160 L.T. 420; Digest Supp.
- (4) *The Petrel*, [1893] P. 320, 62 L.J.P. 92; 70 L.T. 417; 34 Digest 213, 1757.
- (5) *Metcalfe v. London Passenger Transport Board*, [1939] 2 All E.R. 542; 108 L.J.K.B. 733; 160 L.T. 599; 103 J.P. 246; Digest Supp.

APPEAL from a decision of the Second Division of the Court of Session reported 1946 S.C. 109. The facts appear in the opinion of VISCOUNT SIMON.

James Walker, K.C., and *T. J. Doull Connolly* (both of the Scottish Bar) for the appellant.

R. P. Morison, K.C., *R. H. Sherwood Calver, K.C.*, and *J. J. Cunningham* (all of the Scottish Bar) for the respondents.

The House took time for consideration.

Dec. 16. VISCOUNT SIMON : My Lords, on Jan. 22, 1944, the appellant sustained personal injuries when engaged in her employment by the respondent corporation as a conductress of an electric tramcar, No. 1011. The tramcar was about to travel up a steep incline and at a short distance in front of it, on the slope of the hill, was another tramcar of the corporation, No. 1089, moving in the same direction. The two cars were on the same line of rails and were part of a sequence providing the same shuttle-service, each with its appropriate timetable. The electric system of car No. 1089 became overloaded while mounting the hill; a contact-breaker, with which each car is fitted as a safety device, came into operation; and, as a result, the car was left on the slope without electric motive power. The duty of the driver in such circumstances was promptly to apply his brakes and thus hold the car stationary. He negligently failed to do so, and car No. 1089 ran backwards down the hill until it collided with car No. 1011. In the collision the appellant was injured. The respondents admit that the negligence of the driver of car No. 1089 caused the injury. Apart from the possible application of the doctrine of "common employment," the liability of the respondents in accordance with the axiom *respondet superior*, is, therefore, undisputed. The sole question in the case is whether, in view of the fact that the injured conductress and the negligent driver were both employed by the respondents and were respectively at work as described, the doctrine operates to relieve the corporation from liability.

I am of opinion that it does, and I should be prepared to adopt as it stands the judgment of the LORD JUSTICE CLERK (LORD COOPER) delivered on behalf of the judges of the Second Division of the Court of Session, but, in view of the fact that we have before us a careful opinion of the LORD ORDINARY (LORD PATRICK) sustaining the opposite view, and of the excellent arguments from each side addressed to this House, I will state the grounds of my conclusion in my own words.

The first judicial indication of the defence of "common employment" is to be found in the judgment of ABINGER, C.B., in 1837 in *Priestley v. Fowler* (1). The

defence depends on the theory that the contract of employment between workman and employer contains an implied term that the workman will not hold his employer liable for an injury due to the negligence of a fellow-servant engaged in common employment with him. In 1858 the House of Lords, through the mouth of LORD CRANWORTH, laid it down that the same doctrine applied in the law of Scotland : *Bartonhill Coal Co.* cases (2). The Employers' Liability Act, 1880, provided a statutory exception to the common law rule, and the Workmen's Compensation Acts, under which the employer's liability does not depend on negligence at all, give no room for the defence in cases dealt with under those Acts, but, apart from statute, the common law rule, within proper limits, still applies.

At one time it might almost have seemed that the defence of common employment could be compendiously expressed by saying that at common law a servant cannot claim damages from his master for the negligence of a fellow-servant.

In view, however, of the increasing ramifications of business and of the many cases in which one servant could not be supposed to have had in contemplation the negligence of another servant engaged on quite a different piece of work and acting in quite a different sphere, later judicial pronouncements have made it clear that the defence provided by the doctrine is not available without regard to the circumstances, and have made room for the conception that two servants are not necessarily in "common employment" because they have a common employer.

Regard must be had to the work they are respectively doing and to the relation between them when they are working, but the defence still depends on the conception, however artificial, of an implied contract. The issue is whether, having regard to the particular facts, the implied contract must be considered to cover the case. Fine distinctions may be involved, but, where necessary, they must be made, and it is dangerous to argue that a decision on one set of facts would provide a sufficient guide if the facts were somewhat varied.

The qualification to be introduced in mitigation of the bald proposition that a servant cannot hold his employer liable at common law for the negligence of a fellow-servant was closely examined and carefully defined by this House in *Radcliffe v. Ribble Motor Services Ltd.* (3). It is a striking proof of the fineness of the distinction to be drawn that both the Lord Ordinary and the Court of Session founded their conclusions in the present case on what was said in *Radcliffe's* case (3), but with contrary results, LORD PATRICK holding that the defence of common employment, therefore, failed to exonerate the respondents, and LORD COOPER that it, therefore, succeeded. In *Radcliffe's* case (3) the facts were that two motor-coach drivers in the service of the same employer, after helping to take a party of people to New Brighton, were free to bring the empty vehicles back to the garage at Bootle by any route each driver chose. The coach driven by Radcliffe stopped in a street in Liverpool. Radcliffe got out and was standing on its offside when the other coach, proceeding independently, but, as it happened, along the same street, owing to the negligence of its driver passed too close and crushed Radcliffe. The two drivers were held not to be, at the time of the accident, in common employment. "The one [driver] was no more interested in the skill of the other than in that of the drivers of myriads of other vehicles in whose vicinity he might happen to drive": per LORD ATKIN ([1939] 1 All E.R. 637, at p. 640). "The risk was the general risk of the highway, not the specific risk of the fellow-servant's negligence": per LORD WRIGHT (*ibid.*, at p. 661). SIR FRANCIS JEUNE, P., in *The Petrel* (4) had already drawn the same kind of distinction in the case of a collision at sea of two ships belonging to the same owner. He said ([1893] P. 320, at p. 326):

The consideration that the risk of injury to the one servant is the natural and necessary consequence of misconduct in the other, implies that the skill and care of the one is of special importance to the other by reason of the relation between their services. Tried by this principle, can it be said that the safety of the captain of one ship of a company is in the ordinary and natural course of things dependent on the skill and care of the captain of another ship of the same company, or that injury by the negligence of one is an ordinary risk of the service of the other? In some cases it might perhaps: for example, it might if all the ships of the company were in the habit of meeting in the same dock, and the safety of each thus became, in the ordinary course of things dependent on the skill with which the other was navigated. But in regard to navigation on the high seas, or in the estuary of the Thames, would a captain of one ship of the General Steam Navigation Company have more reason to be interested in the skill of a captain of

another ship of the company than in that of the masters of the myriad other craft in whose vicinity he might happen to navigate? By no reasonable supposition can it be imagined that he would. I think, therefore, that these two captains were not in common employment.

The criterion is often expressed by saying that, to make good the defence of common employment, it is not enough that the plaintiff was a fellow-servant of the person by whose fault he was injured, but it is also necessary that the two should have been engaged at the time of the injury in a "common work." But this last expression also needs definition, or at any rate, explanation. "Common work" is not limited to the sharing of the same task, like the task of two sawyers in a saw-pit, or of engine-driver and stoker on the footplate of a locomotive. The phrase covers the case where the work of one is so related to the work of the other that the risk of injury to the one, due to the carelessness of the other, is not merely fortuitous, but is a special risk involved in the relationship itself, so that that risk must be deemed to have been in contemplation of the injured servant when he entered into his contract of service.

Radcliffe's case (3), therefore, does not support the broad proposition that the defence of common employment is never available when two vehicles driven by fellow-servants of the same employer collide in the high road. If the risk of collision between them is merely the ordinary risk arising from contiguity in traffic, *i.e.* the risk of being run into by another vehicle, whoever is its driver, then the injured party has no special interest in the skill and caution of a driver who is his fellow-servant. The risk he runs is a mere risk of the road in the sense that he might equally well be run into by anyone else driving in his vicinity, but, if the relation between the work of the two fellow-servants is such that one of them depends for his safety from harm in a special degree on the care and skill of the other, then they are engaged in a "common work" and the term in the contract of employment exonerating the common employer from liability has to be implied.

Here we have a collision between two of the corporation's tramcars engaged in the same service and following the same route on the same pair of rails. They are intended, of course, to maintain a proper interval between them, as their timetables prescribe, but it is notorious that in the course of practical working tramcars moving in the same direction on a line of rails sometimes cluster and, unless carefully handled, may run into one another. There is no "block system" as there is on railways, by which signals warn a following train not to advance along a section of the line until it is clear of the preceding train. Moreover (and this is the most significant circumstance), if there is danger of collision between two tramcars on the same line of rails, either by the foremost running backward or by the car following advancing too fast, neither car can avoid the collision by lateral movement, for each can move only along the fixed grooves. Every case in this branch of the law depends on its own facts, and obviously a collision between tram and tram is not governed by all the same considerations as a collision between bus and bus, or even between bus and tram each following its own route and happening to collide in the roadway. An instance of the latter occurred in *Metcalfe v. London Passenger Transport Board* (5) where LORD GREENE, M.R., pointed out ([1939] 2 All E.R. at p. 546), that the risk did not arise out of any special relation between the injured and the negligent fellow-servants, but was a type of risk in a public thoroughfare which was equally present when the negligently driven vehicle belonged to and was driven by the servant of a different owner. I cannot agree with LORD PATRICK that "on the facts of this case the defenders have failed to prove that the pursuer was subject to any greater degree of risk of her tramcar being in collision with tramcar 1089 than she was to the risk of being in collision with one of the countless vehicles in whose vicinity it would be while traversing the streets of Glasgow." On the contrary, the circumstance that tramcars cannot avoid an impending collision by lateral movement and that a common path is prescribed for them by the rails on which they both travel necessarily creates a greater risk, and there was uncontradicted evidence of this "unavoidable feature of the operation of a tramway system." The crews of the two tramcars were carrying out a "common work."

On the facts of this case, therefore, the appellant's contract of employment was rightly regarded by the Court of Session as including the implied term exonerating the respondent from liability for the negligence of the appellant's

fellow-servant. I move that the appeal be dismissed.

LORD THANKERTON : My Lords, I concur in the opinion which has just been delivered by my noble and learned friend on the Woolsack.

A LORD MACMILLAN [read by LORD THANKERTON] : My Lords, on Jan. 22, 1944, a tramcar belonging to the respondents collided, owing to the negligence of the driver employed by them, with another of their tramcars on which the
B appellant was employed by them as a conductress, with the result that the appellant sustained injuries for which she seeks reparation from the respondents. The accident occurred in Kilbowie Road, Clydebank, which forms part of one of the respondents' tramway routes, and both tramcars were at the time engaged in providing a public service on that route. The details of the accident have already been described and I need not repeat them. The respondents plead that, the
C appellant's injuries being due to the negligence of a fellow employee, her claim is excluded by the doctrine of common employment.

Since the decision of this House in *Radcliffe v. Ribble Motor Services Ltd.* (3) some attempt has been made to suggest that the plea of common employment is inapplicable to the case of traffic accidents occurring on the highway, though due to the negligence of a fellow-servant, on the ground that such accidents are incidental to the general use of the highway by the public and are not among
D the special risks of a fellow-servant's negligence which an employee is impliedly taken to have assumed on entering his employment. The case of *Radcliffe v. Ribble Motor Services Ltd.* (3) affords no warrant for any such limitation of the doctrine. Two fellow servants may be engaged in a common employment on the highway just as they may be so engaged elsewhere. The place where the negligent act occurred is no more than one of the elements to be considered in deciding whether the servants involved were at the time in common employment in the relevant sense. The test is one of relationship, not of locality. The question must always be whether the nature of the employment in which the fellow-servants were engaged was such as to bring them at the time and place of the accident into association with each other in carrying on some activity in common. Each case must be judged on its own facts.

E In the present case the Lord Ordinary, on his view of the facts, has held that the plea of common employment is inadmissible, while the Second Division of the Inner House, on their view of the facts, have sustained the plea. In my opinion, the evidence amply justifies the summary of the facts with which the Lord Justice-Clerk concludes his opinion and on which he and his colleagues base their decision. I agree both with his summary of the facts and with his conclusion in law. I, accordingly, concur with the motion that the appeal be dismissed.

F LORD SIMONDS : My Lords, I concur in the opinion delivered by my noble and learned friend on the Woolsack.

LORD DU PARCQ : My Lords, I also concur in the opinions which have been delivered.

Appeal dismissed.

Solicitors : *Hy. S. L. Polak & Co.*, agents for *Edward J. Boyle*, Glasgow, agent for *Edmund M. McCabe*, Leith (for the appellant) ; *Martin & Co.*, agents for *Simpson & Marwick*, Edinburgh (for the respondents).

(Reported by C.St. J. NICHOLSON, ESQ., Barrister-at-Law.)

DOUDIE v. KINNEIL, CANNELL AND COKING COAL CO., LTD.

[HOUSE OF LORDS (Viscount Simon, Lord Thankerton, Lord Macmillan, Lord Simonds and Lord du Parcq), November 14, December 16, 1946.]

Workmen's Compensation—Compensation—Amount—Workman receiving compensation for partial incapacity—Second accident resulting in total incapacity—Workmen's Compensation Act, 1925 (c. 84), s. 9 (1) (c).

On Feb. 15, 1939, a workman met with an accident arising out of and in the course of his employment. When sufficiently recovered to undertake light work, he was re-employed by the same employers at a lower wage and received, in addition to his wage, 15s. a week as compensation for partial incapacity. On Apr. 17, 1944, the workman met with a second accident arising out of and in the course of his employment and was totally incapacitated for some weeks. He contended that for this period he was entitled to receive not only the sum of 30s. a week (and supplementary allowances) for total incapacity in respect of the second accident, but also the 15s. a week to which he was entitled in respect of the first accident. It was contended by the employers that under the Workmen's Compensation Act, 1925, s. 9 (1), proviso (c), the total amount of compensation payable could not exceed 30s. per week:—

HELD: the workman was entitled to receive the compensation payable in respect of the first accident in addition to the 30s. a week for total incapacity in respect of the second accident, for proviso (c) to s. 9 (1) of the Act merely limited the compensation for injury resulting from any one accident and did not provide that a workman should never at any time receive more than 30s. under the Act, however often he might have sustained injuries by accidents.

Thompson v. London & North Eastern Ry. Co. (2) followed. *M'Kinstrey v. Auchinlea Coal Co.* (1) overruled.

Per LORD DU PARCQ: I agree with the proviso put on s. 9 (1), proviso (b) by the Court of Appeal in *Evans v. Oakdale Navigation Collieries Ltd.* (6).

[AS TO COMPENSATION IN CASES OF MORE THAN ONE ACCIDENT, see HALSBURY, Hailsham Edn., Vol. 34, p. 912, para. 1255, note (e); and FOR CASES, see DIGEST, Supp., Master and Servant, Nos. 3362a, b. See also WILLIS'S WORKMEN'S COMPENSATION, 37th Edn., pp. 288—290.]

Cases referred to:

- (1) *M'Kinstrey v. Auchinlea Coal Co., Ltd.*, [1920] S.C. 75; 57 S.L.R. 80; [1919] 2 S.L.T. 263; 13 B.W.C.C. 388.
- (2) *Thompson v. London & North Eastern Ry. Co.*, [1935] 2 K.B. 90; 104 L.J.K.B. 515; 152 L.T. 571; 28 B.W.C.C. 95; Digest Supp.
- (3) *McCann v. Scottish Co-operative Laundry Assocn., Ltd.*, [1936] 1 All E.R. 475; 105 L.J.P.C. 58; 154 L.T. 503; 29 B.W.C.C. 1; Digest Supp.
- (4) *Harwood v. Wyken Colliery Co.*, [1913] 2 K.B. 158; 82 L.J.K.B. 414; 108 L.T. 283; 6 B.W.C.C. 225; 34 Digest 348, 2803.
- (5) *Wheatley v. Lambton, Hetton & Joicey Collieries, Ltd.*, [1937] 2 All E.R. 756; [1937] 2 K.B. 426; 106 L.J.K.B. 667; 156 L.T. 490; 30 B.W.C.C. 171; Digest Supp.
- (6) *Evans v. Oakdale Navigation Collieries, Ltd.*, [1940] 2 All E.R. 201; [1940] 1 K.B. 702; 109 L.J.K.B. 493; 164 L.T. 17; 33 B.W.C.C. 122; Digest Supp.

APPEAL by the workman from a judgment of the Second Division of the Court of Session, affirming a decision of the arbitrator. The workman, who was in receipt of 15s. a week as compensation for partial incapacity, met with a second accident arising out of and in the course of his employment and was totally incapacitated for some weeks. He claimed compensation at the rate of 30s. a week for that period in addition to the compensation which he was receiving for partial incapacity, but the arbitrator (following the decision in *M'Kinstrey v. Auchinlea Coal Co., Ltd.* (1)) found that he was not entitled to both weekly payments, but only to the payment of 30s. a week in respect of the second accident.

James Walker, K.C., and *T. J. D. Connolly* (both of the Scottish Bar) for the workman.

R. P. Morison, K.C., and *David Watson* (both of the Scottish Bar) for the employers.

The House took time for consideration.

Dec. 16. VISCOUNT SIMON: My Lords, this is an appeal from the Second Division of the Court of Session raising a question of construction under the Workmen's Compensation Act, 1925. The Court of Session followed a previous decision of that court in *M'Kinstrey v. Auchinlea Coal Co.* (1), and on this ground decided against the contention of the workman, who is the present appellant. A decision of the Court of Appeal in England (LORD HANWORTH, M.R., SLESSER and ROMER, L.JJ) in *Thompson v. L. & N.E.R.* (2) is to the contrary effect, and there is no doubt that the respective conclusions in *M'Kinstrey's* case (1) and *Thompson's* case (2) conflict with one another. The question before the House, therefore, is which of these decisions correctly interprets the provisions of the Act on the point involved.

The situation to be dealt with occurs where a workman meets with two accidents in succession, each of which arises out of and in the course of his employment and inflicts personal injury on him. The injury caused by the first accident gives rise to a weekly payment during partial incapacity, and while these circumstances continue to exist a second accident befalls him, causing injury involving total incapacity, in respect of which the workman has a claim for compensation. In *M'Kinstrey's* case (1) LORD DUNDAS, delivering the opinion of the Scottish Court, adopted the view ([1920] S.C. 75, at p. 79) that incapacity:

... can never be more than total incapacity, however many injuries by accident the man may have suffered from.

He hence concluded that the maximum weekly payment which a workman could receive under the Act, however many accidents he might have met with, was the maximum fixed by the statute where there had been only one accident producing total incapacity. In *Thompson's* case (1), on the other hand, it was held that a workman who is in receipt of compensation under the Act for partial incapacity resulting from the first accident should continue to receive this compensation in addition to further weekly compensation in respect of the total incapacity resulting from a second accident. The result would, therefore, be, according to the Court of Appeal in England, that a workman who met with more accidents than one, and had a claim for compensation in respect of each, might be in receipt of a larger sum than the maximum prescribed if only one accident had occurred.

The admitted facts in the present case are simple and clear and neatly illustrate the point to be decided. The arbitrator in his Stated Case sets them out thus:

(i) The claimant is married and his wife is alive and there is one child of his marriage, a daughter, who is alive and is under 15 years of age. (ii) On Feb. 15, 1939, the claimant, while in the employment of the respondents, had been injured by accident arising out of and in the course of his work. (iii) He was thereby incapacitated for work and the respondents paid him compensation as for total incapacity. (iv) On or about Feb. 26, 1943, the claimant was able to resume light work. (v) The respondents then agreed to pay and did pay the claimant compensation in respect of partial incapacity at the rate of 15s. per week with supplementary allowances. (vi) On Apr. 17, 1944, the claimant sustained injury to the thumb of his left hand by accident arising out of and in the course of his work with the respondents and was thereby incapacitated for work until June 7, 1944. (vii) The claimant has claimed in respect of the accident on Apr. 17, 1944, compensation at the rate of 30s. per week with supplementary allowances from Apr. 18, 1944, to June 6, 1944, inclusive. (viii) The respondents have tendered to the claimant the sum of 15s. per week in addition to the sum of 15s. already paid in respect of the accident which occurred on Feb. 15, 1939, together with supplementary allowances.

On these facts the arbitrator found in law that the claimant is not entitled to receive from the respondents the sum of 15s. per week with supplementary allowances in respect of the first accident from Apr. 18, 1944, to June 6, 1944, inclusive, but is entitled to receive in respect of the second accident the sum of 30s. per week with supplementary allowances during this period.

The whole matter turns on the proper application of proviso (c) to s. 9 (1) of the Act. This proviso runs:

the weekly payment shall in no case exceed 30s.

Does "in no case" mean "in the case of no individual" or "in the case of no given accident"? More at length, does the proviso mean that a workman who has been injured more than once, and has been entitled to compensation in respect of more than one accident, cannot receive total compensation exceeding 30s. a week? Or does it mean that this maximum applies to limit the compensation

for injury resulting from any one accident, so that multiple accidents may in some instances result in providing him with compensation in a total sum exceeding 30s. a week ?

It seems to me that, on examining the language of the Act, the preferable construction is the latter of these alternatives. When s. 9 (1) begins by saying :

The compensation under this Act where total or partial incapacity for work results from the injury shall be a weekly payment during the incapacity of an amount calculated in accordance with the rules hereinafter contained . . .

"the injury" is the specific injury then under consideration which produces a degree of incapacity. The proviso is a proviso to this section and relates to compensation for the specific injury. The fact that a workman has been previously injured and partly incapacitated is irrelevant. This view of the meaning of the phrase "the injury" is supported by considering the language of s. 1 of the Act where a particular "personal injury by accident" is plainly dealt with. The proviso does not say, or mean, that, however many accidents the workman has to endure, the compensation in respect of all of them put together can never be more than 30s. a week. This view of the matter is greatly strengthened by two further considerations. It is not disputed that, for the purpose of testing the true construction of s. 9, the case must be considered of a workman who meets with his first accident when in the employment of A, but meets with his second accident when in the employment of B. In such circumstances it appears impossible to construe the Act otherwise than as above suggested. There is nothing whatever in the Act providing for an adjustment between the two employers, yet, if the first accident produces partial incapacity with considerable but partial loss of earning power so that A becomes liable to make a weekly payment of, say, 15s., the workman, when he enters the employment of B, may receive substantially lower wages than he would have if he were a completely fit man, and yet the measure of compensation for a second accident producing total incapacity will partly turn on the wages he was receiving from B before this occurred. It would be a remarkable result if, in these circumstances, the man's total incapacity produced while serving B should have the result of suspending or wiping out altogether A's previous liability to make the weekly payment previously due from him.

Moreover, it has been decided by this House in *McCann v. Scottish Co-operative Laundry Association* (3) that a liability to pay compensation under the Act for partial incapacity does not cease because at a later date the workman becomes totally incapacitated for work by events unconnected with the accident for which he is being compensated, e.g., by supervening illness or old age. Once a liability to pay a weekly compensation in view of a degree of incapacity, whether total or partial, is established, the liability continues during the workman's life until the workman's capacity improves. To quote LORD MACMILLAN ([1936] 1 All E.R. 475, at p. 482) :

. . . it is now well settled, that a workman who by reason of incapacity due to an accident is entitled to compensation does not lose that right merely because through some extraneous supervening cause, such as illness or old age, a natural incapacity is added to the incapacity due to the accident. The employer cannot plead that as the workman would, by reason of his condition apart from the accident, be incapacitated in any event, he has lost his right to compensation. There is no merger of the accidental incapacity in the natural incapacity.

McCann's case (3) approved a similar decision of the Court of Appeal in *Harwood v. Wyken Colliery Co.* (4), in which the observations of HAMILTON, L.J. ([1913] 2 K.B. 158, at pp. 169, 170) are particularly worthy of study. I agree with the view of the Court of Appeal in *Thompson's* case (2) that the reasoning in *Harwood's* case (4) equally applies where the supervening cause is a subsequent accident creating total incapacity.

The liability, therefore, in the present case to pay 15s. a week from Feb. 26, 1943, continues, while the new liability arising out of the accident of Apr. 17, 1944, is not affected by, and the compensation arising from this second accident is not reduced by reason of, the former and independent liability, save so far as the wages earned before the second accident were less by reason of the previous partial incapacity.

In this appeal we are concerned with a case in which after the first accident there remained some partial capacity for work, which the workman lost as the result of the second accident. It is not, therefore, necessary to discuss the

complicated problem (illustrated by such decisions as *Wheatley v. Lambton Collieries* (5) and *Evans v. Oakdale Navigation Collieries* (6)) which arises when a workman who is receiving compensation for an accident is certified to be incapacitated by industrial disease.

It seems to me clear that, if a man is already partially incapacitated by accident and then meets with a second accident which incapacitates him altogether, the second accident none the less is the event which produces total incapacity. Total incapacity is the condition to which the man is reduced and in which the man is unable to earn any wages. It is immaterial to inquire whether he was previously partially incapacitated or not. We are engaged simply in construing the words of the Act, and to read the relevant sections as though they required credit to be given for continuing compensation for an earlier accident involving partial incapacity, when compensation is claimed for total incapacity arising from a later accident, would be, as HAMILTON, L.J., said in *Harwood's case* ([1913] 2 K.B. 158, at p. 169) :

... not interpretation but . . . legislation, unless the context or the scheme of the Act (natural justice not being in question) demonstrates that the legislature so intended. In my view, therefore, the decision in *Thompson's case* (2) should be approved and we should over-rule the decision in *M'Kinstrey v. Auchinlea Coal Co.* (1). I move that the appeal be allowed.

LORD THANKERTON : My Lords, the facts of this appeal and the questions at issue have been clearly stated by my noble and learned friend on the Wool-sack in his opinion, which I have had the privilege of considering, and in which I concur.

It has long been settled by a series of decisions of this House that the right to compensation under the Workmen's Compensation Acts is conferred by the statute—at present by s. 1 of the Act of 1925—that the amount of compensation is to be measured, at present, by ss. 8 and 9 of the Act of 1925, and that you must not resort to these latter two sections for the purpose of cutting down the right to compensation. Further, the right to compensation thus conferred by the statute is not dependent on an award by the arbitrator or any payment of compensation by the employers. I am of opinion that consideration of s. 1 of the Act of 1925 will provide the key to the solution of the present question.

In my opinion—and, indeed, I understood the respondents' counsel as conceding it—the appellant acquired on the occasion of each accident a separate right to compensation in respect of the personal injury caused by the particular accident. If so, the measurement of the compensation in respect thereof will involve a separate measurement in respect of each right to compensation, and ss. 8 and 9 are thus designed to quantify the compensation due in respect of injury caused by the particular accident, in respect of which the statutory right to compensation is acquired. It will follow that the limit of 30s. imposed by proviso (c) to s. 9 (1) of the Act will be equally confined to the compensation in respect of the injury caused by the particular accident. There is no statutory provision under which the compensation payable in respect of injury by another accident can be taken into account, and no machinery for aggregation and apportionment of compensation payable in respect of injury from more than one accident, whether the employers are the same or not. If there be any hardship on the employers, it is for Parliament, if it thinks fit, to amend the statutory provisions.

LORD MACMILLAN (read by LORD SIMONDS) : My Lords, your Lordships in this appeal have to choose between two conflicting decisions of the Court of Session in Scotland and the Court of Appeal in England on an important point in workmen's compensation law.

The appellant, on Feb. 15, 1939, while in the respondents' employment, was injured by an accident which totally incapacitated him. He was paid compensation on that footing until he sufficiently recovered to enable him to undertake light work at a lower wage and was thereafter paid, in addition to his wages, 15s. a week as compensation for partial incapacity. On Apr. 17, 1944, a second accident befell him which totally incapacitated him from work. In respect of this second accident he claimed compensation at the rate of 30s. a week to which he would have been entitled had there been no previous accident and no subsisting weekly compensation for partial incapacity. The appellant maintained his right to both the 15s. a week for partial incapacity due to the first

accident and the 30s. a week for total incapacity due to the second accident. This the respondents disputed, founding on proviso (c) to s. 9 (1) of the Act of 1925, which provides that "the weekly payment shall in no case exceed 30s." They, accordingly, tendered to the appellant in respect of the second accident a weekly payment of 15s. which, with the 15s. being paid to him in respect of the first accident, made up a total weekly payment of 30s. The arbitrator, holding himself bound by the decision of the Second Division of the Court of Session in *M'Kinstrey v. Auchinlea Coal Co.* (1), on the corresponding provisions of the Act of 1906, decided that the appellant was not entitled to both weekly payments concurrently, but was entitled only to payment of 30s. a week in respect of the second accident. On appeal, this decision was affirmed by the judges of the Second Division who likewise held themselves bound by *M'Kinstrey's* case (1). The appellant now asks this House to overrule the decision in *M'Kinstrey's* case (1) and to approve and give effect to the contrary view enunciated by the Court of Appeal in England, on precisely the same state of facts, in *Thompson v. London & North Eastern Railway Co.* (2).

Having considered the opinion of LORD DUNDAS, the only opinion delivered in the Scottish case, and compared its reasoning with the judgments of LORD HANWORTH, M.R., SLESSER and ROMER, L.JJ. in the English case, I have no hesitation in preferring the latter to the former. LORD DUNDAS finds the key to the whole problem (1920 S.C. 75, at p. 79) in the proposition that :

... compensation under the Act is not for a man's injury but for his incapacity, that that incapacity is one and indivisible, and that it can never be more than total incapacity, however many injuries by accident the man may have suffered from.

In common with the judges of the Court of Appeal in England, I find no warrant in the Act for this view. Section 1 of the Act confers on a workman injured by an accident arising out of and in the course of his employment a right to compensation. Where an accident occurs and injury is sustained by a workman, the right to be compensated in respect of that accidental injury at once arises and must be assessed on its own merits. Any other accident he may have previously suffered or may thereafter suffer is irrelevant. No doubt, the compensation is to be "in accordance with the provisions hereinafter contained," and s. 9 (1) with its proviso (c) is one of the provisions thereafter contained, but s. 9 is concerned only with the quantification of the amount of compensation payable in respect of the particular accident. When it provides that "the weekly payment shall in no case exceed 30s." it means that in arriving at the weekly compensation payable in respect of the injury due to the accident in question a maximum of 30s. shall not be exceeded. I see no justification for reading the proviso as if it had enacted that no workman shall ever at one and the same time receive more than 30s. a week as compensation under the Act however often he may have sustained injuries by accidents. Each case as it arises must be dealt with on its own facts and for each case compensation must be awarded as the Act prescribes, subject only to the limit that in no one case of injury shall the compensation exceed 30s. a week.

This view is fortified by taking the case where the liability for the first accident has been satisfied by a lump sum payment. There are no means of taking this into account in assessing the compensation for a second accident. Again, take the case of the second accident occurring in employment by a different employer. In that case, is the employer to pay less compensation for total disablement because the employee is drawing compensation for partial disablement from a previous employer? The Act imposes no such restriction. As SLESSER, L.J., said ([1935] 2 K.B. 90, at p. 100) in *Thompson's* case (2) :

The partial incapacity is not so absorbed into the total incapacity that there is but one claim; there are two separate and continuing liabilities giving rise to two separate claims for compensation.

The views expressed by my noble and learned friend LORD THANKERTON in this House in *McCann v. Scottish Co-operative Laundry Association* (3) lend support to the opinion which I have formed in the present case, though the circumstances were different. There supervening total incapacity due to illness was held to have no effect on an award of compensation for partial incapacity subsisting at the time of the onset of the illness. The appeal should, in my opinion, be allowed.

LORD SIMONDS : My Lords, I concur.

LORD DU PARCQ : My Lords, the question of construction which is now before your Lordships cannot be said to be a simple one since the appellate courts of England and Scotland have differed on it. None the less, I am of opinion, with deference to those who have thought otherwise, that, if the question is approached with regard only to the words of the Act of Parliament, the answer to it is reasonably plain.

A Section 1 of the Act provides that if a workman suffers "personal injury by accident" (I omit words not germane to this inquiry) his employer becomes liable to pay him compensation. The compensation, as is seen from s. 9 (1) is to be a weekly payment. The payment is to be made "where total or partial incapacity for work results from the injury" and is to be payable "during the incapacity." It is to be calculated in accordance with the rules laid down, for cases of "total incapacity" in s. 9 (2) and for cases of "partial incapacity" in s. 9 (3). The Act assumes, not unnaturally, that the workman immediately before the accident which had injured him, had some capacity for work. It may not have been the complete capacity of a wholly fit and hitherto uninjured man, but such as it was it enabled him to earn wages. When that capacity is diminished or destroyed, so that "total or partial incapacity for work results," the employer in whose service he has suffered the incapacitating injury must compensate him. It does not seem to me to be a misuse of language to say that, when a workman loses through an accident all that capacity for work which he possessed immediately before the accident, "total incapacity for work" has resulted from the accident.

D The rules for calculating the weekly payment are based on a comparison of the workman's earnings before and after the accident, and as the extent of his capacity will normally be reflected in his wages, compensation may be said to be measured, though, no doubt, roughly measured, according to the reduction in his capacity for work, by comparison, not with an ideal standard of full capacity, but with that degree of capacity which he possessed before the accident. Thus, where a partially incapacitated man is totally incapacitated by a subsequent accident, the liability of the employer in whose service the man became totally incapacitated is to compensate him by payments based, not on the difference between full earning capacity and total incapacity, but on the depreciation of his earning power attributable to the last accident, by which partial incapacity was converted into total incapacity. When the calculation is made in accordance with s. 9 it may turn out that, but for the operation of proviso (c) to s. 9 (1), a weekly payment exceeding 30s. would be due to the workman. The proviso limits the weekly payment to that amount. If I have rightly construed the section thus far, there can be no ground for supposing it to have been the intention of the legislature that, when a workman has suffered injuries from successive accidents, the total of the weekly payments he receives in respect of them is to be limited to 30s. Certainly, no such intention is expressed, and I cannot infer it from the words of the Act. On the contrary, it seems to me to be manifest that in s. 9 the legislature is concerning itself solely with the payment to be made by the employer in whose service the workman was when a particular accident befell him. The words of the section are not, in my opinion, ambiguous, but any doubt should, I think, be dispelled by the consideration that, if Parliament had intended that a workman who, after successive accidents, was in the end totally incapacitated, could recover no more than 30s. a week in all, it could hardly have failed to make some provision for the adjustment and apportionment of the liability as between the different employers who might be concerned. There is no trace of any such provision in the Act or in the rules made under it.

G I only wish to add, with regard to the point raised on the proviso in s. 9 (1) (b) that I agree with the interpretation put on that proviso by the Court of Appeal in *Evans v. Oakdale Navigation Collieries, Ltd.* (6). For these reasons, and for the reasons given by the noble and learned Lord on the Woolsack, whose opinion I have had the advantage of reading in print, I would allow the appeal.

Appeal allowed.

Solicitors : *Hy. S. L. Polak & Co.*, agents for *C. M. Scott & M'Gillivray*, Glasgow, and *Herbert Macpherson*, Edinburgh (for the appellant); *Beveridge & Co.* (Parliamentary agents), agents for *J. A. M'Ara*, Glasgow, and *W. & J. Burness*, Edinburgh (for the respondents).

[*Reported by C. St. J. NICHOLSON, Esq., Barrister-at-Law.*]

SEARLE v. WALLBANK

[HOUSE OF LORDS (Viscount Maugham, Lord Thankerton, Lord Porter, Lord du Parc and Lord Uthwatt), October 24, 25, December 16, 1946.]

Animals—Trespass—Horse on highway—Escape through gap in fence of field adjoining highway—Collision with cyclist—Duty so to maintain gates and fences that escape of animals impossible—Duty to take reasonable care to prevent escape.

Practice—Appeal to House of Lords—Leave to appeal—Appellant a poor person—Consideration of respondent's position as to costs.

In April, 1944, at about 1.30 a.m. and during "black-out" conditions, the appellant was cycling along the highway when he was injured through coming into collision with a horse (which was not of a mischievous nature) belonging to the respondent who kept it in a field adjoining the highway. At the time of the accident the horse was straying unattended on the highway on which it had got through a gap in the fence which separated the highway from the field.

HELD: the respondent was not liable in negligence because (a) there was no *prima facie* legal obligation on him, as the owner of a field abutting on the highway, to users of the highway so to maintain his fence as to prevent his animals from straying on to the highway, and (b) he was under no duty as between himself and users of the highway to take reasonable care to prevent any of his animals (not known to be dangerous) from straying on to the highway.

Per VISCOUNT MAUGHAM: In such a case, if the animal is wild by nature or is a domestic animal known to be dangerous, I can readily conceive that the possibility or probability of danger to passers-by might impose a duty of reasonable care.

Per VISCOUNT MAUGHAM: When the Court of Appeal gives leave to appeal to the House of Lords in what is regarded as a test case, the position of the respondent as to costs, if the appeal should fail, ought to be borne in mind. It is an unfortunate fact for the respondent in the present case that the appellant presents his appeal as a poor person.

[AS TO TRESPASS BY ANIMALS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 545, 546, para. 936; FOR CASES, see DIGEST, Vol. 2, pp. 233-235, 243 and 253; Vol. 36, p. 64, No. 414; Vol. 38 p. 286, No. 216; AND FOR STATUTES, see HALSBURY'S STATUTES, Vol. 5 (Distress), Vol. 9 (Highways), and Vol. 2 (Commons and Rights of Common).] Cases referred to:

- (1) *Heath's Garage, Ltd. v. Hodges*, [1916] 2 K.B. 370; 85 L.J.K.B. 1289; 115 L.T. 129; 80 J.P. 321; 2 Digest 234, 226.
- (2) *Hughes v. Williams*, [1943] 1 All E.R. 535; [1943] 1 K.B. 574; 112 L.J.K.B. 275; 168 L.T. 305; Digest Supp.
- (3) *McAlister (or Donoghue) v. Stevenson*, [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.
- (4) *Higgins v. Searle* (1909), 100 L.T. 280; 73 J.P. 185; 2 Digest 234, 223.
- (5) *Fletcher v. Rylands* (1866), L.R. 1 Exch. 265; 4 H. & C. 263; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; 2 Digest 228, 195.
- (6) *Rylands v. Fletcher* (1866), L.R. 3 H.L. 330.
- (7) *Brackenhorough v. Spalding U.D.C.*, [1942] 1 All E.R. 34; [1942] A.C. 310; 111 L.J.K.B. 100; 166 L.T. 108; 106 J.P. 81; Digest Supp.
- (8) *Cox v. Burbidge* (1863), 13 C.B.N.S. 430; 1 New Rep. 236; 32 L.J.C.P. 89; 2 Digest 233, 218.
- (9) *Hadwell v. Righton*, [1907] 2 K.B. 345; 76 L.J.K.B. 891; 97 L.T. 133; 71 J.P. 499; 2 Digest 233, 222.
- (10) *Ellis v. Banyard* (1911), 106 L.T. 51; 2 Digest 234, 225.
- (11) *Jones v. Lee* (1911), 106 L.T. 123; 76 J.P. 137; 2 Digest 234, 224.
- (12) *Fraser v. Pate* (1923), S.C. 748.
- (13) *Turner v. Coates*, [1917] 1 K.B. 670; 86 L.J.K.B. 321; 115 L.T. 766; 2 Digest 235, 230.
- (14) *Gayler & Pope, Ltd. v. Davies (B.) & Son, Ltd.*, [1924] 2 K.B. 75; 93 L.J.K.B. 702; 131 L.T. 507; 36 Digest 64, 414.
- (15) *Deen v. Davies*, [1935] 2 K.B. 282; 104 L.J.K.B. 540; 153 L.T. 90; Digest Supp.
- (16) *Mason v. Keeling* (1699), 1 Ld. Raym. 606; 12 Mod. 332; 2 Digest 243, 274.
- (17) *Smith v. Cook*, [1875] 1 Q.B.D. 79; 45 L.J.Q.B. 122; 33 L.T. 722; 40 J.P. 24; 2 Digest 253, 345.
- (18) *Fardon v. Harcourt-Rivington* (1932), 146 L.T. 391; Digest Supp.

- (19) *Mitchil v. Alestree* (1676), 1 Vent. 295; *sub nom. Michell (Michael) v. Allestry* 3 Keb. 650; 2 Lev. 172.
 (20) *Aldham v. United Dairies (London), Ltd.*, [1939] 3 All E.R. 522; [1940] 1 K.B. 507; 109 L.J.K.B. 323; 162 L.T. 71; Digest Supp.
 (21) *Bessant v. Great Western Railway Co.* (1860), 8 C.B.N.S. 368; 38 Digest 286, 216.
 (22) *Maitland v. Raisbeck & Hewit (R. T. & J.), Ltd.*, [1944] 2 All E.R. 272; [1944] 1 K.B. 689; 113 L.J.K.B. 549; 171 L.T. 118; Digest Supp.

A APPEAL from a decision of the Court of Appeal affirming a decision of the county court judge at Atherstone County Court who gave judgment for the respondent, the owner of the horse, in an action against him by the appellant for personal injury received by him as the result of the respondent allowing the horse to stray on the highway. The facts appear in the opinions of VISCOUNT MAUGHAM, LORD PORTER and LORD DU PARCQ.

R. T. Paget and S. Silkin for the appellant.

B *F. W. Beney, K.C.*, and *A. J. Flint* for the respondent.

The House took time for consideration.

Dec. 16. VISCOUNT MAUGHAM: My Lords, on Apr. 1, 1944, at 1.30 a.m. the appellant, a chageman packer earning £9 10s. a week, was riding a cycle down a lane known as "Boulter's Lane Hill," Baddesley, in the county of Warwick. There is no evidence as to the speed at which he was travelling or as to the width or nature of the lane, but the appellant himself said that the slope, as its name suggests, was steep. His front light was masked in accordance with the black-out regulations, and he also had a back light. He estimated the visibility at 100 yards. The hedge, he said, was thick at the side of the road running past the respondent's farm. He there met with a serious accident as to which we only know this from the county court judge's note—that he collided on the highway with a horse belonging to the respondent, and, being thrown to the ground, was badly injured. In examination in chief he said, according to the note, that he was "twisted over by horse. Saw horse standing on top. He came from [respondent's]." In cross-examination he said: "I first saw horse standing on top of me, I saw it dashing out from the side of me. No signs of vicious behaviour. Light chestnut. Saw colour by lamp. I recognised the horse straight away." He also said in cross-examination, which **E** he had not said in chief, that the fence was dilapidated and that there were gaps through which a horse could get. The respondent said there was no gap to his knowledge. The judge, in his judgment, according to the notes kept by the solicitor on one side and by counsel on the other, after stating that he did not believe the respondent, said concisely that the horse was on the road and that "the appellant collided with it and was thrown to the road." He found as a fact that it was the respondent's horse and added: "It got on to the road because the fence was defective." Your Lordships will, of course, accept these findings though the last finding was apparently a conjecture. The learned judge held, following the decided cases, and, in particular, *Heath's Garage, Ltd. v. Hodges* (1) and *Hughes v. Williams* (2), that there was no duty on the respondent to maintain his fences, and, consequently, that there was no negligence on his part, and he, accordingly, dismissed the action. He stated, however, that, in case his judgment was held to be wrong, he assessed the damages **G** at £200.

The appellant appealed to the Court of Appeal, contending that the judge was wrong in law in holding that there was no duty on the part of the respondent so to fence his land as to prevent his horse from straying upon the highway. The appeal was dismissed after a hearing by MACKINNON, LAWRENCE and MORTON, L.JJ., but they thought fit to give leave to appeal to this House, apparently because of some expressions of opinion in *Hughes v. Williams* (2) to the effect that the state of the law laid down by the older authorities was not very satisfactory having regard to modern conditions. I must observe that, in giving leave to appeal in what is considered to be a test case, the position of the respondent as to costs, if the appeal should fail, ought to be born in mind. It is an unfortunate fact for the respondent in this case that the appellant presents his appeal as a poor person.

H My Lords, I have had the advantage of reading the judgment of my brethren LORD PORTER and LORD DU PARCQ in which the previous authorities are care-

fully examined and the facts of this case are fully dealt with, and to avoid repetition I propose to deal with each of the questions of law involved as if it were coming as *res integra* before your Lordships. As I apprehend the matter, there are two possible questions that arise. First, was the respondent, as the owner of a field or fields abutting on the highway, under a *prima facie* legal obligation to users of the highway so to keep and maintain his hedges and gates (if any) along the highway as to prevent his animals from straying on to it? Secondly, assuming there is no such general duty, was he under a duty as between himself and users of the highway to take reasonable care to prevent any of his animals (not known to be dangerous) from straying on to the highway? I should say here that I do not propose to deal with the question which would arise if the animal is wild by nature or is a domestic animal known to be dangerous, though I may observe that in such cases I can readily conceive that the possibility or probability of danger to passers-by might impose a duty of reasonable care.

My Lords, light will be thrown on both the two above questions by a consideration of the history of the growth of our highways to see whether there was at any time such a state of things that a legal obligation on the owner or occupier of roadside lands to repair and maintain the adjacent hedge may reasonably be inferred, or any such duty towards users of the roadway can be established as to render such owner or occupier liable in an action for negligence should a horse or other animal belonging to him stray on to the road and cause damage to a passer-by. I do not think that the history of English roads has ever been exhaustively written, but a great deal is known about them, and in comparatively recent times is to be found in a great number of private and public Acts of Parliament, particularly those in relation to enclosure. It was only by a very slow and gradual process extending over centuries that the forests and chases mainly belonging to the King which covered great tracts of land were disafforested, that the commons and wastes of different kinds were enclosed, and that the fens and marshes were drained. Even as late as the year 1700 about one-half of the arable land of England was cultivated on the traditional open field system where there were intermixed strip holdings with the benefit of common rights in pasture and waste: see *HISTORICAL GEOGRAPHY OF ENGLAND BEFORE 1800*, edited by H. C. Darby, Cambridge, at p. 469.

While England was largely covered by royal forests (not by any means all woodland), heaths, downs, fens, marsh, and above all by commons, waste and common fields, there can have been few roads except tracks for the use of commoners and local inhabitants of the vills or townships. Until enclosure was effected roads or ways could not be made since either the landowner or the lord of the manor or persons with common rights would have objected. Before dealing with the vast enclosures which altered the face of England it is important to observe that such roads or tracks as there existed between market towns were almost completely unenclosed by hedges or fences. The fact is established by the interesting Act 13 Edw. I (A.D. 1285 Statute of Wynton) c. 5. It has come down to us in these terms:

Highways leading from one Market Town to another shall be enlarged so that there be neither Dyke, Tree, nor Bush Whereby a Man may lurk to do Hurt, within 200 feet of the one side and 200 feet of the other side of the Way.

This Act was not repealed till the Act 7 Geo. III, c. 42 (s. 57) came into force. The Act of Edward I probably became obsolescent as the countryside became less infested with rogues and vagabonds, who largely, if not mostly, consisted of men who were discharged soldiers and sailors without means of support. That change must have been after the reign of Queen Elizabeth, who would do nothing for such persons, but the Act remained on the Statute Book for over five centuries, which seems to show that there was no real demand for hedges along the roads: see also the General Highway Act (13 Geo. III, c. 78).

Coming now to enclosures, it will be remembered that the break-up of manors was a process which continued from roughly 1300 to 1485. The lords aimed at increasing their enclosures and they were empowered to do so by the Statute of Merton (20 Hen. II, c. 4), and the amending Statute of Westminster (13 Ed. I, c. 46), provided they left enough pasture for persons with grazing rights. They also enclosed the desmesne lands. Different forms of enclosure subsequently took place which resulted in the break-up of the old village and manorial

systems of cultivation, but many open fields and commons continued to exist in and after 1793 when an Act was passed to deal with the matter. Enclosures were constantly sanctioned by private Acts and it is calculated that they numbered no less than four thousand in the 18th and 19th centuries : Williams on RIGHTS OF COMMON, 1880, at p. 249. A general Inclosure Act was passed in 1801 consolidating provisions usually inserted in private Acts of Inclosure. The total amount enclosed since enclosure began was very great. Forests were also inclosed to a great extent, particularly after the Act 16 Car. I, c. 16, relating to forests, came into force. When enclosure took place and the wastes and other lands were divided up between lords and commoners, it became very desirable and often essential to do a good deal of roadmaking and fencing, and the general Inclosure Acts of 1801 and the amending Act of 1845 contain provisions on the subject. Both the Acts gave power (to the commissioners by the first Act and the valuer by the second) to set out and make public roads and ways and to alter them, and after providing that carriage roads so set out should be well and sufficiently fenced on both sides by such of the persons interested as the commissioners or the valuer should direct, enacted that the roads were to be repaired by the inhabitants after certificate by two justices of the peace that the roads had been sufficiently formed and completed ; but there was no provision as to upkeep of the fences : see 41 Geo. III, c. 109, s. 9 ; 8 and 9 Vict., c. 118, ss. 65, 66 and 67. It is a fair conclusion that the absence of any provisions in a multitude of Acts for the repair and maintenance of hedges or fences beside the roads by the owners of the adjoining lands is ground for thinking that the legislature had no intention of imposing any such liability. I should add that the early Highway Act mentioned above and the Highway Act, 1835, made provision for the cleansing of the ditches beside the highways and for the cutting back of hedges extending over the roads, but made no mention of the upkeep or repair of the hedges. Railway companies, however, for obvious reasons were an exception : see Railway Clauses Consolidation Act, 1845, s. 68.

In 1663 the first turnpike trust was established (15 Car. II, c. 1). By 1760 turnpike roads covered the land. Between that year and 1800 well over a thousand Turnpike Acts were passed. In 1864 the power of refusing the renewal of Turnpike Acts was transferred to a Select Committee of the House of Commons and roads were then dis-turnpiked at the average of 1,500 miles a year. The whole burden of repair of the roads then fell on the locality. A liability was imposed on the owners of the hedges to prevent them from interfering with the roads, but there was no obligation to maintain them.

I have summarised these facts—to which many others could easily be added—to show that the great majority of our roads were necessarily laid out piecemeal during long periods on hitherto unenclosed lands. Even at the present time very long stretches of highway are alternately enclosed by fences or hedges on one side or both sides or are quite unenclosed. An interesting map showing the position not very long ago will be found in THE WOODLANDS AND MARSHLANDS OF ENGLAND, by H. A. Wilcox. The process depended on the circumstances to which I have already referred and their gradual effect. There was no duty imposed as to repair of hedges or fences. It is obvious that the roadside owner who puts up no fence would not be under any duty to passers-by on the roads as regards horses and cattle. That is admittedly the case at this day in relation to roads over unenclosed land. On what principle can such a duty be imposed on one who chooses to erect a fence with a view to keeping out trespassers, or in an endeavour to prevent his cattle and horses from straying ? It should be borne in mind that the roads of England until the days of Telford and Macadam were often in a shocking state. A vigorous account of them is given in the celebrated third chapter (State of England in 1685) of Lord Macaulay's HISTORY OF ENGLAND. In the seventeenth century, apart from a few main roads, they were often mere tracks used by pack animals. There are still plenty of green lanes and not a few bridle paths in the country which technically are highways. Would the suggested duty apply to the owners of lands on the sides of green lanes or bridle paths ? There are also roads in some places so precipitous and so badly made that a motorist uses them at his peril and cyclists are almost compelled to walk their cycles. Would the owner of adjacent lands be under any liability to adventurous drivers and riders of that kind ?

It must, of course, be remembered that a man has long been *prima facie* liable if his cattle or horses, by his negligence, stray on the land of another and there tread down his corn or damage his herbage: BLACKSTONE'S COMMENTARIES, Vol. III, p. 211. The law in a remote past gave the owner or occupier of the land on which the trespass took place a special remedy by what used to be called *distress damage feasant*, namely, a right to detain the animal in a place of detention called a pound to which the owner could have access in order to give the animal food and water. The practice of impounding such animals grew up, and public pounds existed in most villages; Viner's ABRIDGEMENT TIT. DISTRESS A, pp. 121 and 178; BLACKSTONE'S COMMENTARIES, vol. III, p. 211. As a public institution the pound was commonly referred to in our literature of a hundred years and more ago and added to our language. I hope that a good many people recollect that in, perhaps, the most celebrated of English novels Mr. Pickwick was removed by Captain Boldwig to the village pound under the imputation of being a drunken plebeian. The right of impounding was the subject of a series of Acts of Parliament, of which the Statute of Marlbridge (52 Hen. III, c. 4) was not the first, and was the cause of a number of decisions which will be found in Viner's ABRIDGEMENT under the title "*Distress*." The Highway Act, 1835, and the amending Act of 1864, dealt with the matter so far as it affected surveyors of highways. These various Acts, however, and the provisions in them obviously give no assistance to the appellant since he has no right founded on trespass, but has a mere right of passage over the road. The roads were laid out largely for the benefit of owners of adjacent land including farmers. No one supposes that cattle and horses can be driven to market except on a road. Road users are expected to exercise at least reasonable care in passing animals in such cases. Further, there are roadside strips beside enclosed roads in many parts of the country which form part of the highways, and horses may often be seen grazing on such strips by leave of the owners of the soil. They do not seem to interfere with any reasonable use of the roads. Obviously road users cannot expect to have roads kept clear of animals.

For these reasons I conclude that the first question I have formulated above must be answered in the negative, and I did not understand that counsel for the appellant in his careful argument contended to the contrary. In the absence of any general duty to repair hedges we now come to the second question which is based on the alleged negligence of the respondent. The established rule is that negligence must depend on failure to perform a duty of reasonable care to the class of persons of whom the plaintiff is one. In this case, the duty must be to exercise reasonable care to avoid an act or omission which would be likely, in the view of a reasonable and prudent man, to injure such a person as a cyclist or a motorist using the road beside the land of the respondent: *Donoghue v. Stevenson* (3), and cases there cited. The very curious nature of the facts in that decision must not make us forget that mere possibility of accident is not enough to establish liability. Otherwise the many decisions as to accidents to persons caused by domestic animals (in the absence of *scienter*) would have been differently decided.

My Lords, it is not irrelevant to observe that the suggested duty of the occupiers of enclosed land to the users of an adjoining highway ought to be capable of a definition intelligible to ordinary men. Is it to extend to hedges along roads such as green lanes, bridle paths, or other roads which have seldom or never been made up? Does it apply to roads which are rarely or never used by fast traffic? The height of the hedges ought to be mentioned, for it is obvious that young horses are often capable of jumping without difficulty over many of the existing hedge-rows as well as over the existing gates. The practice of hunting is sufficient evidence of that fact, if evidence were needed. Then the question arises as to what animals the owner is required as a matter of duty to fence in? It is admitted that dogs, cats, pigs and fowls cannot be prevented from straying by ordinary quickset hedges, yet accidents from their presence on roads must, I should suppose, be more frequent than those arising from straying horses or cattle. Then one must ask what standard of care is required from farmers and others? Gaps in hedges, of course, do constantly arise, but many of them are due to trespassers in attempting short cuts on a mere country ramble or in search of mushrooms or blackberries. Gates are constantly left open by horsemen or by persons legitimately visiting a house or farm. We see

every day in the country the request, "please shut this gate," but we often see the gate in question left open. A good owner of land has been in the habit of attending yearly to the operation of hedging and ditching. In war-time it was often impossible to provide the necessary labour. Even in peace-time it would scarcely be reasonable to require a farmer to examine from day to day whether there was a gap or a thinning of a hedge through which a horse, a sow, or a bullock could force his way, and immediately to repair it. And it is plain that the liability for negligence of the owner of animals straying on a road must be subject to the condition that the road user himself must exercise reasonable care in driving or riding along the road.

There is, I believe, no record before recent times of any accident between a vehicle of any kind and an animal straying from an adjoining enclosed field on to a road. It is only since cycles and motor-cars began to move along our roads at speeds generally unthought of a hundred years ago that there has been any chance of such collisions. That they have been more common of late on unenclosed roads over open heaths and the like is demonstrated by the notices we often see in such places warning the motorist to "beware of cattle." The absence of accidents between vehicles and stray animals was certainly not due to the absence of the latter. The fact is, as the desuetude of the village pound shows, that "estrays" or "strays" were far commoner a hundred years ago.

The above considerations seem to me to be conclusive to show that no such duty to road users as the appellant relies on could possibly have existed before the advent of fast traffic on made-up roads. Hedges and fences were generally constructed and maintained in the interests of the owners of adjacent lands, and accidents to road users arising from the animals straying on the roads were so far as one can judge practically non-existent. Since fast traffic on such roads became usual, accidents due to straying animals, no doubt, sometimes occur, but so far as we know they are exceedingly rare. Moreover, they also arise when animals are being led or driven along highways in the usual course of husbandry, and no one suggests that motorists and cyclists have a *prima facie* right of action against the person in charge of them. More frequently such accidents are caused by dogs or fowls which can get through or over any ordinary hedge, and counsel for the appellant admitted, and I think rightly, that no action would lie in such cases against the owners. No facts, in my opinion, have been established which would tend to show that farmers and others at some uncertain date in our lifetime became subject for the first time to an onerous and undefined duty to cyclists and motorists and others which never previously existed. The fact that the duty does not exist if the road is unenclosed by fences and yet that accidents are rare is, I think, strong to show that the respondent was not bound as a reasonable man to think that his failure to fill up a gap in his fence was likely to cause such an accident as the one which took place.

My Lords, I have dealt with the matter at some length owing to my respect for the doubts expressed by some eminent judges which seemed to call for an elaborate consideration. The arguments before your Lordships based on alleged negligence by the respondent might have been more shortly dealt with on the ground that the case as presented in the county court was not really founded and fought on that ground, and counsel for the appellant, therefore, thought it best to express my opinion without regard to a point which savours of technicality. In the result, I am of opinion that the appeal fails and must be dismissed, and I move your Lordships accordingly.

LORD THANKERTON: My Lords, I concur in the opinion which has just been delivered by my noble and learned friend on the Woolsack, I also concur in the opinions about to be delivered by my noble and learned friends Lord Porter and Lord du Parc which I have had an opportunity of considering in print.

LORD PORTER (read by LORD THANKERTON): My Lords, the relevant facts in this case can be very shortly stated. The appellant, who was plaintiff in the action, was riding his bicycle at night on a public highway bounded on each side by fences. It was dark and, being in time of war, black-out regulations were in force. In these conditions he came into collision with a horse belonging

to the respondent, which had escaped from a field in which the respondent had placed it. It is not clear from the evidence whether the horse dashed across the road and collided with the appellant or whether, because of the dimness of his lights, he failed to see it and ran into it. I do not think it material to determine which version is the true one, but, if it had to be decided, the former version appears the more likely. There was evidence that the fence between the field in which the horse was placed and the road had gaps in it—at any rate, there was a gap between the gate stump and the hedge, and the county court judge who tried the case found that the fence was defective and that this was the means by which the horse got on to the road. He also said that he did not believe the respondent, but one of the matters in dispute was whether the animal was the respondent's horse and this finding appears to deal with the respondent's allegation that it was not his. In these circumstances the appellant sued the respondent, alleging him to be liable because as a reasonable man he ought to have realised that to put a horse into a field adjoining the highway with gaps, or, at any rate, a gap, in the hedge would enable it to escape and so might endanger those using the highway, and, in particular, ought to have foreseen the possibility of danger on a dark night with black-out regulations in force.

My Lords, on this evidence, even if one is to assume that the respondent was under a duty to fence his land, I should not be prepared to hold that negligence was established. The respondent stated in the witness box that he was not aware of any gaps, and there is not in fact any evidence that a gap or gaps existed before the horse escaped. There were seventeen beasts and two or three horses in the field on the night in question. The horses were kept there every night and according to the respondent's evidence neither they nor the cattle had been known to escape. I doubt whether it would be expected that they would do so at night even if there were gaps in the hedge, and still more do I doubt whether it should have been foreseen that a horse's mere presence on the highway would lead to an accident. If, as may be the case, the horse came down from the bank on top of the cyclist the accident was an unusual one. If, on the other hand, the cyclist ran into the horse, I think that the accident would be equally unexpected. It would be supposed that those passing along the highway would be able to see the horse, even in black-out conditions, in time to avoid a collision.

In *Higgins v. Searle* (4), BUCKLEY, L.J. said (100 L.T. 280, at p. 281) :

A person on the highway is exposed to the ordinary risks taken by those using the highway and, if an accident happens owing to those risks, to my mind no legal consequence follows.

Similar observations had already been made by BLACKBURN, J. in *Fletcher v. Rylands* (5) (L.R. 1 Ex. 265, at p. 286) approved in *Rylands v. Fletcher* (6), and by COZENS-HARDY, M.R. in *Higgins v. Searle* (4).

For these reasons I should think the appellant disentitled to recover, but the case was brought to your Lordships' House presumably to test the obligation of a landowner or tenant occupying land abutting on the highway to keep his beasts off the highway, or, at any rate, to exercise reasonable care to do so, and it is, perhaps, desirable to express some view on this wider question. In *Brackenborough v. Spalding U.D.C.* (7) LORD WRIGHT suggests that the rule that the owner or occupier of land adjoining the highway is under no duty to prevent animals escaping on to the highway is a modern one and that its limits are still uncertain, and he points out that it was not relied upon by the judges forming the court which decided *Cox v. Burbridge* (8). The appellant relied on this statement and the argument, as I understand it, was that, if this rule had been recognised when that case was decided, the basis for discussion in that case would never have existed inasmuch as if there was no duty to fence, then, whatever the horse might do, its owner could not be liable unless it was known to be vicious. It is, indeed, true that no mention of the doctrine is made in that case, but I myself should read the judgments of WILLIAMS and WILLES, JJ. as confining the duty of owners of horses and cattle to keeping them from trespassing on the land of others to its hurt and as giving no ground for action against the owners of beasts which do injury to persons on the high road unless they are known to be vicious. ERLE, C.J. and KEATING, J. decide merely that in order to establish liability on the part of the owner of an animal of a tame

species it is necessary to show knowledge of its vicious propensities. I shall not regard them as tending to show either that there is or is not a general duty to fence.

A If one comes to the later cases the whole tendency of the decisions is against imposing any liability to fence in ordinary circumstances. *Hadwell v. Righton* (9), *Higgins v. Searle* (4), *Ellis v. Banyard* (10) and *Jones v. Lee* (11) all show this tendency, though in none of them was the exact point decided as negligence was negatived, and in the last-named case VAUGHAN-WILLIAMS and KENNEDY, L.JJ. were careful to guard themselves against deciding that cattle, if allowed to escape in large numbers and obstruct the highway, could not constitute a public nuisance. BANKES, L.J., however, in *Jones v. Lee* (11) and BUCKLEY, L.J. in *Ellis v. Banyard* (10) state in terms that there is no liability to fence. The decision in *Higgins v. Searle* (4) seems to me to be to the like effect and the same opinion is expressed in the Scottish case of *Fraser v. Pate* (12), though B LORD ANDERSON leaves for future discussion the case of animals straying on the highway at night.

The point, however, was directly decided in *Heath's Garage v. Hodges* (1) and again in *Hughes v. Williams* (2), and the appellant cannot succeed if those cases stand. A different view has, it is true, been held where animals have been brought on to the road and have not been kept under such reasonable control as is possible while they are there. The recent cases of *Turner v. Coates* (13), *Gaylor v. Davies* (14) and *Deen v. Davies* (15) are, I think, to be C included under this principle. As ROMER, L.J. pointed out in the last-mentioned case, there is no duty to prevent animals straying on the highway, but, if they are brought on the highway, reasonable care must be exercised to control them.

D Proof of negligence, however, is not always necessary to establish liability for damage caused by straying animals. The law seems to have developed on two separate lines. Trespass on the land of another was always actionable at the suit of that other if damage was done to his land, and that whether there was negligence or not. Unless he was under a duty to fence a plaintiff could, therefore, sue. On the other hand, there was no duty to prevent beasts *mansuetæ naturæ* from straying on to the highway unless they were known to be vicious. The distinction is natural enough—the landowner's or occupier's E property was, it was thought, entitled to be free of invasion, the wrong was the mere entering on his land and causing damage. On the other hand, much, if not most, of the country was unfenced, as, indeed, a not unsubstantial portion still is, and passers along the highway had to take it as they found it and run such risks of traffic as are inevitably imposed on those who use it. They too, must take reasonable care to avoid what they find on the road, and the obligation of the owners of beasts or of users of the highway are not, in my view, altered by an increase in the fencing of the country or by the increase F in the speed of traffic or the imposition of precautions necessary in war-time. The incidence of these changes does not, in my opinion, increase the duties of farmers or the burden on agriculture by increasing the duty to fence.

I would dismiss this appeal primarily because no negligence on the part of the respondent has been proved, but also, on the ground that on the facts established, it has not been shown that he was in breach of any duty which G he owed to the appellant.

LORD DU PARCQ: My Lords, the appellant, while riding a bicycle down a hill on a country road at about 1.30 in the morning of Apr. 1, 1944, came into collision with a horse which was straying unattended on the highway. He was injured, and sued the respondent in the county court to recover damages "for negligence and/or nuisance and/or breach of statutory duty." The action H failed, but the learned judge, having regard to the possibility that he might be held to have erred in law, stated his findings of fact and assessed damages. The case went to the Court of Appeal, where the appellant's counsel confessed that the appeal was "a forlorn hope" in view of the authorities binding on that court. It was dismissed, but leave was given to appeal to this House in order that those authorities, which had been criticised with some severity by the Master of the Rolls and two Lords Justices in *Hughes v. Williams* (2), might be considered further by your Lordships.

The county court judge found that the horse which caused the appellant's injuries was owned by the respondent, and this finding, read together with the

evidence, makes it clear that it was one of two horses which were kept, with some cows or other cattle, in a field adjoining the highway. The judge further found that the horse "got on the road because the fence was defective." These were his only findings. The evidence would not, I think, have supported any further findings in the appellant's favour. There was no evidence that the peccant horse, which seems to have been at least 30 years old, and to have been accustomed to spend its days drawing a milk-cart, had ever before shown a disposition to wander or any vicious or mischievous propensity. There was no evidence that the defects in the fence were of long standing, or that the respondent either knew of them or might with reasonable care have discovered them.

My Lords, it is a commonplace of our law that there is a striking contrast between the liability of the owner of cattle for their trespass on another's land and his liability for any injuries which they may cause to the person of another. The man whose cattle stray into his neighbour's field, and consume or damage what belongs to that neighbour, is liable to make good the loss although no negligence be proved against him. He is under no such liability for a trespass to the person by an animal which does not belong to an untamed and dangerous species unless it has, to his knowledge, some vicious or mischievous propensity. We are here dealing with ancient doctrines of the common law. At the very beginning of the 18th century, in *Mason v. Keeling* (16) (as reported in 12 Mod. 332) the complaint which has been echoed in our own days is to be found in the argument of counsel for the plaintiff (at p. 333):

It is hard that one should have a remedy for the least trespass done in his land, and none for a trespass done thus to the person by wounding or maiming.

It is doubtful from a comparison of the two available reports of the case whether it resulted in judgment for the defendant or a settlement. However that may be, the forensic protest of the plaintiff's counsel did not deflect the current of authority. The report of *Mason v. Keeling* (16) in *Ld. Raym.* 606 (at p. 608) attributes to *HOLT, C.J.* and *TURTON, J.* a dictum which I believe to have been then, and to have remained ever since, a correct statement of the law:

If the owner puts a horse or an ox to graze in his field, which is adjoining to the highway, and the horse or the ox breaks the hedge, and runs into the highway, and kicks or gores some passenger, an action will not lie against the owner; otherwise if he had notice that they had done such a thing before.

The present case is only distinguishable from that supposed by *HOLT, C.J.* in that the horse in the illustration did a vicious act, whereas the horse with which we are concerned may have been only heedless or clumsy, but I take this to be an immaterial distinction. As was said by *ROMER, L.J.* (as he then was) in *Deen v. Davis* (15) ([1935] 2 K.B. 282, at p. 293) it would be strange if the owner of a horse which strays on the highway were to be free of liability if his horse kicked a passenger, but liable if the passenger were injured "merely by the horse trotting along the highway in the natural manner." My Lords, no such paradoxical conclusion is to be drawn from the authorities. The law was accurately stated by *BLACKBURN, J.* in *Smith v. Cook* (17) (1 Q.B.D. 79, at p. 82) when he said that the owner of animals:

... not of mischievous nature ... is entitled to suppose that they will not injure anyone until he has had actual knowledge to bring him to a contrary opinion.

I would add that, if an animal's owner knows that it has shown a tendency to run into cyclists or other passengers on the highway, it cannot avail him to say that it was not vice, but a frolicsome disposition, or, perhaps, mere blundering which caused the harm.

Counsel for the appellant submitted that, apart from any question of liability for injury caused by an animal known to its owner to be dangerous, an owner might be liable on the ground of negligence if he could be shown to have failed in his duty to take reasonable care. I agree that, subject to certain reservations, this proposition may be accepted. In *Fardon v. Harcourt-Rivington* (18) in this House, *LORD ATKIN* used words which I would respectfully adopt:

... Quite apart from the liability imposed upon the owner of animals or the person having control of them by reason of knowledge of their propensities, there is the ordinary duty of a person to take care either that his animals or his chattel is not put to such a use as is likely to injure his neighbour—the ordinary duty to take care in the cases put upon negligence.

This is not a novel principle. As early as 1676 an action on the case was brought successfully against a defendant who had set about breaking in a horse in Lincoln's Inn Fields, "a place" (as the pleader said) "much frequented by the King's subjects and unapt for such purpose": *Mitchil v. Alestree* (19). When, in *Cox v. Burbidge* (8) (13 C.B.N.S. 430, at p. 437), ERLE, C.J. stated the question before the court to be "whether the owner of a horse is liable for a sudden act of a furious and violent nature which is altogether contrary to the usual habits of a horse, without more," the last two words of the sentence were not superfluous. They allow for the possibility that there may be circumstances to account for an animal's unusual misbehaviour of which the defendant knew and against which it was his duty to guard. Such circumstances were held to exist (to name only two instances) in the recent cases of *Deen v. Davies* (15) and *Aldham v. United Dairies (London) Ltd* (20). Nevertheless, LORD ATKIN's proposition will be misunderstood if it is not read as subject to two necessary qualifications: first, that where no such special circumstances exist negligence cannot be established merely by proof that a defendant has failed to provide against the possibility that a tame animal of mild disposition will do some dangerous act contrary to its ordinary nature, and, secondly, that, even if a defendant's omission to control or secure an animal is negligent, nothing done by the animal which is contrary to its ordinary nature can be regarded, in the absence of special circumstances, as being directly caused by such negligence.

My Lords, it is manifest that on the judge's findings of fact negligence cannot be imputed to the respondent, and, indeed, there was, in my opinion, no evidence before the court on which a finding of negligence could have been supported. This being so, it is, I think, regrettable that the Court of Appeal was induced to give leave to appeal to your Lordships' House notwithstanding the objection of the respondent's counsel that no question of principle could arise on the particular facts of the case. At your Lordships' Bar the learned counsel for the appellant frankly conceded that he could not ask for judgment, but submitted that the case should go back to the county court to be investigated anew on the issue of negligence. Even if your Lordships were of opinion that the appellant had some hope of success in a new trial, it would, I think, be a great injustice to the respondent to order one. The appellant has had his opportunity of putting any available evidence before the court, and cannot ask for a second chance. I would add, however, that there is no reason to suppose that he could do better on another occasion. The only special circumstance to which his counsel could point was that, at the time of the accident, lighting restrictions were in force. But the road was a country road, not normally lighted. It is true that the cyclist's light was masked or dimmed, but this fact, which was certainly a reason for great care on the part of a cyclist, is not shown to have contributed to cause the accident. The complaint was, not that the appellant could not see the horse, but that he saw it "dashing out from the side" of him.

One other argument should, perhaps, be noticed. Counsel disclaimed any suggestion that the respondent was bound to maintain a fence, and he recognised that for centuries both the law and the general sense of the community have sanctioned the depasturing of cattle on unfenced land. He contended, however, that one who keeps his cattle on land adjoining the highway behind an apparently secure fence must see to it that it is, in fact, secure, for otherwise (he said) a deceptive feeling of safety will be induced in the passing cyclist or motorist. My Lords, I should have thought that, on principle, where there is no duty to maintain a fence at all, it cannot be a breach of duty to maintain one which is imperfect, but, however that may be, the argument takes little account of rural conditions. A stray horse, even if it has come from the nearest field and not from one a mile or more away, may have escaped, not through a gap in the fence, but through a gate left open by a trespasser. Moreover, the suggested duty could only be to take reasonable care to maintain a reasonably secure fence, and it must be a very high fence which a horse cannot jump. Indeed, we have it on the authority of BYLES, J. that, in or about the year 1858, it was proved that a bull had leaped over an iron fence six feet high. *Bessant v. Great Western Railway Company* (21).

The truth is that, at least on country roads and in market towns, users of the

highway, including cyclists and motorists, must be prepared to meet from time to time a stray horse or cow, just as they must expect to encounter a herd of cattle in the care of a drover. An underlying principle of the law of the highway is that all those lawfully using the highway, or land adjacent to it, must show mutual respect and forbearance. The motorist must put up with the farmer's cattle: the farmer must endure the motorist. It is commonly part of a man's legal duty to his neighbour to tolerate the untoward results of his neighbour's lawful acts. These observations are, I think, relevant not only to the issue of negligence, but also to the allegation of nuisance. The stray horse on the road does not seriously interfere with the exercise of a common right, and is no more a nuisance in law, merely by reason of its presence there, than the fallen cart-horse or its modern analogue, the lorry which has temporarily broken down. The same considerations which guided the Court of Appeal in *Maitland v. Raisbeck* (22) are, I think, applicable here.

Counsel refrained from contending before your Lordships that the provisions of the Highway Acts could affect the rights of the parties between themselves. Rightly, I think, he accepted as correct the observations of ERLE, C.J. in *Cox v. Burbidge* (8) (at p. 435): "As between the owner of the horse and the owner of the soil of the highway . . . we may assume that the horse was trespassing . . . So it may be assumed that, if the place in question were a public highway, the owner of the horse might have been liable to be proceeded against under the Highway Acts. But, in considering the claim of the plaintiff against the defendant for the injury sustained from the kick, the question whether the horse was a trespasser as against the owner of the soil, or whether his owner was amenable under the Highway Act, has nothing to do with the case of the plaintiff."

The appellant has suffered what may well have been undeserved misfortune, but I am satisfied that no blame for it can in law be attributed to the respondent, and I would dismiss the appeal.

VISCOUNT MAUGHAM: My Lords, I have been requested by my noble and learned friend LORD UTHWATT to say that he concurs in the judgment which has been proposed.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *C. L. Hale*, Nuneaton (for the appellant); *Nash, Field & Co.*, agents for *Blewitt & Co.*, Birmingham (for the respondent).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

SHORT AND ANOTHER v. THE LORDS COMMISSIONERS OF H.M. TREASURY

[KING'S BENCH DIVISION (Morris, J.), December 16, 1946.]

Emergency Legislation—Control of undertaking—Compulsory acquisition of company—Transfer of shares to government nominee—Price to be paid for shares—Price on Stock Exchange at date of transfer—Defence (General) Regulations, 1939, reg. 78 (5).

By orders made under regs. 55 and 78 of the Defence (General) Regulations, 1939, the Minister of Aircraft Production took control of the undertaking of a company and directed that the shares thereof should be transferred to his nominee to hold on his behalf. By a further order made by the Treasury under reg. 78 (5) of the Defence Regulations the price of the shares so transferred was fixed at 29s. 3d. per share, a figure which was arrived at simply by reference to the prices of the shares ruling on the Stock Exchange on the date of the transfer of the shares. The shareholders contended that, as the transfer was of all the shares in the company, the appropriate mode of fixing the price of the shares was to ascertain the value of the whole undertaking and then to determine the proportionate value of the separate classes of shares and of individual shares within each class.

Held: when the order was made transferring the shares each shareholder was divested of the value of the shares which he held and the rights

to which the shares entitled him and not of some aliquot part of the property of the company, and, therefore, the basis of valuation adopted for which the Treasury contended was correct.

[FOR THE DEFENCE (GENERAL) REGULATIONS, 1939, regs. 55 and 78, see HALSBURY'S STATUTES, Vol. 36, pp. 636 and 703 respectively.]

Cases referred to :

- A (1) *John Fowler & Co. (Leeds), Ltd. v. Duncan & Crabtree*, [1941] 2 All E.R. 577; [1941] Ch. 450; 110 L.J.Ch. 161; 165 L.T. 128; Digest Supp.
(2) *Central Control Board (Liquor Traffic) v. Cannon Brewery Co., Ltd.*, [1919] A.C. 744; 88 L.J.Ch. 464; 121 L.T. 361; 83 J.P. 261; 11 Digest 548, 512.
(3) *Craddock v. Zevo Finance Co., Ltd.*, [1944] 1 All E.R. 566; Digest Supp.

SPECIAL CASE stated by arbitrator.

B The claimant, Francisco Samuel Short, was at all material times before March 23, 1943, the holder of 22,958 "A" ordinary shares in Short Brothers (Rochester and Bedford) Ltd., and the claimants, Lonsdale Investment Trust Ltd., were at all material times before the said date holders of 3,000 ordinary shares in the company. On March 17, 1943, the Minister of Aircraft Production, acting in pursuance of powers conferred on him by reg. 55 of the Defence (General) Regulations, 1939, made an order, intitled the Short Brothers (Rochester and Bedford), C Ltd. Control Order, which recited that it appeared to the Minister to be necessary to take control on behalf of His Majesty of the whole of the existing undertaking of the company and that the undertaking should be carried on in pursuance of the said order, and authorised and directed that one K. A. Layton-Bennett should exercise on behalf of His Majesty the functions of control specified in the order.

D By an order dated March 22, 1943, and intitled the Short Brothers (Rochester and Bedford) Ltd. (Transfer of Shares) Order 1943, the Minister of Aircraft Production (with the consent of the Treasury) in the exercise of powers conferred on him by reg. 78 of the Defence Regulations, 1939, and being satisfied that it was necessary for the purpose of securing effective control of the undertaking and expedient that all the shares of the company should be held on behalf of the Minister, ordered (*inter alia*) that all the ordinary shares and all the "A" E ordinary shares in the company should be transferred, and the same were, accordingly, transferred, to a nominee of the Minister as specified in the order, with effect from March 23, 1943. Of the authorised capital of the company (in addition to 230,475 redeemable cumulative preference shares of £1 each) 250,000 "A" ordinary shares of 5s. each had been issued as fully paid or were outstanding in March-August, 1943.

F By an order made on May 31, 1943, and intitled the Short Brothers (Rochester and Bedford) Ltd. (Price of Shares) Order 1943, the Lords Commissioners of the Treasury, in the exercise or pretended exercise of powers arising under reg. 78 (5) of the Defence Regulations, 1939, ordered that the price to be paid by the Minister in respect both of the "A" ordinary shares and the ordinary shares so transferred should be 29s. 3d. per share.

G The claimants were dissatisfied with that valuation and they claimed under reg. 78 (7) of the Defence Regulations, 1939, that the value of the shares should be determined by arbitration. The dispute was, accordingly, referred to arbitration, and the hearing took place on October 15, 16, 17 and 18, 1946. In the course of the evidence it appeared that the figure of 29s. 3d. per share was fixed simply by reference to the prices of the shares ruling on the Stock Exchange on the date of transfer of the shares, namely, March 23, 1943. On behalf of the Treasury it was contended that the proper basis of valuation under reg. 78 (5) of the Defence Regulations was to assume that the Minister had acquired all the shares in H individual blocks from individual shareholders on the date of transfer, and on this assumption to fix the value of all the shares on the basis of the prices ruling on the Stock Exchange on that date. On behalf of the claimants it was contended that, the transfer effected by the order of March 22, 1943, being a transfer of all the shares in Short Brothers (Rochester and Bedford) Ltd., it was improper to fix the value on the hypothesis of the purchase of individual blocks of shares from individual shareholders, and that the appropriate mode of fixing the price of the shares was to ascertain the value of the whole undertaking and then to determine the proportionate value of the separate classes of shares and of

individual shares within each class. Following this mode of valuation, the arbitrator came to the conclusion that a fair price for both classes of shares would be 41s. 9d. per share.

The question for the opinion of the court concerned which mode of valuation was proper to be followed in fixing the price of the shares.

The Rt. Hon. Sir David Maxwell Fyfe, K.C., and Cecil W. Turner for the claimants.

Sir Cyril Radcliffe, K.C., and H. L. Parker for the Treasury.

Cur. adv. vult.

December 19. MORRIS, J. read the following judgment. This Special Case which is stated by an arbitrator nominated in pursuance of powers given by the Defence (General) Regulations, 1939, raises questions of construction in connection with reg. 78 of those regulations.

The competent authority being satisfied that the necessities prescribed by reg. 55 made it expedient for him to exercise control over the undertaking of Short Brothers (Rochester and Bedford), Ltd., made an order to that effect on March 17, 1943. The competent authority further became satisfied that for the purpose of securing effective control of the undertaking it was necessary and expedient that all the shares in the company carrying on the undertaking should be held on behalf of the competent authority. On March 22, 1943, the Short Brothers (Rochester and Bedford), Ltd., (Transfer of Shares) Order, 1943, was made. It was made pursuant to reg. 78 of the Defence Regulations as then in force. By the operation of that order the shares of the claimants were expropriated. The shares previously held by the claimant, Francisco Samuel Short, being 22,958 "A" ordinary shares, and those previously held by the claimants, Lonsdale Investment Trust, Ltd., being 3,000 ordinary shares, together with the shares of all other holders, became transferred to a nominee of the competent authority. In exercise of the powers conferred on them by the Defence (General) Regulations, 1939, reg. 78 (5), the Lords Commissioners of His Majesty's Treasury made, on March 31, 1943, the Short Brothers (Rochester and Bedford), Ltd. (Price of Shares) Order, 1943, by which prices were specified of the shares transferred. The claimants exercised their rights under reg. 78 (7), which reads as follows :

Without prejudice to the provisions of s. 3 of the Rules Publication Act, 1893, any order made by the Treasury under para. (5) of this regulation shall as soon as may be after the making thereof be published in such manner as appears to the Treasury to be most suitable for bringing the order to the notice of persons affected thereby; and if within three months after the date on which any such order is made, or within such further time as the Treasury may in special circumstances allow, any person who immediately before the date of transfer had an interest in any of the shares to which the order relates gives notice in writing to the Treasury claiming that the price specified in the order is less than the value aforesaid, the value of the shares in which that person had an interest shall be determined by the arbitration of a qualified accountant nominated by the Lord Chief Justice of England, and if the value so determined exceeds the price specified in the order, the price to be paid in respect of those shares shall be increased accordingly.

The claimants claim that the price specified in the Price of Shares Order was less than the value of the shares directed and prescribed by reg. 78 (5). It fell, therefore, for the arbitrator to determine the value of the shares in which the claimants had an interest. The claimants had blocks of shares to the number which I have mentioned. The 22,958 "A" ordinary shares held by Francisco Samuel Short formed part of a total of 250,000 issued "A" ordinary shares. Mr. Short's shares having been compulsorily acquired, he was entitled to be paid the price specified for them. The price which has to be specified was as laid down in reg. 78 (5), which is in these terms :

The price to be paid by a competent authority in respect of any shares transferred by virtue of such an order as aforesaid shall be such price as may be specified in an order made by the Treasury, being a price which, in the opinion of the Treasury, is not less than the value of those shares as between a willing buyer and a willing seller on the date of the order made by that authority under para. (4) of the said reg. 55; and the price so payable shall carry interest from the date of transfer until payment at the rate for the time being prescribed under and for the purposes of s. 10 of the Compensation (Defence) Act, 1939...

If the wording of that paragraph and the wording of para. (7) is related to the arbitration in respect of the ordinary shares formerly held by Mr. Short, then, in

my view, the resultant applicable wording is as follows :

The price to be paid by the competent authority in respect of Mr. Short's shares shall be such price as is determined by the arbitrator to be not less than the value of Mr. Short's shares as between a willing buyer and a willing seller on March 17, 1943.

The same applies *mutatis mutandis* to the 3,000 5s. ordinary shares held by the other claimants, the Lonsdale Investment Trust, Ltd., being a block of the 581,302 ordinary shares which had been issued.

A In my view, the ordinary and reasonable construction of the regulation leads to the conclusion which I have indicated. The compensation or the price to be paid to each holder is to be not less than the value of his shares, assuming that at the specified date he, as a willing seller, was selling his shares to a willing buyer. This is the view which was put forward before me on behalf of the Treasury and which was put forward at the arbitration. It is expressed in para. 11 of the Special Case as follows :

B On behalf of the Treasury it was contended that the proper basis of valuation under reg. 78 (5) of the Defence Regulations was to assume that the Minister had acquired all the shares in individual blocks from individual shareholders on the date of transfer, and on this assumption to fix the value of all the shares on the basis of the prices ruling on the Stock Exchange on that date.

C The alternative view which was put forward on behalf of the claimants, both before me and at the arbitration, is expressed in para. 12 of the Special Case as follows :

D On behalf of the claimants it was contended that, the transfer effected by the above-mentioned order of March 22, 1943, being a transfer of all the shares in Short Brothers (Rochester & Bedford) Ltd., it was improper to fix the value on the hypothesis of the purchase of individual blocks of shares from individual shareholders, and that the appropriate mode of fixing the price of the shares would be, first, to ascertain the value of the whole undertaking and then to determine the proportionate value of the separate classes of shares, and of individual shares within each class. Following this mode of valuation, I [the arbitrator] came to the conclusion, after considering the evidence, that a fair price for the "A" ordinary shares and for the ordinary shares in Short Brothers (Rochester & Bedford) Ltd. at the date of transfer would be 41s. 9d. per share.

E The question raised by the Special Case is whether the contention of the claimants or that of the Treasury should prevail. On behalf of the claimants it was emphasised that the competent authority must first be satisfied that it is necessary for him to exercise control, and that, in addition, before acquiring the shares of an undertaking, he must be satisfied that this further step is necessary to secure effective control and that it is expedient that all the shares shall be held on his behalf. If fully so satisfied, the competent authority may require all the shares to be held on his behalf. No power is given to acquire some only of the shares. Control can only be secured by ordering transfer of all the shares. It was submitted on behalf of the claimants that, if the stage is reached when all the shares are to be transferred, then, as the competent authority is buying a totality, so he ought to pay for a totality, and that strong and clear language must be found before total payments of less than the total value of the undertaking could be justified. The competent authority, it was said, is in effect buying the whole undertaking, and that in the matter of payment the Treasury cannot retire from its position and specify a price or prices resulting in less than the value of the undertaking, and that no words so authorise them. As an additional and separate contention, it was urged that the regulation, which it was said is of a nature demanding and compelling strict construction, admittedly requires a valuation of the shares to be made, and that a true and fair valuation could only be achieved by ascertaining the value of the undertaking and then relating that ascertained value distributably to the shares held in the company. It was also submitted that the opening words of reg. 78 (5) which are as follows :

The price to be paid by a competent authority in respect of any shares transferred by virtue of such an order...

must have the meaning, since all the shares are transferred, that the price to be paid is the price of all the shares valued as a whole, which must in turn mean the value of the undertaking.

In considering these submissions I am in no way concerned with what might have been done, but solely with what has been laid down by the words of the regulation. The arguments of the claimants, to which I have referred, do not seem to me to pay heed to the realities of the factual situation or to be in tune with the provisions of the regulation. When the order was made expropriating the shares, the result, both intended and achieved, was that each holder of shares was compulsorily divested of those shares which he held. The competent authority compulsorily acquired a number of individual blocks of shares. Each holder or owner lost, therefore, those rights to which his shares entitled him. What each owner lost was the value, not of some aliquot part of the property of the company, but the value of the particular holding of shares which he held. A

If it had been intended that a price or value should be arrived at for the whole of an undertaking, and that that price or value should then in some manner be apportioned between the shareholders, the regulation would, in my view, have been differently expressed. The words "any shares transferred by virtue of such an order as aforesaid" appear both in para. (5) and in para. (6) of reg. 78. I think that it is clear that in para. (6) the words are denoting, not the totality of the shares, but individual holdings, and this tends to indicate that para. (5) should be similarly construed. In para. (7) there is the different phrase, "any of the shares," and that paragraph also, in my view, has reference to individual holdings, but, whatever an owner has lost, the price which he is to receive is that which is laid down, and, in my view, reg. 78 (5) means that each holder is to be paid for his shares a price which represents their value to him, assuming that on the specified date he were willingly selling those shares to someone who was willingly buying them. On such an assumption, the motive or purpose of the purchaser in buying is, in my view, irrelevant, as is also the circumstance that one who buys several individual holdings and thereby acquires all the holdings, may thereafter possess total holdings which, when all concentrated in one ownership, possess a value greater than the aggregate of the values or prices which he has paid. B C D

In the course of the very careful and helpful arguments which were addressed to me I was usefully referred, largely for purposes of illustrative comparison, to other statutory provisions, as well as to certain authorities and statements of principle. Desirable as, indeed, it is to pay heed to all these references, in my view, the task now before me is one of construing reg. 78. I, therefore, do not find it necessary to say more than that I was referred to the Finance Act, 1894, s. 7 (5); the Finance Act, 1930, s. 37 (1); the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2; the Compensation (Defence) Act, 1939, s. 6; the Defence (Finance) Regulations, 1939, reg. 1; *Cripps on Compensation*, 8th ed., p. 182; *John Fowler & Co. (Leeds), Ltd. v. Duncan and Crabtree* (1); *Central Control Board v. Cannon Brewery Co., Ltd.* (2); and *Craddock v. Zevo Finance Co., Ltd.* (3). E F

For the reasons which I have indicated, I am of the opinion that the contentions of the Treasury are correct.

Order accordingly, with costs.

Solicitors: *William Charles Crocker* (for the claimants); *Treasury Solicitor* (for the respondents).

[Reported by B. ASHKENAZI, Esq., Barrister-at-Law.] G

Re BOTIBOL (*deceased*) BOTIBOL *v.* BOTIBOL.

[CHANCERY DIVISION (Evershed, J.), December 3, 1946.]

Receiver—Action against—Breach of contract—Necessity for leave of court. H

So long as a receiver in an action is acting as such, a person who desires to bring proceedings against him in respect of something he has done as such may reasonably say that he requires the authority of the court. Certainly so in a case where the receiver has no constituent behind him, as, e.g., in the case of a receiver appointed to manage the affairs of a deceased person pending the appointment of a personal representative.

It may be difficult to say that a receiver acting strictly as such can ever be sued in contract, but he may adopt as his own a contract and render

himself liable as on a novation of it. If he can assert a right, certainly where there is no constituent behind him, to accept a repudiation so as to terminate the contract, he must have put himself in the position by adoption of being a party to the contract or representing a party. Even if a receiver could not be sued *ex contractu*, it would not follow that he could not be sued in tort if he had taken steps which effectively prohibited the completion of the contract.

A [AS TO LEAVE OF COURT TO THIRD PARTY TO EXERCISE RIGHTS WHEN RECEIVED IN POSSESSION, see HALSBURY, Hailsham Edn., Vol. 28, p. 56, para. 99; and for CASES, see DIGEST, Vol. 39, pp. 51, 52, Nos. 619—634.]

B PROCEDURE SUMMONS issued in an action that a stranger to the action should be at liberty to institute proceedings for breach of contract against the receiver appointed in the action to look after and manage the affairs of a deceased person pending the appointment of an administrator, the contract having been entered into by the stranger and the deceased.

V. M. Pennington for the applicant.

F. Bower Alcock for the receiver.

C EVERSHED, J.: This is a summons dated Aug. 14, 1946, issued by Henry Lynn & Co., Ltd. (hereinafter called "the company"), in an action of *Botibol v. Botibol* that they, Henry Lynn & Co., should be at liberty to institute proceedings against Mr. C. H. Barclay, the receiver appointed in the action, for breach of a contract, dated Mar. 4, 1941, and entered into by them, Henry Lynn & Co., with a man who was deceased at all the material dates.

D The contract was a contract under which the deceased was under an obligation to deliver quantities of rubber to the company who had to pay a certain price therefor. It is conceded that, in June, 1946, when the deceased died, that contract was partially completed. It also appears that the company claimed that they had a right to damages for breach of contract in respect of certain deliveries which had been made. No personal representative appeared on the death of the deceased. Accordingly, on July 1, 1946, the present writ was issued and the court was moved for the appointment of Mr. Barclay as receiver to manage the affairs of the deceased pending the appointment of a personal representative. On July 2, 1946, an order was made by which Mr. Barclay was appointed receiver and manager, the appointment being expressed to be "until 14 days or the second motion day after a personal representative of the deceased has been appointed." On Sept. 12, 1946, the plaintiff in the action was appointed personal representative. Therefore, according to the terms of the original order, the appointment of Mr. Barclay would cease either 14 days or on the second motion day after that date, which was in the Long Vacation. On Oct. 18 a further order in the action was made reciting the original order, and ordering that Mr. Barclay, the receiver, should lodge his final account and pay any balance due from him to the plaintiff as personal representative, and releasing him and his sureties and staying all proceedings in the action. It follows from that narrative, first, that, until Sept. 12, 1946, there was no personal representative of the deceased; secondly, that, at the latest, from Oct. 18, 1946, Mr. Barclay ceased to act and be receiver or manager of the deceased's estate, and ceased, therefore, to be for any purpose which is material an officer of the court.

G The circumstances which have given rise to the present application took place between the date of the death of the deceased and October 18. There is a considerable mass of evidence from which it appears, on the one hand, that the company claimed that the receiver, while acting as such, so acted as to put an end to the contract either by repudiation or by other interference with the contract. On the other hand, it is alleged that the contract was repudiated by the company and that the receiver, in his capacity as such, accepted the repudiation, so that the contract came to an end in that way.

H It is stated by counsel for the company that the ground for this summons is that, so long as Mr. Barclay was an officer of the court, it would not have been proper for a third party to bring an action in these courts against him, and that to have done so without the authority of this court might have involved the company in contempt of court. It is conceded, however, that from the time when Mr. Barclay ceased to be receiver and manager, no such justification existed at all. If a cause of action lies against him in respect of his past transactions, then

suit can be brought in respect of that and no possibility of contempt of court can be involved, because there could, in no sense, then be any interference with an officer of the court in the performance of his duty. Therefore, it follows, in my judgment, plainly, that as from Oct. 18, 1946, this summons became unnecessary.

There remains the question of the propriety of the proceedings before that date, because there is here a substantial question of costs. I must, therefore, examine to some extent the question of justification for this summons from the date of its issue on Aug. 14, until it became unnecessary on Oct. 18. Counsel for the receiver says that this application could never in any circumstances have succeeded. He argues that on the face of it it is an application for leave to bring an action for breach of contract and that as regards that the company find themselves on the horns of a dilemma because, unless it can be shown that the receiver, as an individual, adopted the contract, there can be no question of a right of action against him. If, on the other hand, the receiver did so adopt the contract, thus making it his own, then, according to counsel no leave of the court is required to sue him for breach.

I think that there may be separate approaches to the question with which I am concerned. First, I have to ask myself whether the summons was necessary on any view. When I say "on any view," I mean in circumstances such as we have here, without reference to the particular facts of this case, is a summons necessary? I have also to consider, assuming such an application is one that ought to be made by the company in these circumstances, is the proposed action one which could possibly succeed? If either or both of those questions is to be answered in the negative, then the whole summons was misconceived from the start. I am not satisfied that with the necessary assurance I can answer either of those questions by an unqualified "no." I think that, so long as a receiver is acting as such, an applicant may reasonably say, if he desires to bring proceedings against the receiver in respect of something he has done as such, that he requires the authority of the court. Certainly so in a case where, as here, the receiver had behind him no constituent, *i.e.*, at the material dates there was nobody representing the deceased, there being no grant of representation.

As regards the question whether an action could possibly succeed, it may be difficult to say that a receiver acting strictly as such can ever be sued in contract. On the other hand, a receiver may, as I think counsel for the respondent concedes, adopt as his own a contract and render himself liable as on a novation of it. There is also the submission of counsel for the company that if a receiver can assert a right, certainly where, as I say, there is no constituent behind him, to accept a repudiation so as to terminate the contract, he must have put himself in the position by adoption of being a party to the contract or representing a party. There is a further ground that, even if the receiver could not be sued *ex contractu*, it would not follow that he could not be sued in tort if he had taken steps which effectively prohibited the completion of the contract. I am not satisfied that because of the form of the summons it would necessarily have been impossible on a full hearing of this matter on the merits for the company to have obtained authority to bring an action in respect of the contract, albeit founded alternatively in contract and in tort. I do not feel called on to express a more decided opinion on many of these matters, which plainly would have been open to discussion of considerable interest and illumination about 200 years ago, because, after all, I am only concerned with costs.

Bearing all these things in mind, I shall exercise my discretion as to costs by saying that there shall be no costs on either side up to Oct. 18, but that the company must pay the respondent's costs from Oct. 18 up to and including to-day. I add that this order is without prejudice to the right the receiver may have to claim indemnity in respect of any costs which he may have to provide or pay in respect of this summons. The result will be there will be no order on the summons except that, notwithstanding the stay in the action, the company should pay the taxed costs of the respondent of the summons from Oct. 18.

Order accordingly.

Solicitors: *Oscar Mason & Co.* (for the applicants); *Sydney Pearlman* (for the respondent).

[Reported by B. ASHRENAZI, Esq., Barrister-at-Law.]

DREDGE v. DREDGE (otherwise HARRISON).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), March 15, November 28, 1946.]

Divorce—Nullity—Wilful refusal to consummate marriage—Result of decree to bastardise child—Wife pregnant by husband at date of marriage—Child born subsequently—Delay—Matrimonial Causes Act, 1937 (c. 57), s. 7 (1) (a).

The wife respondent was pregnant by the husband when the parties went through a ceremony of marriage on Mar. 6, 1929, and a child was born on Sept. 30, 1929. The husband, a serving marine, made every effort to consummate the marriage and continued to do so up to 1937, when the parties ceased cohabitation, but the wife wilfully refused to permit intercourse. The petitioner was on foreign service until the end of 1939 and in 1940, unaware of the facilities available for poor persons, he approached a solicitor with a view to taking proceedings, but found they were beyond his means. In 1942 he laid his case before the Services Poor Persons Department and in due course a petition for nullity was presented:

HELD: (i) in cases of the type visualised by the Matrimonial Causes Act, 1937, s. 7 (1) (a), the fact that a child would be bastardised by a decree of nullity was not a matter to affect the decision of the court;

(ii) in the circumstances the petitioner should not be penalised for the long delay, and he was, therefore, entitled to a decree.

[FOR THE MATRIMONIAL CAUSES ACT, 1937, s. 7, see HALSBURY'S STATUTES, Vol. 30, p. 339].

Cases referred to:—

- (1) *Farnham v. Farnham (otherwise Daniels)*, [1936] 3 All E.R. 776; [1937] P. 49; 106 L.J.P. 6; 155 L.T. 621; Digest Supp.
- (2) *Jackson v. Jackson & Barwell*, [1936] 2 All E.R. 1588; [1936] P. 214; 105 L.J.P. 93; 155 L.T. 324; Digest Supp.

PETITION by the husband for a decree of nullity on the ground of his wife's wilful refusal to consummate the marriage, the wife being, at the date of the ceremony, pregnant by the husband, and the child subsequently born being 17 years of age at the date of the hearing. The facts appear in the judgment.

A. Marlowe, K.C., and *Briant Irvine* for the petitioner.

S. Lawrence for the King's Proctor.

WILLMER, J.: This case was before me on Mar. 15, 1946, when I had occasion to adjourn the matter because I desired to have the assistance of argument by the King's Proctor. It is a petition by a husband for nullity on the ground of the alleged wilful refusal of the wife to consummate the marriage. The ceremony of marriage was held on Mar. 16, 1929, and at that time the wife was already pregnant by the husband. A child was born on Sept. 30, 1929, *i.e.*, after the ceremony of marriage, and is, therefore, up to the present moment a legitimate child. The evidence given by the husband was, broadly speaking, that he made every effort to consummate the marriage and that he was refused at first because as he thought, his wife, being pregnant, did not want intercourse during the pregnancy, but after the birth of the child, he says, she continued to refuse his advances. He was a serving marine and, therefore, the periods of cohabitation were subject to the exigencies of his service, but he says that he continued to make attempts to consummate the marriage up to 1937. It will be appreciated that at that date the Matrimonial Causes Act, 1937, had not come into force, so that wilful refusal was at that date no ground for seeking relief in this court. From 1937 onwards the parties have never lived together. The husband was on foreign service until the end of 1939, and by that time it appears he had decided that his marriage was finished. In 1940 he approached a solicitor and found that proceedings were too expensive, and it was not until 1942 that he laid his case before the Services Poor Person's Department. In due course the petition was launched from which the present proceedings have resulted.

We have thus the strange position that in 1946 I am being asked to declare that a marriage now over 17 years old was never a marriage at all, and the case is made stranger still by the fact that there is a child, now 17 years old, who, at any rate up to date, must be regarded as a legitimate child of the marriage. It appeared to me that this was rather a startling state of affairs, because, without hearing anybody on his behalf, I was being asked to pronounce a decree

which, so far as I could see, would have the inevitable consequence of bastardising this child who has grown up legitimate for 17 years and that was a point which required consideration. A further point requiring consideration in a case such as this, where a child has grown up for so many years as legitimate, was the question of delay in bringing proceedings. I had in mind that it might be one thing to make a decree which would have the effect of bastardising a baby, but another thing to make a decree which would have the effect of bastardising one who is now virtually a young man and who has grown up in the belief that he was legitimate. In those circumstances the matter was adjourned at the hearing in March of this year, and I have had the benefit of further argument both on behalf of the husband, and also on behalf of the King's Proctor.

It appears to me, having heard the arguments, that the questions I have to decide are, first, whether, assuming I am satisfied the marriage has not been consummated, the existence of the child conceived before the ceremony of marriage but born after the ceremony makes any difference in law; secondly, whether this is a case in which, having regard to the long delay which has occurred before the proceedings have been brought here, I ought to exercise my discretion by refusing a decree; thirdly, whether I am satisfied that the marriage never was in fact consummated; and, fourthly, if so, whether or not the non-consummation was due to the wilful refusal of the wife within the meaning of the Act.

Under the Matrimonial Causes Act, 1937, which came into force on Jan. 1, 1938, it was provided by s. 7 (1):

In addition to any other grounds on which a marriage is by law void or voidable, a marriage shall be voidable on the ground—(a) that the marriage had not been consummated owing to the wilful refusal of the respondent to consummate the marriage.

There follow three other cases in which marriages are made voidable, namely, (b) mental deficiency of the respondent, (c) the fact that the respondent is suffering from venereal disease, and (d) the fact that the respondent is pregnant by some other person than the petitioner. In two of these cases, namely, where a marriage is voidable by reason of the mental deficiency of the respondent and where a marriage is voidable by reason of venereal disease, special provision is made in sub-s. 2 of s. 7 for preserving the legitimacy of any children of the marriage, but no such provision is made where a marriage is voidable under paras. (a) or (d) of sub-s. (1). I suppose in the case of para. (d) the draftsman thought that, as *ex hypothesi* the child the subject of the pregnancy belonged to somebody else it did not matter very much that no provision for legitimating the child was made, but in the case of para. (a) I can only assume the draftsman took the view that what has happened in this case could not conceivably happen, namely, that there could be a child begotten by the petitioner where there had been no consummation of the marriage due to the wilful refusal of the respondent. Apparently, the possibility that a child might be conceived before the marriage and born afterwards had not occurred to the draftsman in the framing of this section of the Act.

That, however, is the situation which has arisen in this case, and I am bound to say that, curious and unhappy as the consequences are, I do not think that the fact that a child born after the ceremony of marriage would be bastardised is any ground for withholding a decree if I am otherwise satisfied. I need not refer in detail to the authorities to which counsel have referred. It is sufficient to say that it is well settled that, except in the cases where special provision to the contrary is made by the Act, a decree of nullity will undoubtedly have the effect of bastardising any child hitherto regarded as a child of the marriage. I was referred by counsel for the husband to *Farnham v. Farnham* (1) and *Jackson v. Jackson* (2). Those cases appear to make it clear that at any rate in cases of the type visualised in para. (d), i.e., cases where the respondent wife is pregnant by some person other than the petitioner, the fact that the child will be bastardised by the decree of nullity is not a matter to affect the decision of the court in any way. It has been argued by counsel for the husband—and I see no answer to the argument—that no distinction in principle is to be drawn between cases where the wife is pregnant by some person other than the petitioner and cases in which she is pregnant by the petitioner.

That deals with the first point which seems to me to arise for decision. The

second point is whether the question of the delay is one of any special significance, particularly having regard to the unfortunate fact that this child of 17 has grown up in the belief that he is legitimate. The question of delay is material when one comes to examine the sincerity or otherwise of the evidence given by the husband. It is rightly said that the longer a petitioner puts off the bringing of the proceedings the more inquisitive the court naturally is, and the more the court will require to be satisfied that he is presenting a true case, but I do not think it goes any further than that. It seems to me that in this case it would be wrong for me to penalise the husband because of the great delay in bringing this case. He has stated, and I see no reason to doubt it, that he did take up the question immediately after his return from foreign service at the end of 1939. It is to be remembered that until 1938 the remedy which he now seeks was not open to him, and it was his misfortune that in 1940, when he did take the matter up, there was a state of war, and it was also his misfortune that at that time he could not afford to take proceedings and was unaware of the facilities available for poor persons, but he did get in touch with the Services Divorce Department in 1942. Having regard to the fact that there was a war, in which he himself was taking a part, I cannot impute any great delay to him in not presenting his case to the authorities before 1942. Moreover, it is his misfortune and not his fault that, from the date when he did make contact with the Services Divorce Department, it took over three years before the petition was presented and another year still before determination by the court. Having regard to these considerations, and despite the question whether the child may or may not be prejudiced, I am not disposed to regard the question of the delay in the circumstances as one of any significance, except in so far as the point argued on behalf of the King's Proctor is concerned. That goes to the question what I think of the sincerity or otherwise of the evidence given by the husband.

I had the opportunity of having the wife called at my instance should I so desire it. I did not think it was necessary, even if I thought it were desirable, for several reasons. In the first place, this has been at all times an undefended suit, that is to say the wife, with full knowledge of the allegations made against her, has not seen fit to come to this court to deny them. Secondly, there is the fact that the King's Proctor, having made inquiries, does not seek to intervene. I can only assume that he, at any rate, has not discovered anything which would defeat the right of the husband, and it did not seem to me that by calling the wife I was likely to discover anything where the King's Proctor had failed. Thirdly, I preserve a lively recollection of the impression which the husband made on me at the first hearing, which was wholly favourable. I thought he was giving his evidence with complete candour and truthfulness, and I am prepared to accept it. In those circumstances all I need do is to express myself as satisfied with the evidence on points three and four which I have to decide, namely that the marriage has not been consummated, and that the non-consummation was due to the wilful refusal of the wife. The husband is, therefore, *prima facie* entitled to the relief which he seeks, and, having regard to what I have previously said, I do not see that there is any legal ground on which I can withhold relief. It is a most unfortunate position for the child to be placed in, but, so far as I can see, I am powerless to do anything to protect him. It is a situation which would not have arisen if the Act had been drafted in different terms, but I have to administer it as it is and not as it, perhaps, ought to have been drafted. In those circumstances I pronounce a decree nisi.

Decree nisi.

Solicitors: N. A. M. Sitters (for the husband); Treasury Solicitor (for the King's Proctor).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

HOLBORN v. HOLBORN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Hodson, J.), November 19, 20, 1946.]

Husband and Wife—Summary jurisdiction—Maintenance order—Separation order—Wilful neglect to maintain—Persistence by husband in revolting or inordinate demands—Justification of wife in withdrawing from cohabitation.

Where a spouse persists in making sexual demands which are known to be regarded by the other spouse as inordinate or revolting, such persistent lack of consideration may amount to a course of conduct so grave and weighty as to justify the other spouse in withdrawing from cohabitation—a *fortiori* where such a course of conduct is calculated to affect the health of the other spouse.

Jackson v. Jackson (1) considered.

If it is found that a wife was justified in withdrawing from cohabitation and that the husband failed to maintain her after she left him, justices are justified in holding that he has been guilty of wilful neglect to maintain her and in making a maintenance order against him, but where there is nothing of a permanent or irrevocable character in the conduct which is complained about, the wife is not entitled to a permanent separation.

[AS TO WILFUL NEGLECT TO MAINTAIN, see HALSBURY, Hailsham Edn., Vol. 10, pp. 838, 839, para. 1340; and FOR CASES, see DIGEST, Vol. 27, p. 557, Nos. 6124—6128, and Supplement.]

Cases referred to:

(1) *Jackson v. Jackson* (1932), 146 L.T. 406; 96 J.P. 97; Digest Supp.

(2) *Thomas v. Thomas*, [1924] P. 194; 93 L.J.P. 61 130 L.T. 716; 27 Digest 315, 2925.

APPEAL by the husband from a maintenance order made by Portsmouth justices on May 28, 1946, on a summons by the wife on the ground of wilful neglect to provide reasonable maintenance. The justices found that the wife was justified in withdrawing from cohabitation by reason of the husband's persistence in revolting and inordinate sexual demands which had resulted in affecting her health.

J. F. Marnan for the husband.

J. E. N. Russell for the wife.

LORD MERRIMAN, P.: This is an appeal from the justices for the city of Portsmouth by a husband who complains that the justices were wrong in holding that he had been guilty of wilful neglect to maintain his wife.

The parties were married as lately as January, 1944, and, owing to the exigencies of the war, they have spent very little of their married life together. The wife's home was in Nova Scotia, the husband was serving there, and they were married. Unfortunately, during the all too brief first period of their married life certain troubles arose, and I am satisfied that there was abundant material on which the justices could accept the wife's story of what, in the main, was the nature of those troubles. She complains that the husband was over-sexed, and she says that not merely was he insistent in his demands for sexual intercourse in season and out of season, but that, when she expressed reluctance to have sexual intercourse in the ordinary way, he made certain revolting suggestions to her.

That was the case she put forward to account for the fact that she had withdrawn from cohabitation early in their married life, while they were still in Nova Scotia. Before I go any further, I wish to say this. I have said it before, but it is strictly germane to the present case. No one can sit here as long as I have sat without realising that there is the greatest diversity of standards between one set of spouses and another as to what is or is not a normal standard of sexual intercourse. What will be regarded as grossly excessive demands by one wife (or by the husband, as the case may be) will be regarded as quite normal and reasonable by another wife or husband. I go further. There are things strictly outside what may be called normal sexual intercourse which will be regarded by one wife (or one husband, as the case may be) as so revolting as to be unmentionable, whereas other couples will regard them as nothing more than natural, normal love-making. Anyone who is familiar with the class of evidence and the class of controversies which arise in this court will know exactly what I mean.

To my mind, the point in any given case is whether, having regard to the

A known reactions of the other spouse to this, that, or the other type of love-making in the physical sense, it behoves the husband or wife to conduct himself or herself with consideration. Demands which are known to be regarded by the other spouse as inordinate or revolting may, if persisted in, show such a lack of consideration as, coupled with other conduct, to come within the well-known words, sanctioned by immemorial usage, as being so "grave and weighty a matter" as to justify one spouse or the other in withdrawing from cohabitation, and for this reason, that there must come a point of time at which persistent lack of consideration in matters of this sort may amount to a course of conduct calculated to cause injury to the mental health of the other spouse, or, at any rate, to lead to a reasonable apprehension of such injury. It comes back, in other words, to the point whether the husband or the wife, as the case may be, has conducted himself or herself with a grave lack of consideration for the feelings of the other spouse.

B That is the wife's case here. She says that that is what, in the main, induced her to break off cohabitation in the early days of the marriage. In fact, the parties resumed cohabitation in this country at the beginning of 1946. I do not think it is necessary to go into the vicissitudes which occurred in the meanwhile. So far as I can see, the wife resumed cohabitation with every determination to make the marriage a success. There were, however, two things which upset her. One was ceaseless quarrelling about money. The husband's case before the justices was that that, and nothing but that, was the reason why she "flounced" out of the house on May 5. If that had been all, this case would have assumed, no doubt, a very different aspect, but that is not the case which the wife put forward. The case on which she mainly rested was this same sexual trouble. She says that the husband was "after her day and night," at all times and all seasons demanding sexual intercourse, sometimes even as much as five times in one night, and, having been refused, possibly because their tempers were frayed in this argument about money, he then made once more the revolting suggestion which had been made in Canada and had then proved to be the main cause of the earlier disruption of their married life. The wife says that it was for that reason she left home.

C To justify the wife in withdrawing from cohabitation, as she did on May 5, by reason of misconduct on the part of the husband, there must be, in the words of the time honoured phrase which I have already used, some "grave and weighty matter." I am prepared—though the words were used in a very different context from the facts of the present case—to accept, as one of the paraphrases of that time-honoured phrase, some words used by LORD MERRIVALE, P., in *Jackson v. Jackson* (1) on which counsel for the husband insisted. LORD MERRIVALE, P., said (146 L.T. 406, at p. 407):

D Is it right to say that the conditions imposed on the wife were unbearable for her or any other wife, conditions which it was not competent for a reasonable husband to set up? Were they such conditions that a reasonable wife, being so treated by an unreasonable husband, could not be expected to proceed with the conjugal life?

E He was speaking there of difficulties arising through the presence of the husband's mother in the matrimonial home—very different facts from those of the present case—but they have this in common with the present situation, that there was nothing of a permanent or irrevocable character about the conduct which was being complained about. I must not be taken to say that those words are to be substituted for all other tests, but I am prepared to adopt them and adapt them to the circumstances of this case. If the wife's evidence is to be accepted, as it was by the justices, I think the conditions were such as to be unbearable by her, and that it was not competent for a reasonable husband to set them up. The conditions to which I have alluded had already once broken up the marriage and the husband knew perfectly well what effect they were likely to have and what effect such lack of consideration for her feelings was likely to have on this particular wife.

F But the matter does not end there. The wife arrived in England in January. The parties found a flat in April, and it was from then onwards that these matters of which she complains began to affect her. It is common ground that she saw a doctor for something which was affecting her nervous system. In my opinion, it was unreasonably inconsiderate for the husband to insist on, or to repeat, demands of a character which were not merely likely to have, but were in fact having, that effect on the wife's health.

In my opinion, the justices were entitled to find on the evidence that the wife was justified in withdrawing from cohabitation. That, and nothing but that, is what we are deciding in this case. It follows that they were justified in holding that the husband had been guilty of wilful neglect to maintain his wife, just as, if the summons had been for desertion, they would have been justified in holding that she was the deserted wife and, as such, was entitled to an order for the same amount of money by way of support.

I wish, however, to make it perfectly clear what we are *not* deciding in this case. We are not deciding that there is anything here which would justify the wife in taking up the position that she is entitled to a permanent separation from her husband, supported by the maintenance awarded under this order. The husband, I hope, has now had his lesson. If these two experiences of the wife withdrawing from cohabitation have not taught him the necessity for forbearance and consideration in the matters I have mentioned, then nothing will teach him, but, if he has learned what his wife is entitled to in the way of such consideration and is minded to make it clear to her that he has learned his lesson, there is nothing which will justify the wife in refusing to resume cohabitation. That is quite a different question from the question whether on May 5 she was entitled to withdraw from cohabitation. If the husband is prepared to treat her, and to convince her that he is prepared to treat her, with the consideration to which she is entitled in any matters in which he may have been at fault, including questions of money, she must return to cohabitation, and, if she refuses, the rights of the husband have been clearly defined in a series of cases, perhaps the best known of which is *Thomas v. Thomas* (2) in the Court of Appeal. So far as this appeal is concerned, I have no doubt that the justices' decision was justified and that the appeal must be dismissed.

HODSON, J. : The order appealed against is based on the wilful neglect of the husband to maintain the wife. She left him on May 5, 1946, and the question which was argued on this appeal was whether she had just cause for refusing to live with him at the time of the hearing on May 28, 1946. The gist of the case was that in the early days of the marriage her husband had made a suggestion to her which had revolted her and caused her to leave him, and, having got her back, he again made the same suggestion which caused her to leave him for the second time.

There seem to me to be two questions in this case. The first is whether that conduct of the husband actually revolted the wife so as to cause her to leave him. The justices have found that it did, and there was material upon which they could so find. The second question is whether she was reasonable or unreasonable in being so revolted, and I, too, am very ready to apply the test, which was mentioned by LORD MERRIVALE, P., in *Jackson v. Jackson* (1) and which we were invited by counsel for the husband to apply. In my view, it is plain that the wife was acting reasonably in refusing to live with her husband after that suggestion had been made. I wish to add nothing to what has been said by my Lord on this topic. He has made it clear that there is nothing permanent in that situation. The finding was merely that, things being as they were on May 5 and 28, the wife was justified in withdrawing from cohabitation.

A second argument has been addressed to us on the question whether there is any evidence of actual failure by the husband to pay his wife sums for her maintenance, it being said that he was unable to do so because she disappeared and kept out of the way. It is futile to contend that, even if the wife was justified in leaving, there was no failure to maintain, because the argument would seem to involve the proposition that, although the husband acted so badly that she was justified in concealing herself from him, yet he is entitled to take advantage of that fact and to say that, as she concealed herself, he need not pay. If his conduct caused the concealment, that seems to me to be fatal to that line of argument. There is no substance in that point and I agree that this appeal must be dismissed.

Appeal dismissed with costs.

Solicitors : *Henry I. Sydney & Co.* (for the husband), *Maude & Tunnickliffe*, agents for *MacDonald & Jacobs*, Southsea (for the wife).

[*Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.*]

FOLLETT v. LUKE.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Lewis, JJ.),
December 17, 1946.]

Food and Drugs—Watered whisky—Defence—Warranty—Excise certificate—Spirits Act, 1880 (c. 24), ss. 105 (5), 108 (2), sched. IV—Food and Drugs Act, 1938 (c. 56), s. 84 (1) (a).

A The appellant was charged under the Food and Drugs Act, 1938, s. 3, with selling whisky containing 14 per cent. excess water. The whisky was sold from a bottle which had not been opened previously and had been kept in locked premises between the time of its delivery by the dealers to the appellant and that of its sale. As required by the Spirits Act, 1880, the whisky, when delivered by the dealers, was accompanied by a certificate which purported to state its strength, namely, that it was "30 degrees under proof."

B HELD : the certificate was a written warranty on which, under s. 84 (1) of the Food and Drugs Act, 1938, the appellant could rely as a defence to the charge.

[AS TO WARRANTIES AS TO NATURE ETC. OF GOODS SOLD, see HALSBURY, 2nd Edn., Vol. 15, pp. 162—166, paras. 265—274; and FOR CASES, see Digest, Vol. 25, pp. 92—98, Nos. 172—217.]

C CASE STATED by a metropolitan police magistrate.

The appellant, Follett, was charged on an information under the Food and Drugs Act, 1938, s. 3, that on Apr. 2, 1946, he sold whisky not of the quality demanded and containing 14 per cent. excess water. The whisky sold was taken from a sealed bottle which had been delivered to the appellant by the dealers on the previous day and kept by him in locked premises over night. With it the dealers, as required by the Spirits Act, 1880, sent a certificate stating that the whisky was "30 degrees under proof." The question to be decided was whether this excise certificate amounted to a warranty on which the appellant was entitled to rely under s. 84 (1) of the Food and Drugs Act, 1938.

G. O. Slade, K.C. and James Burge for the appellant.
Vernon Gattie for the respondent.

E LORD GODDARD, C.J. : According to the facts stated in the Case, on Apr. 2, the respondent, an inspector of the local authority under the Food and Drugs Act, 1938, purchased at the appellant's premises whisky which was found to contain 14 per cent. of excess water. The magistrate has found all the facts in the appellant's favour, namely, that the whisky was sold from a bottle which had not been previously opened, and that it had been properly taken care of in locked premises between the time of delivery by the dealers—using the word "dealers" in the technical sense in which it is used in relation to spirits—and the time of the sale. When, however, the whisky was analysed, it was found that it had 14 per cent. of added water and was not of the strength of 30 degrees under proof, which, I suppose, can only be attributed to the dealers, in view of the facts that have been found.

F The only question raised in the Case is whether or not the appellant as seller was protected by a written warranty. The document which was produced and relied on as the written warranty is known as an "excise certificate for the removal of duty paid spirits," and it is given pursuant to the Spirits Act, 1880 (c. 24). By that Act, s. 105 (5) :

G No spirits may be sent out or delivered from the stock of a dealer unless accompanied by a certificate, except spirits not exceeding in quantity one gallon at a time sold by him under an additional licence or a licence to retail to a person not being a dealer or retailer.

H By s. 108 :

(1) Every rectifier, dealer, and retailer must, by written request, obtain from the proper officer a certificate book containing forms of certificates and counterfoils, for which he must give a receipt. (2) Before sending out or delivering any spirits required to be accompanied by a certificate, he must enter in one of these certificates, and in its counterfoil, the particulars specified in that behalf in the fourth schedule, and must sign the certificate. (3) He must deliver the certificate with the spirits to the person to whom the spirits are entered in the certificate.

There are other provisions about keeping the certificate open for inspection. Schedule IV to the Act specifies what the certificate is to contain. Among other things, it is to contain: "Quantity, denomination, and strength of spirits nt out or delivered." By the Finance Act, 1935, s. 14 :

If any spirits delivered in bottle from a warehouse for home consumption are sold by a dealer in or retailer of spirits at a strength lower than that by reference to which the customs duty or the excise duty chargeable thereon was computed, he shall, for each offence, be liable on summary conviction to a fine not exceeding £50.

So, a dealer commits an offence if, having given a certificate showing the strength of the spirits delivered or to be delivered, he delivers spirits at a different strength from that on which the duty has been paid. When a proprietor of a hotel or public house orders spirits from his dealer, he knows that he will receive with it an excise certificate, and that one of the things that the excise certificate must state is the strength of the spirits.

That seems to me to be about as clear and conclusive a written warranty as anybody can possibly require or possibly give. I think that if the argument throughout this case had been confined to whether or not this certificate was a warranty, the learned magistrate might have reached a different decision, but the point seems to have been taken in the court below that the certificate was an invoice, because under the Food and Drugs Act, 1938, s. 84 (5), it is provided that :

For the purposes of this and the next succeeding section, a name or description entered in an invoice shall be deemed to be a written warranty that the food or drug to which the entry refers is of such a nature, substance and quality that a person can sell, or otherwise deal with it, under that name or description without contravening any of the provisions of this Act.

This document is clearly not an invoice. It was not intended to be an invoice. But a purchaser can rely not only on an invoice. He can rely on any warranty, provided it is a written warranty. Then it is said there are cases which show that the written warranty must form part of the contract, in other words, that a person must stipulate for a written warranty.

Where two persons are dealing with an article which can only legally be supplied provided it is accompanied by a document containing a statement which in law must amount to a warranty, it is part of the contract that this warranty shall be given and received, because the law requires it shall be given and received. In the present case it appears to me as clear as it can be that the sellers knew they had got to give, and did send, this written statement with the goods, and the written statement is that the goods are : " 8 gallons of whisky, 30 degrees under proof." That is a warranty that the goods are 30 degrees under proof. The fact that it was given for the purpose of the Spirits Act does not make it any the less a warranty, and it would seem to be very hard in a case of this sort if the purchaser were not entitled to rely on that document, because it is not only given in pursuance of an Act of Parliament, but also, if any alteration in the strength of the whisky had taken place after the document was given to the Customs and Excise authorities, the person giving it would have incurred a serious penalty. In my opinion, the appeal succeeds, with costs.

HUMPHREYS, J. : I agree.

LEWIS, J. : I agree.

Appeal allowed with costs.

Solicitors : *J. E. Lickfold & Sons* (for the appellants) ; *Allen & Son* (for the respondent).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

READ v. DONOVAN.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Lewis, JJ.), December 12, 1946.]

Firearms—"Lethal weapon"—*Signal pistol not designed as weapon but capable of inflicting injury*—*Firearms Act, 1937 (c. 12), ss. 1 (2) (a), 32 (1).*

The expression "lethal weapon" in the *Firearms Act, 1937*, does not mean an implement which is designed to kill or inflict injury as distinct from an implement which, being misused, is capable of killing or inflicting injury. The intention of the manufacturer or designer is immaterial. The question is whether the weapon, being a barrelled weapon and one from which any shot, bullet or other missile can be discharged, is capable of inflicting harm.

Therefore, where a person, without holding a firearm certificate, acquired a double barrelled signal pistol, firing a cartridge with explosive ballistite and containing a phosphorous and magnesium flare, with a small propelling charge, not designed as a weapon, but capable of being used as such with fatal results,

HELD : he was guilty of an offence under s. 1 (2) (a) of the Act.

[FOR THE FIREARMS ACT, 1937, ss. 1 (2) (a), 32, see HALSBURY'S STATUTES, Vol. 30, pp. 909, 929.]

CASE STATED by a metropolitan magistrate. The facts appear in the judgment of LORD GODDARD, C.J.

Vernon Gattie for the appellant.

The respondent did not appear.

LORD GODDARD, C.J. : The respondent was summoned for having acquired a firearm to which pt. I of the *Firearms Act, 1937*, applied without holding a firearm certificate in force at the time, contrary to s. 1 (2) (a) of the Act. The question is whether the article he had in his possession is a firearm.

The matter seems to be beyond question. It is stated in the Case :

The implement in question was a double-barrelled signal pistol of German make, firing a cartridge with explosive ballistite and containing a phosphorous and magnesium flare. There is a small propelling charge. It is capable of killing at short range, and might be fatal up to twenty feet. It might inflict a more serious wound than a heavy revolver, as the flare might penetrate and continue burning in a wound. This type of instrument is not designed as a weapon, but it has been used as such. During the past war it was, in fact, used against enemy troops with fatal results.

The magistrate, however, was of opinion that the expression "lethal weapon" in the *Firearms Act, 1937*, meant an implement which is designed to kill or inflict injury as distinct from an implement which being misused, is capable of killing or inflicting injury, and, accordingly, he dismissed the summons.

It appears that this is a pistol designed, so far as design has anything to do with the matter, as a signalling apparatus, and it is significant that signalling apparatus is itself dealt with in s. 4 (6) of the Act. Section 4 deals with exemptions from the necessity of having a certificate, and one of the exemptions is a signalling apparatus on board an aircraft or on an aerodrome as part of the equipment of the aircraft or aerodrome. Therefore, the framers of the Act obviously intended that a signalling apparatus should be within the Act, but it is exempted from the necessity of obtaining a certificate under the Act if it is used merely in an aircraft or on an aerodrome. The definition of "firearm" in the Act is "any lethal barrelled weapon of any description from which any shot, bullet, or other missile can be discharged." A lethal weapon means a weapon capable of causing injury, and if it is barrelled, and if "a shot, bullet, or other missile can be discharged" from it, it is a firearm. In this case those requirements are clearly fulfilled. The intention of the manufacturer or designer of the weapon is immaterial. This case must go back to the magistrate with an intimation that the offence is proved.

HUMPHREYS, J. : I agree.

LEWIS, J. : I agree.

Case remitted.

Solicitors : *Solicitor for the Metropolitan Police* (for the appellant).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

X.Y. v. MINISTER OF PENSIONS.

[KING'S BENCH DIVISION (Denning, J.), December 11, 1946.]

Royal Forces—Pensions—Attributability—Suicide by serving soldier after receiving letter from fiancée breaking off engagement—Evidence—Statements of witnesses at, and findings of, military court of inquiry.

In 1940 the deceased man joined the Army. In 1942 he went home on embarkation leave. During this leave his fiancée tried to persuade him to marry her before he went overseas, but he refused to do so. After his return to his unit after his leave his fiancée wrote and broke off the engagement and four days later he shot himself with his service revolver.

HELD: (i) the pensions appeal tribunal were entitled to accept as evidence the statement of witnesses at, and the findings of, the military court of inquiry into the man's death.

(ii) the cause of the man's death was the letter written by his fiancée which constituted an intervening cause so powerful that the other circumstances were not causes at all, but only part of the circumstances in or on which the cause operated, and that the tribunal was right in holding that death was not due to war service.

Minister of Pensions v. Chennell (1) applied.

[EDITORIAL NOTE. It is interesting to observe that in *W. v. Minister of Pensions* (2), a case where the appellant's anxiety state was held to be due to his wife's conduct with other men while he was away from home on war service and not to that service, DENNING, J., put the hypothetical case "where a young man, serving abroad, receives a letter from his fiancée breaking off the engagement on account of his absence and he is so distressed that he commits suicide. There again his death is not attributable to war service. It is attributable to an intervening cause." That hypothetical case has now become an actuality, and DENNING, J., while not specifically referring to *W. v. Minister of Pensions* (2), gives effect to the views which he there expressed. The strict rules of evidence which bind courts of law are not necessarily observed by a pensions appeal tribunal, and so the proceedings of the military court of inquiry are held to have been properly taken into consideration.

FOR THE PENSIONS APPEAL TRIBUNAL ACT, 1943, see HALSBURY'S STATUTES, Vol. 36, p. 480.]

Cases referred to:

- (1) *Minister of Pensions v. Chennell*, [1946] 2 All E.R. 719.
- (2) *W. v. Minister of Pensions*, [1946] 2 All E.R. 501.

APPEAL from the decision of a pensions appeal tribunal.

The claim for a pension was made on behalf of the family of a deceased man, and it was refused by the tribunal. The unsuccessful applicant now appealed to the High Court. The facts appear fully in the judgment.

The appellant was not represented.

Stephen Chapman for the Minister.

DENNING, J.: I allowed this case to be put in the list without the name of the appellant because the relatives of the deceased man were so distressed about the matter that it would embarrass them if the name were made public. For similar reasons I allowed the case to be argued by submissions in writing.

In 1940 the deceased man joined the Army, and in 1942 he went home on embarkation leave. During this leave his fiancée tried to persuade him to marry her before he went overseas, but she was unsuccessful, and after his return to his unit, she wrote and broke off her engagement with him. Four days later he shot himself with his service revolver. A court of inquiry found that he met his death by his own hand while the balance of his mind was disturbed. There was no reason to suppose that he died accidentally. Before shooting himself he had written three letters, one to his commanding officer, another to his father saying goodbye, and a third one to his fiancée.

The tribunal found that the death of the deceased was not due to his war service. The questions which they put forward for my determination are, (1) whether they were correct in accepting as evidence the statements of the witnesses at, and the finding of, the military court of inquiry, and, (2), whether or not the death was attributable to war service. The contention on behalf of the appellant is that:

the facts disclose that death took place within the confines of a military camp as the

direct result of a bullet discharged from a service revolver with ammunition also supplied by the military authorities, and that this took place at a time when the deceased was under the orders and subject to the discipline of the military authority.

On behalf of the Ministry it was contended :

The fact that he was issued with a service revolver and ammunition was no more than an occasion for his turning them against himself. It was not the cause of his so doing. Similarly, the fact that he was subject to service supervision and control was no more than the temporary background of his life. It was not the cause of his deciding to commit suicide. This cause is to be found solely in the trouble with his fiancée, a factor which was entirely extrinsic and unrelated to his service life.

On the first question, in my opinion, the tribunal were entitled to accept as evidence the proceedings of the military court of inquiry. Although they would not be admissible in an ordinary court of law, they have probative force and could be admitted by the tribunal.

On the second question, recently in *Minister of Pensions v. Chennell* (1), I dealt with the question of causation. This case, on its facts, seems to me to fall within the fourth category which I mentioned there, namely, where an intervening or extraneous event is so powerful a cause that the other circumstances are not causes at all but only part of the circumstances in or on which the cause operated. That is, in my judgment, the position here. The cause of this man's death was the letter written by his fiancée operating in the conditions of his own mental make-up. The circumstances of the revolver being a military revolver and his being on service at the time were only part of the circumstances in which that cause operated. Therefore, in my judgment, on the principle which I stated in *Minister of Pensions v. Chennell* (1), the tribunal were right in holding that this man's death was not due to war service. The appeal is, therefore, dismissed.

Appeal dismissed.

Solicitor : *Treasury Solicitor* (for the respondent).

[*Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.*]

THORNE v. SMITH.

[COURT OF APPEAL, (Scott, Bucknill and Somervell, L.JJ.), November 17, December 10, 1946.]

Landlord and Tenant—Rent restriction—Possession—Order obtained by misrepresentation—Compensation for damage or loss sustained by tenant—Misrepresentation by landlord that premises required for own occupation—Consent by tenant to order for possession—Immediate sale of premises with vacant possession—Compensation for damage or loss sustained as result of order—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 5 (6).

A landlord's claim for possession of a house within the Rent Restriction Acts specified no grounds, but over a long period the landlord had repeatedly stated by letter to the tenant that he wanted possession for himself and had convinced the tenant of the truth of his statement. In the circumstances the tenant, on the advice of his counsel, consented to judgment for possession. The tenant vacated the house, and the landlord on the same day inspected the house, but instead of taking steps to enter into occupation he gave instructions to house agents to sell the house, and in due course it was sold with vacant possession. In an action by the tenant under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5 (6), for a declaration that the order giving the landlord possession of the house was obtained by misrepresentation and/or the concealment of material facts and that he was entitled to recover compensation for damage or loss sustained by him as the result of the order, the county court judge, though satisfied that on the merits the tenant had fully established a right to substantial damages, gave judgment for the landlord on the ground that a claim which was based on an order obtained by consent where there had been no hearing by the court was not competent under s. 5 (6), his view being that the sub-section presupposed that there had been an investigation of the claim by the court and an order made after it, and that the concealment referred to in the sub-section was misrepresentation to and concealment from the tribunal investigating the claim :—

HELD : the landlord had obtained the order for possession by misrepresentation within s. 5 (6), and the tenant was entitled to damages.

Per SOMERVELL, L.J. : The expression "consent order" may suggest some compromise or arrangement which might be inconsistent with the provisions of the Acts. When the defendant is agreeing to submit to judgment because he is satisfied that the plaintiff can establish his right to an order under the Acts, it might be advisable to avoid the use of the word "consent," which may have a wider meaning and cover cases where the "consent" was the result of an arrangement which could not properly be made the basis of an order.

[FOR THE INCREASE OF RENT AND MORTGAGE INTEREST (Restrictions) Act, 1920, s. 5 (6), see HALSBURY'S STATUTES, Vol. 10, p. 340.]

Cases referred to :

- (1) *Ainsworth v. Wilding*, [1896] 1 Ch. 673, 677 ; 65 L.J. Ch. 432 ; 74 L.T. 193 ; Digest Practice 473, 1539.
- (2) *Wilding v. Sanderson*, [1897] 2 Ch. 534 ; 66 L.J.Ch. 684 ; 77 L.T. 57 ; Digest Practice 622, 2589.
- (3) *Derry v. Peek* (1889), 14 App. Cas. 337 ; 58 L.J.Ch. 864 ; 61 L.T. 265 ; 54 J.P. 148 ; *revsg. S.C. sub. nom. Peek v. Derry* (1887), 37 Ch.D. 541 ; 35 Digest, 27, 185.
- (4) *Barton v. Fincham*, [1921] 2 K.B. 291 ; 90 L.J.K.B. 451 ; 124 L.T. 495 ; 85 J.P. 145 ; 31 Digest 579, 7280.
- (5) *Salter v. Lask*, [1924] 1 K.B. 754 ; 93 L.J.K.B. 685 ; 130 L.T. 323 ; 31 Digest 577, 7263.

APPEAL by the tenant from an order of JUDGE DONALD HURST at Reading County Court refusing damages against the landlord for obtaining an order for possession of a dwelling-house within the Rent Restriction Acts by misrepresentation. The facts appear in the judgment of SCOTT, L.J.

R. G. Micklethwaite for the tenant.

Cecil R. Havers, K.C., and *E. Anthony Jessel* for the landlord.

Cur. adv. vult.

Dec. 10. The following judgments were read.

SCOTT, L.J. : This appeal by a tenant depends solely on the correct interpretation of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5 (6), which is as follows :

Where a landlord has obtained an order or judgment for possession or ejectment under this section on the ground that he requires a dwelling-house for his own occupation, and it is subsequently made to appear to the court that the order or judgment was obtained by misrepresentation or the concealment of material facts, the court may order the landlord to pay to the former tenant such sum as appears sufficient as compensation for damage or loss sustained by that tenant as the result of the order or judgment.

The present defendant, the landlord, had, as plaintiff, obtained in the county court as against the tenant (then defendant and now plaintiff) an order for possession of the house in which the tenant was living. To avoid confusion, I will refer to them in their then capacities of landlord and tenant. The landlord's claim had specified no grounds, but the tenant's defence had raised two issues : (1) on the plea that the premises were "not reasonably required by the landlord for his own occupation" ; and (2) on the plea of "greater hardship." Both grounds of defence assumed that the claim would be based on para. (h) of sched. I to the Act of 1933, which *inter alia* confers jurisdiction on the county court to make an order for possession without proof of "suitable alternative accommodation." Section 3 of, and sched. I to, the Act together provide that the landlord can obtain possession if he shows that he wants the house for his own occupation. Over a long period of time the landlord had repeatedly stated by letter to the tenant that he did want possession for himself, and, in fact, he had convinced the tenant of the truth of his statement. At the hearing the landlord was represented by counsel, the tenant by his solicitor. The tenant, being thus convinced by his landlord's representations, came to the conclusion (and he was acting under legal advice) that it was useless to fight the case, and he consented to judgment for possession on Mar. 2, 1946. We have seen the indorsement on the brief of counsel for the landlord, duly signed on behalf of both parties by himself and the tenant's solicitor. The court was thereupon duly informed of the fact

and made the order accordingly. As late as one week before the date for possession the landlord in a letter to the tenant repeated his many previous statements that he wanted the house for his own occupation. On Mar. 2, 1946, the tenant moved out. The landlord and his wife made an inspection of the house, but, instead of taking steps to carry out his announced intention, the landlord went straight off to a house agent, put the house in his hands for sale, and through him a few weeks later sold it with vacant possession.

A On hearing the tenant's claim under s. 5 (6) of the Act of 1920, the judge found every fact in his favour, refused to believe the landlord's evidence, and would have given judgment in favour of the tenant for £180 15s. 4d. damages, but for a view he took of the interpretation of the sub-section. He thought that it predicated an order *in invitum* of the tenant made after a contentious hearing in court on the merits, during which, in the opinion of the court which later heard the tenant's claim, the landlord was guilty of misrepresentation or concealment in and to the court, and that a consent order for possession was outside the jurisdiction conferred by sub-s. (6). He, therefore, reluctantly gave judgment for the landlord.

In my opinion, he was wrong. As I read the sub-section, the tenant was entitled to the benefit of it. As an aid to construction it is well to consider what the rights of the tenant would have been apart from the sub-section. In essence, the provisions of the Act of 1933 contained in s. 3 (1)(a) and sched. I allowing recovery of possession by a landlord without proof of "suitable alternative accommodation," if he wants the house for his own occupation, had been present in the Act of 1920, and so far as they throw light on s. 5 (6) of that Act they must be borne in mind. If the misrepresentation was fraudulent, the tenant who had submitted to a consent judgment because of the landlord's representation that he wanted the house for his own occupation could have brought a common law action for damages for deceit and the consent judgment would have been no defence. C
D In addition, he would have been entitled to have that judgment set aside by bringing an action for the purpose, and the two causes of action could have been included in the one writ. In the second place, even without an allegation and proof of fraud, if the judgment had been obtained by innocent misrepresentation, the tenant could in equity have had the consent judgment set aside, as in the case of any contract obtained by misrepresentation, and, since the Judicature Acts, E also in a common law action: see *Ainsworth v. Wilding* (1) ([1896] 1 Ch. 673, at pp 679, 680), and *Wilding v. Sanderson* (2) ([1897] 2 Ch. 534, at p. 550), where LINDLEY, L.J., said:

It was conceded, and in my opinion it is clear, that the order of Nov. 23, 1894, being a consent order based on and intended to carry out an agreement come to between the parties, should be treated as an agreement, which could be properly set aside on any ground on which an agreement in the terms of the order could be set aside. Mistake is one of such grounds. F

Without proof of fraud, no action for damages would lie: *Derry v. Peek* (3); but rescission of the contract could always be obtained from a court of equity. "Concealment of material facts" is a phrase borrowed from the law of contract in the case of agreements of "utmost good faith" like insurance. There G the common law imposes on the person seeking insurance the duty of disclosing to the underwriters all facts within his knowledge which are material to the underwriter's estimate of the risk. If he fails to do so, the underwriter, on proof of the fact of non-disclosure, escapes from the obligations of the policy, and the court will, if asked, grant rescission.

That being the state of the law—both common law and equity—apart from the sub-section, it is obvious that Parliament was conferring two new substantive H rights to money compensation: (1) for mere misrepresentation, that is, without proof by the claimant of any fraud, and (2) for non-disclosure of material facts, with the correlative result that the landlord who obtained a judgment for possession by either means would be committing a statutory breach of duty. The second new right of action created by Parliament, in legislation interfering with freedom of contract for the purpose of protecting tenants, has particular significance, for it treats the landlord's claim to recover possession as analogous to the claim by the assured against his insurer, and, therefore, as one calling for "the utmost good faith" on the part of the landlord.

It was argued for the landlord below and before us—and decided below—that the order for possession was not “obtained” by the misrepresentation, although it was the misrepresentation by the landlord which made the tenant consent to judgment. I cannot accede to any such contention. The word “obtain” raises the issue of cause and effect, and the mere introduction of the tenant’s consensual submission to what he foresaw would be the inevitable result in the judge’s mind of the fact (as he thought) that the landlord *bona fide* wanted the house for his own occupation, does not sever the causal *nexus* between the landlord’s misrepresentation and the court’s order. The order made was, in my opinion, plainly caused by the misrepresentation, and it was, therefore, so obtained within the meaning of the section, for there was no “new cause intervening.” A refinement of the main argument was suggested in the further submission that the misrepresentation could not be said to have been made to the court by any oral or documentary evidence. That refinement is, in my view, meaningless, and is not the sort of argument which Parliament intended to be applied in county courts for the solution of disputes between landlords and tenants. The landlord “obtained the order by misrepresentation,” within the meaning of the sub-section.

The appeal must be allowed with costs here and below, and judgment entered for the tenant for £180 15s. 4d. I think that the conduct of the landlord makes it right that he should pay the costs below, taxed on Scale “C.”

BUCKNILL, L.J.: In this case the defendant is the owner of a house, 23, Shepherds Lane, Reading, which is within the Rent Restriction Acts, and the plaintiff was at all material times the tenant. It will be convenient to call them landlord and tenant. On Sept. 22, 1945, the landlord filed a claim in the Reading County Court asking for recovery of the house. The particulars of the claim were as follows:

The plaintiff’s claim is for recovery of all those premises known as No. 23, Shepherds Lane, Caversham Heights, Reading, which said premises the defendant [the present plaintiff] holds of him on a weekly tenancy at £1 1s. 0d. per week and which said tenancy has been determined by service of a notice to quit on the said defendant which expired on July 16, 1945.

The solicitors for the tenant in due course lodged with the registrar the following notice:

I dispute the plaintiff’s claim because the premises are not reasonably required by the plaintiff for his own occupation and further that, if the premises are so reasonably required, greater hardship would fall on the defendant if an order were made than on the plaintiff if an order were refused.

At the hearing on Oct. 17, 1945, the tenant’s counsel agreed with the landlord’s counsel and so endorsed on his brief that possession was to be given on Mar. 2, 1946, and there was to be no order for costs. The county court judge being informed that this order had been agreed between the parties, made the following order, which was duly filed: “It is adjudged that the plaintiff do recover against the defendant,” etc. On Mar. 2, 1946, the tenant vacated the house, and the landlord on the same day looked at the house and then went to house agents and gave them instructions to sell it. The house was duly sold with vacant possession on Apr. 9. On May 17 the tenant applied to the Reading County Court for a declaration that the order of Oct. 17 giving the landlord possession of the house was obtained by misrepresentation and/or the concealment of material facts and that he was entitled to recover compensation for damage or loss sustained by him as the result of such order.

That application was made under the Increase of Rent Act, 1920, s. 5 (6). At the hearing of the application before the county court judge the tenant proved that he had received letters from the landlord and his solicitors in 1945 and early in 1946 in which he or they said that the landlord intended to take up residence at 23, Shepherds Lane and that he desired it for his own personal occupation. The last letter was only a week before the date fixed for the tenant to give up possession. On the hearing of the claim for compensation the tenant said in his evidence that he would not have agreed to the consent order unless the landlord had represented that he wanted the house for his own occupation. On the other hand, the landlord gave evidence to the effect that he intended to live in the house up to Mar. 2. He then changed his mind about living there and went at once to the agents and instructed them to sell it.

The judge, in his judgment, said that he entirely rejected the evidence of the landlord and that he was satisfied that on the merits the tenant had fully established a right to substantial damages. He, however, was not satisfied that in law he could grant the application, because the order for possession was made by consent. The judge held that, on the wording of s. 5 (6) of the Act of 1920, any claim based on an order obtained by consent where there had been no hearing by the court was misconceived. In the judge's view the section presupposed that there had been an investigation of the claim by the court and an order made after such investigation, and that the concealment referred to in the section was misrepresentation to and concealment from the tribunal investigating the claim. The judge also said that it would be very difficult, if not impossible, for a court to inquire into the considerations operating on the minds of parties when not before the court. It seems to me that this view of the judge as to the interpretation to put on s. 5 (6) is not warranted by the words of the section. The landlord had clearly obtained an order for possession, or what purported to be an order, under the Act. It is true that in his claim he did not set out as the basis of his claim that he required the house for his own residence, but he obtained the order by consent of the tenant because he told the tenant that he intended to reside there.

Counsel for the landlord took the point that the landlord had not, in fact, obtained an order for possession such as is referred to in the section, because the judge had not inquired into the matter, and that, therefore, the order for possession was itself invalid. Counsel relied on *Barton v. Fincham* (4) in the Court of Appeal. In that case the tenant of a house within the Rent Restriction Acts agreed with the landlord to give up possession at Michaelmas, 1920, in consideration of the payment of £20 by the landlord to him. When Michaelmas arrived the tenant refused to give up possession of the house or the £20. The landlord then brought an action under the Rent Acts to recover possession of the house, but failed to prove any of the statutory conditions set out in the Rent Acts which would justify the Court of Appeal in making the order. The county court judge made an order for possession. The two judges of the Divisional Court differed whether the county court judge could make such an order, but the Court of Appeal decided that the county court judge could not. The case, therefore, differs very materially in its facts from the case before the court in that in the present case the tenant submitted to the order being made, whereas in *Fincham's* case (4) he ultimately refused to do so. There are passages in the judgments in *Fincham's* case (4) which to some extent support counsel's argument, and there are also passages relied on by the other side. Thus BANKES, L.J., said ([1921] 2 K.B. 291, at p. 296) :

In my opinion s. 5 is an instance of a case where the legislature has in clear and unmistakable language restricted the jurisdiction of the court, and where no agreement between parties can give the court a jurisdiction which the legislature has said it is not to exercise.

ATKIN, L.J., said (*ibid.*, at p. 299) :

The section appears to me to limit definitely the jurisdiction of the courts in making ejectment orders in the case of premises to which the Act applies. Parties cannot by agreement give the courts jurisdiction which the legislature has enacted they are not to have. If the parties before the court admit that one of the events has happened which give the court jurisdiction, and there is no reason to doubt the *bona fides* of the admission, the court is under no obligation to make further inquiry as to the question of fact ; but apart from such an admission the court cannot give effect to an agreement, whether by way of compromise or otherwise, inconsistent with the provisions of the Act.

Is, then, an agreement by consent such as was made in this case such an agreement as ATKIN, L.J., had in his mind ? It seems to me doubtful whether the court could make an order for possession under the Act if, for instance, the tenant stated in court that he consented to quit and to an order for possession solely because the landlord had promised to pay him £20. The question is difficult because of the remarks by SCRUTTON, L.J., in *Fincham's* case (4). There the Lord Justice said (*ibid.*, at p. 298) :

It was urged that the effect of our decision would be to prevent agreements in court. If the tenant is willing to go out, I do not see why any order is wanted ; let him go ; but as at present advised I do not see any reason why the judge on being satisfied that a tenant is then ready to go out (not that he was once willing but has changed his mind) should not make an order for possession.

But in the present case it is, I think, reasonably clear that the tenant, in effect, agreed to the order because at the time when the landlord asked the court to make the order the landlord by his own statements had satisfied the tenant that he intended to occupy the house himself and he, the tenant, could not hope successfully to resist the claim. If the tenant had stated this expressly in court the judge would surely have had jurisdiction to make the order on that ground. I think in the events which happened here, the tenant being legally represented, the judge was entitled to proceed on the view that this was the true position. Before making an order for possession the judge is under a duty to satisfy himself as to the truth if there be a dispute between landlord and tenant, but if the tenant in effect agrees that the landlord has a good claim to an order under the Acts, I think the judge has jurisdiction to make the order for possession under the Acts, without further inquiry.

For these reasons the appeal, in my view, should be allowed.

SOMERVELL, L.J. (read by BUCKNILL, L.J.): I agree, and only wish to add some observations on two points. Counsel for the landlord drew our attention to r. 18 of the rules made under the Act of 1920, which reads as follows:

Where proceedings are taken in the county court for the recovery of rent of any premises to which the Act applies, or of interest on a mortgage to which the Act applies, or for the recovery of possession of any premises to which the Act applies, or for the ejectment of a tenant from any such premises, the court shall, before making an order for the recovery of such rent or interest, or for the recovery of possession or ejectment, satisfy itself that such order may properly be made, regard being had to the provisions of the Act.

That rule was considered and applied in *Salter v. Lask* (5). Nothing in the decision that we are giving in any way, as it seems to me, diminishes the scope of that rule. We are deciding that on what happened in this case, the tenant being, as he was, legally represented, the county court judge was rightly "satisfied" that the order could properly be made.

The other point arises from the use of the word "consent" as applied to the order made herein. The expression "a consent order" may suggest some compromise or arrangement which might be inconsistent with the provisions of the Acts. When the defendant is agreeing to submit to judgment because he is satisfied that the plaintiff can establish his right to an order under the Acts, it might be advisable to avoid the use of the word "consent," which may have a wider meaning and cover cases where the "consent" was the result of an arrangement which could not properly be made the basis of an order.

Appeal allowed with costs.

Solicitors: *Mills & Morley*, agents for *Ratcliffe & Duce*, Reading (for the tenant); *Hancock & Scott*, agents for *Bunker & Son*, Hove (for the landlord).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

FUSSELL v. SOMERSET QUARTER SESSIONS LICENSING COMMITTEE.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Lewis, JJ.), December 10, 1946.]

Licensing—General annual licensing meeting—Application for new licence—Bench equally divided—Adjournment of meeting—Application granted at adjourned meeting—Confirming authority—Jurisdiction to confirm licence.

On Mar. 1, 1946, the appellant applied to the adjourned general annual licensing meeting of the licensing justices for the petty sessional division of Keynsham for a new licence. The bench consisted of six justices, and after they had conferred the chairman said: "The bench being equally divided on this application, no order is made, and the case will be reheard 'by a reconstituted bench.'" The adjourned general licensing meeting is further adjourned until Mar. 22, 1946." On Mar. 22 the justices held a further adjourned meeting, when eleven justices sat and granted the application. When the matter came before the confirming authority, objection was taken on behalf of certain local residents that the matter was not properly before the authority, it being contended that what happened on Mar. 1, when the bench was equally divided, amounted to a decision, and that, therefore, the licence had been refused. The confirming

authority upheld the objection, deciding that the application for confirmation of the licence was not properly before them, and refused to adjudicate on the matter. The appellant appealed.

HELD : that, although the justices might have refused the application on the ground that the bench was equally divided, they did not do so, but did what they were equally entitled to, namely, adjourn the application. The application having been granted at the adjourned hearing, the matter was properly before the confirming authority, and the case must be remitted to them with a direction to adjudicate on it.

AS TO PROCEDURE OF LICENSING JUSTICES, see HALSBURY, Hailsham Edn., Vol. 19, p. 40, para. 110, and Vol. 21, p. 615, para. 1071; and FOR CASES, see DIGEST, Vol. 30, p. 45, Nos. 345-347.]

CASE STATED by the Licensing Committee of the justices for the county of Somerset.

On Mar. 1, 1946, the appellant, Percy John Fussell, applied to the adjourned general annual licensing meeting of the licensing justices for the petty sessional division of Keynsham for a new licence. The bench then consisted of six justices, and, after they had conferred together, the chairman announced: "The bench being equally divided on this application, no order is made, and the case will be reheard. The adjourned general annual licensing meeting is further adjourned until Mar. 22, 1946, when the bench will be reconstituted."

On Mar. 22, the justices held a further adjourned meeting. Eleven licensing justices then sat, and they granted the application. When the matter came before the confirming authority, objection was taken that the case was not properly before that authority, it being said that what had happened on March 1, when the bench was equally divided, amounted to a decision, and that therefore, the licence had been refused. The confirming authority accepted that submission, and the appellant appealed.

P. Colin Duncan, for the appellant.

Vernon Gattie, for the licensing committee.

LORD GODDARD, C.J. : The question which we have to decide depends on what was the true effect of that which happened on March 1—whether the justices gave a decision or whether they merely adjourned the case, because, in my opinion (and I think in the opinion of the court), there must be an inherent right in every court to adjourn a hearing when a matter comes before it, for whatever reason. One reason for which justices can adjourn a hearing is that they are an even number and they want the case tried before an uneven number of justices, so that a majority decision may be given. There is no question that, if, at the hearing of an application for a licence, the justices are equally divided, and for that reason say that they refuse the application because a majority of the justices are not in favour of granting the licence, that amounts to an adjudication refusing the licence, but in the present case I think it is clear that what the justices meant was: "We are not going to give a decision on this case. We are going to adjourn it, so that it may be heard by a larger bench, and then a decision can be given." I think that that is the fair meaning to put on what the justices did, and, in my opinion, they had an inherent right, and also a statutory right, to adjourn the hearing. It is conceded that the justices are not to be regarded as *functus officio* because they did not give a decision for granting or refusing the licence. They simply adjourned the hearing before them to be heard before a larger bench on another day. The larger bench heard the application and they granted it. In my opinion, therefore, the matter came properly before the confirming authority and the case must go back to the confirming authority with a direction that the case was properly before them and they must, therefore, proceed to adjudicate on it.

HUMPHREYS, J. : I am of the same opinion and for the same reasons.

LEWIS, J. : I agree.

Case remitted.

Solicitors: *Godden, Holme & Co.*, agents for *Daniel & Cruttwell*, Frome (for the appellant); *Sharpe, Pritchard & Co.*, agents for *H. King*, Clerk to *Somerset County Council* (for the respondent).

[Reported by C. STJ. NICHOLSON, Esq., Barrister-at-Law.]

PARKER v. BOGGAN.

[KING'S BENCH DIVISION (Macnaghten, J.), December 9, 1946.]

Landlord and Tenant—Underlease—Consent of landlord—Refusal—Reasonableness—Proposed underlessee entitled to diplomatic privilege.

The fact that a proposed underlessee is entitled to diplomatic privilege and immune from proceedings in a court of law is not a reasonable ground for a landlord refusing consent to the underlease.

A tenant, having failed to obtain the landlord's consent, granted an underlease of a flat to the counsellor of the Turkish Embassy in London :—

HELD : it was unreasonable to withhold consent, and the landlord was, therefore, not entitled to possession on the ground that there had been a forfeiture created by breach of a covenant not to underlet without consent.

[AS TO UNREASONABLE WITHHOLDING OF CONSENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 349—352, paras. 421, 422 ; and FOR CASES see DIGEST, Vol. 31, pp. 382—384, Nos. 5279—5281.]

ACTION by a landlord to recover possession of a flat on the ground that there had been a forfeiture created by breach of a covenant not to underlet without the consent of the landlord. The facts appear in the judgment.

Cecil R. Havers, K.C., and J. M. Ahern for the landlord.
J. Pennyquick for the tenant.

MACNAGHTEN, J. : This is an action brought by the landlord against the tenant to recover possession of a flat known as No. 50, Northgate, Regents Park, London, and for damages by way of mesne profits since the date of the issue of the writ, which was June 27, 1946. By a lease dated Aug. 30, 1945, made between the landlord of the one part and the tenant of the other part, the landlord let to the tenant the premises in question, together with the furniture and fixtures therein, for the term of one year from July 23, 1945, and thereafter from quarter to quarter until the tenancy should be determined by either party giving to the other one a quarter's previous notice in writing to expire on any of the usual quarter days, at the rent of £550 per annum, payable in advance on the days and by the instalments set out, namely, on Mar. 25, June 24, Sept. 29, and Dec. 25. By a notice to determine the tenancy, dated Sept. 24, 1946, the tenant's solicitors on his behalf gave notice in writing to the landlord that he would quit and deliver up possession on Dec. 25 next, but the landlord claims by his statement of claim to recover possession as from the date of the issue of the writ for the following reason. The tenant agreed that he would not assign, underlet, charge, or part with the possession of the demised premises or any part thereof or of the furniture and effects without the previous consent in writing of the landlord and of the landlord's superior landlord. By an agreement dated Apr. 15, 1946, between the tenant of the one part and Ibrahim Sadi Kavur, of 69, Portland Place, on the other part, the tenant let to Mr. Kavur the demised premises, No. 50 Northgate, Regents Park, together with the furniture and effects, from Mar. 25, 1946, for the period of nine calendar months less the last day, that is to say, to Dec. 24, 1946, at a rent of 10 guineas a week, £450 being paid by way of premium. That underlease was granted without the consent in writing of the landlord thereto, and so this action is brought to recover possession from the date of the issue of the writ on the ground that there has been a forfeiture created by the breach of the covenant not to under-let without the landlord's consent.

The only answer to the claim is that the tenant, by his solicitors, had applied for a licence to underlet to Mr. Kavur and that request had been refused. To the *prima facie* case that the landlord makes, the tenant replies that it was unreasonable on the part of the landlord to refuse his consent. Although in the correspondence which took place before the underlease was granted in favour of Mr. Kavur various other objections to Mr. Kavur as an under-tenant were raised, before me the only objection raised is, not that Mr. Kavur is a Turkish subject, but that he is the counsellor to the Turkish Embassy to His Majesty and as such is entitled by the comity of nations to diplomatic privilege—for instance, he could not be sued in our courts—and that by reason of that fact it was not unreasonable of the landlord to refuse consent to the grant of an underlease to him. Counsel for the landlord has argued that it is an objection that the proposed sub-tenant has diplomatic privilege. Some people might regard

it as an advantage. Of course, whenever one lets a flat or house, one wants to be satisfied that the tenant or sub-tenant is a responsible person who is able to discharge the obligations he has undertaken. Apart from the banker's reference, the fact that Mr. Kavur was the counsellor to the Turkish Embassy might have satisfied some people that it was certain that any obligations into which he had entered would be duly discharged, not merely on the ground of the responsibility of a gentleman in his position, but by reason of the fact that he held that position, for it might be thought that the Turkish Republic could not afford to allow a man who was accepted by His Majesty as the counsellor to the Embassy to disregard his contractual obligations with regard to the payment of rent or, indeed, with regard to any of the other covenants which the lease imposed. There might be some valid objection if there were some dispute whether Mr. Kavur was entitled to diplomatic privilege, but where there is no question but that the Turkish Embassy is acceptable to His Majesty and that Mr. Kavur, as the counsellor, is a person of position and authority in the Embassy, most people would feel that it was reasonably certain that all the obligations into which he entered would be fully discharged, and that, if he did not discharge them, the Turkish Empire, for its own credit and reputation, would certainly see that they were discharged to the full. No sovereign foreign country could afford that any question should arise regarding the discharge of their obligations by their ministers and servants in this country. I cannot recall any case here where any question has arisen. So meticulous in such matters are members of embassies in this country that I think I am right in saying that all of them undertake the obligation of taking out third-party insurance with regard to their motor cars although, if they could be said to be negligent, they could not be sued. If there is an accident, I do not think that any foreign embassy seeks to raise the question of immunity. They allow the question of liability to be determined.

I conclude, therefore, that it was not reasonable for the landlord to object to the underlease to Mr. Kavur on the only ground that is put forward, namely, that he occupied the responsible position of counsellor to the Turkish Embassy, and was, therefore, a person who was entitled to the customary diplomatic privilege and was immune from proceedings against him in the courts of this country. The tenant has made good his defence, namely, that it was unreasonable to withhold consent to the underlease to Mr. Kavur and the action stands dismissed with costs.

Judgment for the defendant with costs.

Solicitors : *Scott & Son* (for the plaintiff) ; *Nordon & Co.* (for the defendant).
[Reported by B. ASHKENAZI, Esq., Barrister-at-Law.]

PRICE AND OTHERS v. MINISTER OF HEALTH

[KING'S BENCH DIVISION (MORRIS, J.), December 6, 9, 1946.]

Public Health—Housing—Compulsory purchase order—Confirmation by Minister—Regard had by Minister to letters from local authority received by him while acting administratively—Right of Minister to use knowledge gained by him extra-judicially—Housing Act, 1936 (c. 51), s. 29 (1), sched. I (4).

In confirming a compulsory purchase order made by a local authority, the Minister of Health had regard not only to the evidence given at the public inquiry, but also to two letters from the local authority received by him three years earlier. These letters merely stated that the object of the local authority was "the rapid erection of as large a number of dwellings as possible" and that the authority's attention had been drawn to certain areas [including the area in question] which had suffered extensively from damage by enemy action and "the acquisition of which would enable housing development to be commenced immediately conditions permit." Since these letters were not in evidence at the public inquiry, it was contended by the objectors to the order that the confirmation order was bad :

HELD : (i) it was not necessary for copies of the letters to have been laid before the objectors and they had not been prejudiced by not having had an opportunity of dealing with them.

(ii) the letters having been received by the Minister before the public inquiry and while he was still acting in an administrative capacity, and there being nothing in them which required them to be given in evidence at the public inquiry, there was no ground for quashing the confirmation order.

Errington v. Minister of Health (1) and *Stafford v. Minister of Health* (3) distinguished.

Offer v. Minister of Health (2) and *Miller v. Minister of Health* (4) applied. A

[AS TO COMPULSORY PURCHASE ORDERS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 571-573, paras. 1207-1211; and FOR CASES, see DIGEST, Supp., Public Health, Nos. 502 *m et seq.*]

Cases referred to :

(1) *Errington v. Minister of Health*, [1935] 1 K.B. 249; 104 L.J.K.B. 49; 152 L.T. 154; 99 J.P. 15; Digest Supp.

(2) *Offer v. Minister of Health*, [1936] 1 K.B. 40; 105 L.J.K.B. 6; 153 L.T. 270; Digest Supp. B

(3) *Stafford v. Minister of Health*, [1946] K.B. 621; 110 J.P. 210; *sub nom. Mowsley No. 1 Compulsory Order*, 175 L.T. 101.

(4) *Miller v. Minister of Health*, [1946] K.B. 626; 110 J.P. 353.

APPEAL by objectors under the Housing Acts, 1925-1936, against an order of the Minister of Health confirming a compulsory purchase order made by the London County Council. The objectors' main ground of objection was that matters which might have been, but were not, given in evidence at the public inquiry were taken into account by the Minister without the objectors having an opportunity to cross-examine on them. The facts appear in the judgment. C

H. Heathcote-Williams for the objectors.

H. L. Parker for the Minister of Health.

MORRIS, J. : On June 12, 1945, the London County Council made an order which is cited as the County of London (Ocean Street, Stepney) Housing Order, 1945. The applicants in the motion now before the court lodged objections on August 30, 1945, against the order. A number of objections were set out, including that the houses in the schedule to the objections were not unfit for habitation or dangerous, and that the acquisition of the property specified in the schedule to the objections was not reasonably necessary for the purpose of satisfactorily developing the area. Further points were taken indicating that the objectors, being the owners of two island sites within the area proposed to be taken by the London County Council, were themselves contemplating and desirous of developing those sites in conformity with good planning principles. The Minister ordered a public inquiry which was held on Feb. 12, 1946, and on April 11, 1946, he confirmed the order of the county council. D

This application is now made on the grounds stated in the notice of motion dated June 5, 1946, to be as follows. It is said that there was no evidence from which it could appear to the Minister that the land is likely to be required for the purposes of the Housing Act, 1936, pt. V, within ten years from Apr. 11, 1946. The point there stated has reference to the proviso to s. 74 (2) of the Housing Act, 1936, which is in these terms : E

Provided that a local authority shall not be authorised to purchase any land compulsorily for those purposes unless it appears to the Minister that it is likely to be required for those purposes within 10 years from the date on which he confirms the compulsory purchase order. F

Counsel for the objectors urges two matters. He says, in the first place that the order made by the Minister is bad in the light of the order itself and the material on which it was based, because (he submits) there was no evidence before the Minister which would justify him in being satisfied in regard to the consideration set out in the proviso to s. 74 (2) of the Act of 1936. In the second place, he says that the order of the Minister is bad, because matters which might have been, but which were not, given in evidence at the public inquiry were taken into account by the Minister without the objectors having an opportunity to cross-examine on them. Counsel for the applicants, therefore, submits that the confirmation order was not within the powers of the Act and was made by the Minister in violation of the principle of natural justice. G

I propose to deal with those two matters separately. The Minister, when he H

A approached his task, had to consider whether it appeared likely that the land sought to be acquired would be required for the provision of housing accommodation for the working classes in one or more of the manners indicated by s. 72 of the Act. It is to be observed that the language of the proviso to s. 74 (2) includes the words "likely to be required for those purposes," and does not stipulate that the project must be completed within the 10 years specified. From the transcript of the evidence given at the public inquiry, I think that there was, as the result of the inquiry, ample material on which the Minister could form the opinion that it appeared to him to be likely that the land to be taken would be required for the purposes proposed within ten years from the date of any confirmation. I am satisfied that the first ground of this application fails.

B Counsel for the objectors stated frankly that he advanced the second ground of his application with rather greater determination than the first. In this connection I have been referred to the statements to be found in the authorities as to the duty of a Minister when he acts in a quasi-judicial position. The two letters that form the material for this part of the argument of counsel for the objectors were written in 1943. The earlier of the two contains the sentence:

The main object the council has in view is the rapid erection of as large a number of dwellings as possible . . .

C The second letter, of Dec. 2, 1943, begins:

With reference to the council's letter of Apr. 5 last regarding its proposals for the acquisition of housing sites in the suggested reconstruction area in Stepney and Poplar, the attention of the council has been drawn to three sites within the area which have suffered extensive damage as the result of enemy action and the acquisition of which would enable housing development to be commenced immediately conditions permit.

D If those letters have any relevance, they would appear to have it as indicating that in April and December, 1943, it was the intention and the expectation of the London County Council to make as speedy progress as possible in the erection of dwelling-houses. When dealing with the first part of his case, counsel for the objectors submitted that those letters really possessed little or no evidential value, for they merely showed what appeared to have been the intention of the London County Council in 1943, and that did throw not much light on the question as to what were their intentions in 1945 or 1946. It may be, therefore, that these letters really throw very little light indeed on the question that the Minister had to decide. If these letters had been available at the time of the inquiry, I doubt whether any use would have been made of them. It does not seem to me that they would have assisted those who were taking part in the inquiry. It is to be remembered also that, at the date of the inquiry, no point had been taken by the objectors now bringing this motion to the court that the land was unlikely to be required within ten years. Those letters, it seems to me, do no more than to amount to confirmation that it was the intention of the London County Council to construct houses, and I imagine that their value in that way would be very small indeed, but, although I am satisfied that no prejudice of any kind resulted to the objectors because they did not have these letters before them, I wish to examine the matter a little more fully.

F I was referred, I think, to all the relevant authorities, and, in particular, strong reliance was placed by the objectors on *Errington v. Minister of Health* (1). Everything said in that case is, of course, authoritative, and is applicable in reference to matters similar to that which I am now considering. The facts in *Errington's* case (1) were, however, very different from those of the present case. GREER, L.J., said ([1935] 1 K.B. 249, at pp. 264, 265):

I Now it seems to me that if, as I think, the Ministry were acting in a quasi-judicial capacity they were doing what a semi-judicial body cannot do, namely, hearing evidence from one side in the absence of the other side, and viewing the property and forming their own views about the property without giving the owners of the property the opportunity of arguing that the views which the Ministry were inclined to take were such as could be readily dealt with by means of repairs and alterations to the buildings . . . They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice.

Later GREER, L.J., said (*ibid*, at p. 268):

. . . if, instead of directing his mind solely to those matters, he [the Minister] takes



into consideration evidence which might have been, but was not, given at the public inquiry, but was given *ex parte* afterwards without the owners having any opportunity whatever to deal with that evidence, then it seems to me that the confirming order was not within the powers of the Act.

In *Errington v. Minister of Health* (1) the matter was continued in private after the public inquiry. The facts were very different from those in the present case. MAUGHAM, L.J., in his judgment said (*ibid.*, at p. 279) :

I think it is not a compliance with sched. I, para. 4, to come to a conclusion in favour of confirming the order, basing the conclusion not merely on the public local inquiry and the report of the person who held the inquiry but also on an *ex parte* private inquiry, such as I think the officials of the Minister have held here. I think that is not a compliance with what is requisite under sched. I, para. 4.

MAUGHAM, L.J., went on to say (*ibid.*, at pp. 279, 280) :

On the other hand, it seems to me a matter of the highest possible importance that where a quasi-judicial function is being exercised, under such circumstances as it had to be exercised here, with the result of depriving people of their property, especially if it is done without compensation, the persons concerned should be satisfied that nothing unfair has been done in the matter, and that *ex parte* statements have not been heard before the decision has been given without any chance for the persons concerned to refute those statements. That seems to me a matter of the greatest possible public importance, and if I am right in the view that I have expressed as to the functions of the Minister being of a quasi-judicial character, I think it follows that in the special circumstances of this case, as I understand them to be, the court has no option but to quash the order . . .

The events under consideration there occurred after the holding of the public inquiry, and, indeed, what is more important, after the time when the Minister began to act in a quasi-judicial capacity. I think that counsel for the Minister must be right when he suggests that the Minister of Health must at some stages be acting purely administratively, that there will come a time when he will be acting in a quasi-judicial capacity, and that thereafter he may again enter on a period when he is acting administratively. Counsel for the Minister called the attention of the court to the duty imposed on local authorities by the Housing Act, 1936, s. 71.

Regard must be had not only to *Errington's* case (1), but also to *Offer v. Minister of Health* (2). That is also a decision of the Court of Appeal. I think it is sufficient if I refer to one or two sentences from the judgments in that case. GREER, L.J., said ([1936] 1 K.B. 40, at p. 47) :

In these circumstances, I have not the slightest doubt that in dealing with the subject-matter, when he comes finally to deal with it, the Minister is acting in a semi-judicial capacity, and once the objections have been heard, and the report has been made, the Minister is not entitled, as we held in *Errington v. Minister of Health* (1), to hear one side in the absence of the other ; that is to say, that he is not entitled to hear the local authority in the absence of the property-owning objector, or to hear the property-owning objector in the absence of the local authority ; he must in giving his final decision act judicially.

Referring to the duty of making an investigation and calling for a report, GREER, L.J., said (*ibid.*, at p. 48) :

To my mind Parliament intended that these semi-official duties should be conferred upon a Minister who naturally will have some knowledge of the matter before he begins his semi-judicial inquiry, and will possibly have had communications with the local authority before what I have called the "*lis*" is joined between the objecting property owners and the local authority, and who will therefore have some knowledge and have given some opinion about the matter.

It seems to me that GREER, L.J., is there having regard to the type of letters that are before me in this case. Later GREER, L.J., said (*ibid.*, at p. 49) :

I see no reason whatever to suppose that the order was made under any such circumstances, or that anything improper was done from beginning to end. I agree, although perhaps not for entirely the same reasons, with the decision of the learned judge. I see nothing in the decision in this case at all inconsistent or contrary to the decision in *Errington v. Minister of Health* (1). That case is quite a different case from the present one, dependent upon different facts and dependent upon the action of the Minister, after a public inquiry had been held, in continuing in private part of that inquiry after the public inquiry into the objections had been held and before the time when the Minister confirmed the order.

I think it is clear that many documents must come into the possession of the Minister while he is acting administratively, and before a time when he enters on semi-judicial duties, or, to use the language of GREER, L.J.:

... before ... the "*lis*" is joined between the objecting property owners and the local authority.

The Minister, in the nature of things, it seems to me, must enter on his quasi-judicial duties with much knowledge acquired administratively. I think the case with which I am dealing is different on its facts from *Stafford v. Minister of Health* (3). It more nearly resembles *Miller v. Minister of Health* (4). In his judgment in that case, HENN COLLINS J., said ([1946] K.B., 626, at pp. 628, 629):

That does not mean, as the authorities have shown, that he is not to use any knowledge which has come to him, so to speak, extra-judicially, but all the material which has been formulated for his judicial consideration must be available ... to ... both sides.

It is sufficient if I deal with the present case on its own facts. For the reasons I have indicated, I am satisfied that there has been no sort of prejudice to the objectors owing to the fact that they did not have these two letters before them. Apart from that, I am of the opinion that it was not necessary to have laid before the objectors copies of those two letters. On the facts of this case, I am persuaded that there has not been anything which is outside the powers of the Minister under the Act, and that there has not been anything which violates the principle of natural justice. In my opinion, this application fails.

Application dismissed with costs.

Solicitors: *Preston, Lane-Clayton & O'Kelly*, agents for *Pye-Smith and Pepler*, Bath (for the applicants); *Solicitor, Ministry of Health* (for the Minister of Health).

[Reported by B. ASHKENAZI, Esq., Barrister-at-Law.]

Re CATALINAS WAREHOUSES AND MOLE CO., LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), December 9, 1946.]

Companies—Winding-up—Distribution of surplus assets—Profits—Rights of shareholders—Right to dividend in respect of period before winding-up—Necessity for declaration of dividends—Construction of articles.

The capital of a company was divided into preference shares and ordinary shares and the articles of association provided that preference shareholders were to be entitled to a preferential dividend out of the profits of each year of 4 per cent. on the amount paid up on their shares. Out of the surplus profits the ordinary shareholders were to be paid a dividend of 4 per cent. on the amount paid up on their shares and "the balance of the profits. . . available for dividends" was to be applied in paying a dividend to both classes of shareholders treated as one class. The directors were to have power, with the sanction of the company in general meeting and subject to any preferential rights then existing, to declare dividends, and, before recommending any dividend, they could set aside any sum they thought proper as a reserve fund. Preferential dividends were paid for the year ending Dec. 31, 1944, but no ordinary dividends had been paid after the year ending Dec. 31, 1929. During 1945 the company made profits which would have been sufficient to pay the preferential dividends for that year and a dividend on the ordinary shares, but no dividend for that year had been declared or recommended. On Feb. 28, 1946, the company went into voluntary liquidation. A large sum of money was realised by the liquidators and the question arose whether the profits for 1945 ought to be applied in the winding-up in payment of dividends in accordance with the articles of association. It was contended by the preference shareholders that the articles gave them a right to dividend which was not affected by the fact that there had been no declaration of dividend:—

Held: on the true construction of the company's articles, the right to payment of a dividend arose only after a dividend had been declared,

and, therefore, as no dividend for 1945 had been declared or recommended and the company had gone into liquidation, the shareholders had no right to dividend out of the profits for that year.

Re W. Foster & Son, Ltd. (2) *approved and followed.*

[AS TO THE DISTRIBUTION OF SURPLUS ASSETS OF A COMPANY, see HALSBURY, Hailsham Edn., Vol. 5, pp. 702, 703, para. 1172; and FOR CASES, see DIGEST, Vol. 10, pp. 1002—1008, Nos. 6961—6991.]

Cases referred to :

- (1) *Re Bridgewater Navigation Co.*, [1891] 2 Ch. 317; 60 L.J.Ch. 415; 64 L.T. 576; 10 Digest 1005, 6977.
- (2) *Re W. Foster & Son, Ltd.*, [1942] 1 All E.R. 314; 111 L.J.Ch. 221; 167 L.T. 121; Digest Supp.
- (3) *Re Crichton's Oil Co.*, [1902] 2 Ch. 86; 71 L.J.Ch. 531; 86 L.T. 787; 10 Digest 1006, 6980.
- (4) *Bond v. Barrow Haematite Steel Co.*, [1902] 1 Ch. 353; 71 L.J. Ch. 246; 86 L.T. 10; 9 Digest 587, 3934.

ADJOURNED SUMMONS by the joint liquidators of a company which was wound up on Feb. 28, 1946, to determine questions arising as to the distribution of surplus assets on the voluntary liquidation of the company. Although the profits of the company would have been sufficient to pay a dividend on the preference shares for 1945 and leave over some surplus for dividend on the ordinary shares, no dividends had been declared or recommended. The preference shareholders contended that the articles of association, on their true construction, gave them a title to the profits of each year, without the necessity for a declaration of dividend. The facts and the relevant articles appear in the judgment.

Montagu L. Gedge for the liquidators.

Charles R. Russell for a preference shareholder.

J. G. Strangman for an ordinary shareholder.

WYNN-PARRY, J. : This summons raises certain questions in the liquidation of Catalinas Warehouses and Mole Co., Ltd., which went into voluntary liquidation on Feb. 28, 1946. The applicants are the joint liquidators and to raise the first question there are joined a holder of preference shares and a holder of ordinary shares.

The memorandum of association, by cl. 5, states the capital of the company, but does not attach any rights to any class of shares, and, therefore, it is necessary to turn to the articles of association. By them the capital is divided into preference shares and ordinary shares, and by art. 24 it is provided :

The holders of the preference shares shall be entitled to receive out of the profits of each year a preferential dividend for such year at the rate of 4 per cent. on the amount for the time being paid up on the preference shares held by them respectively; and if the company shall be wound up, the surplus assets shall be applied in the first place in repaying to the holders of preference shares the amount paid up or credited as paid up thereon.

Article 25 provides :

The surplus profits in each year shall be applied in or towards payment of a dividend at the rate of 4 per cent. for such year on the amount paid up or credited as paid up on the ordinary shares, and the balance (if any) of the profits of the company for such year available for dividend shall be applied in payment of a dividend rateably upon the amount paid up or credited as paid up on the said preference and ordinary shares alike, treated as one class.

By arts. 80—83 :

80. The directors may, with the sanction of the company in general meeting, and subject to any preferential rights for the time being existing, declare a dividend to be paid to the members in proportion to the amounts credited as paid upon their shares. 81. The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserve fund to meet contingencies, or for equalising dividends or for repairing or maintaining the property of the company, or any part thereof, or for any other purposes of the company; and may from time to time apply the whole or any part of such fund for any purposes of the company. 82. No dividend shall be payable except out of the profits of the company which may include subsidies or guaranteed interest received by the company. 83. When, in the opinion of the directors, the profits of the company permit, interim dividends may be declared and paid by the board, on account of the dividend for the then current year.

There is in the hands of the liquidators a large sum in excess of a million pounds which has been realised in the liquidation and they expect a further substantial sum, £500,000, to come into their hands. It is because of the presence of these funds that the question which I have to deal with becomes material. The preferential dividend at the rate of 4 per cent. was paid on the preference shares for the year ending Dec. 31, 1944, having been declared on Aug. 23, 1945. No dividend has been paid on the ordinary shares since May 28, 1930, in respect of the year ending Dec. 31, 1929. In the year ending Dec. 31, 1945, the company made profits which would have been available for distribution by way of dividend, but the actual amount has not yet been ascertained. I am told that, from figures which have been received by the liquidators, it appears that such profits would have been sufficient to pay a dividend on the preference shares for the year and leave over some surplus available for dividend on the ordinary shares, but no dividend has been recommended by the board in respect of that year. During the two months ended Feb. 28, 1946, which was the date of liquidation, the company made further profits which would have been available for distribution by way of dividend and would have provided the preferential dividend for that period and left a surplus available for dividends on the ordinary shares. No interim dividend was, however, declared, and no dividend has been recommended by the board in respect of that period.

Certain of the preference and ordinary shareholders have claimed that the profits of the company for the year ending Dec. 31, 1945, and for the two months ending Feb. 28, 1946, ought to be applied in the winding-up in payment of dividends in accordance with arts. 24 and 25 of the articles of association. That at once raises a question of what is the true construction of these articles. In my view, the correct course in a case such as this is for the court to construe the articles as in the case of any other document on which a question of construction is raised, and then to consider the articles so construed in the light of any relevant authority. It is, of course, an elementary canon of construction that the articles must be read as a whole.

It was contended on behalf of the preference shareholders that, on its true construction, art. 24 contains language which amounts to constituting a title in the owners of the preference shares to the profits of each year, and that the result is that, before these profits can belong to them, it is not essential that there should be any declaration of dividend, at any rate so far as regards the claim made after the liquidation of the company and in respect of the period between the last declaration of dividend and the winding-up. For that proposition reliance was placed on *Re Bridgwater Navigation Co.* (1), where the language was somewhat stronger, the article in question stating that the profits should belong to the shareholders. In my view, this article is not as strong in its language as the article in the *Bridgwater* case (1). The true scheme of this set of articles is that the decision whether in any year a dividend shall be declared and paid rests primarily with the company in general meeting. If, and only if, the necessary resolution is passed under art. 80, does the right to payment of a dividend arise, but in exercising its rights under art. 80 the company must give effect to the provisions of arts. 24 and 25 as regards the apportionment of money decided to be distributed to the respective classes of shareholders. Therefore, in my view, the right of the holders of the preference shares under art. 24 is not an absolute right, but, on the true construction of the articles taken as a whole, depends on the necessary declaration of dividend. That this construction is the correct one is, I think, emphasised by reference to art. 25, where it is provided that "the balance (if any) of the profits of the company for such year available for dividend shall be applied" as therein directed. As was pointed out by counsel for the ordinary shareholders, the fund which is being dealt with in these two articles is the same, the profits of each year. Although the phrase "available for dividend" only appears in art. 25, it must still mean the same fund and, really, the fund which is being dealt with is the profits which are available for dividend.

Construing the articles in this way, I come to the conclusion that the case is completely covered by the previous decision of BENNETT, J., in *Re W. Foster & Son, Ltd.* (2). In that case the articles, to which I need not refer in detail, are admittedly in all substantial respects indistinguishable in their provisions from the articles which I have to consider. In his judgment, BENNETT, J., said ([1942] 1 All E.R. 314, at pp. 315, 316, :

The real question, in my opinion, is whether, as a matter of principle, the court can, in dealing with surplus assets after the company has gone into liquidation, regard any part of the surplus assets as being profits and so available for distribution amongst the shareholders in accordance with their rights under the company's articles of association, or whether, once the company has gone into liquidation, everything that the company has, after it has satisfied its debts, is to be regarded as surplus assets and to be distributed amongst the members without regard to the particular provisions in the articles dealing with the payment of dividends which, *prima facie*, apply only while the company is a going concern. Counsel for the ordinary shareholders, relying upon a decision of the Court of Appeal in *Re Crichton's Oil Co.* (3) has argued that once the company has passed a resolution for liquidation, the provisions in the articles with regard to the declaration of dividends come to an end, and that after the debts have been paid, all that the company has is to be regarded as surplus assets and disposed of in accordance with the provisions of the articles of association dealing with surplus assets. When one examines the grounds of the decision in *Re Crichton's Oil Co.* (3), that is the principle upon which that decision is based. *Prima facie*, when a winding up has commenced, a dividend is no longer payable. *Prima facie*, a dividend is a payment made to the shareholders whilst the company is a going concern, and when, as is the case with this company, there is a provision in the articles of association which enables the directors to declare a dividend, and which gives the shareholders no right to a dividend unless the directors declare it, the shareholders have no right as against the company to be paid a dividend. That was the view expressed by FARWELL, J., in *Bond v. Barrow Haematite Steel Co.* (4). ([1902] 1 Ch. 353, at p. 362), where he says that the necessity for the declaration of a dividend is a condition precedent to an action to recover. When the decision of the Court of Appeal in the *Crichton Oil Co.* case (3) is carefully considered, *prima facie* where a dividend is being declared either by the directors with the sanction of the company, or by the company itself in general meeting, a shareholder's right to a dividend comes to an end as soon as the company ceases to be a going concern, and as soon as the liquidation of the company begins.

It was urged by counsel for the preference shareholders that BENNETT, J., had misinterpreted the reasoning of the court in *Re Crichton's Oil Co.* (3). I am unable to agree with that submission. In my view, with all respect, BENNETT, J., correctly interpreted the decision in *Re Crichton's Oil Co.* (3), and, in my judgment, it follows that this question, which is primarily one of construction, is completely covered by that decision. I, therefore, propose to declare accordingly, so a declaration will be made that the preference shares and the ordinary shares have no right to dividend in respect of any period before the commencement of the winding up.

Declaration accordingly.

Solicitors: *Bischoff & Co.* (for all parties).

[Reported by B. ASHKENAZI, ESQ., Barrister-at-Law.]

HILL AND ANOTHER v. HILL

[COURT OF APPEAL (Morton, Somervell and Cohen, L.JJ.), December 5, 1946.]

Landlord and Tenant—"Contract for sale or other disposition of land or interest in land"—Option to purchase—Option to take new lease—Memorandum of contract—Inclusion in new lease of option to purchase—Law of Property Act, 1925 (c. 20), s. 40.

By a lease dated Dec. 18, 1936, a landlord demised to a tenant premises for five years from Dec. 25, 1936, at a rent of £1 a week. By cl. 6 of the lease it was provided that if, on the death of the landlord at any time during the term, the tenant wished to purchase the premises and gave notice of his desire to the personal representatives of the landlord within three months after the latter's death, the personal representatives would convey the premises to the tenant on payment by him of £900. By cl. 7: "If the tenant shall be desirous of taking a new lease of the demised premises after the expiration of the term hereby granted . . . then the landlord will . . . grant to the tenant a new lease of the premises hereby demised for a further term of five years . . . at the same rent and with and subject to the same covenants and conditions as in this present lease

reserved and contained (this present covenant for renewal excepted) " In July, 1941, the tenant gave to the landlord a notice in the following terms: "Ref. the lease of shop premises . . . dated Dec. 25 (*sic*)., 1936. This is the six months' notice required to renew the said lease for a further five years from Dec. 25, 1941, to Dec. 25, 1946, as [per] the instructions on the present lease now held." The landlord accepted that notice and thereby agreed to grant, while the tenant agreed to take, a new lease. No new lease was executed in pursuance of that agreement. In the rent book for 1942 the tenant wrote the heading: "Renewed lease Dec. 25, 1941," and throughout the year the landlord initialled the book against the weekly payments of rent by the tenant. In January, 1943, the landlord died. On Feb. 9 the tenant gave notice purporting to exercise the option to purchase contained in cl. 6 of the lease.

HELD: (i) assuming the agreement came to between the landlord and the tenant in July, 1941, to be a "contract for the sale or other disposition of land or any interest in land" within s. 40 of the Law of Property Act, 1925, (observations of *ASTBURY, J.*, in *Morrell v. Studd and Millington* ([1913] 2 Ch. 648, at p. 659) questioned), the initials inserted in the rent book during 1942, which referred to and authenticated the words: "Renewed lease Dec. 25, 1941", constituted a memorandum or note of the contract, signed by the party to be charged.

(ii) the option to purchase the premises contained in cl. 6 of the original lease formed one of the terms of the new lease granted to the tenant in July, 1941.

Sherwood v. Tucker (3) distinguished. *Batchelor v. Murphy* (4) applied.

Cases referred to:

- (1) *Morrell v. Studd and Millington*, [1913] 2 Ch. 648; 83 L.J.Ch. 114; 109 L.T. 628; 12 Digest 72, 418.
- (2) *Goss v. Nugent (Lord)* (1833), 5 B. & Ad. 58; 2 Nev. & M.K.B. 28; 2 L.J.K.B. 127; 110 E.R. 713; 12 Digest 354, 2941.
- (3) *Long v. Millar* (1879), 4 C.P.D. 450; 48 L.J.Q.B. 596; 41 L.T. 306; 43 J.P. 797; 12 Digest 141, 956.
- (4) *Stokes v. Whicher*, [1920] 1 Ch. 411; 89 L.J.Ch. 198; 123 L.T. 23; 12 Digest 143, 967.
- (5) *Sherwood v. Tucker*, [1924] 2 Ch. 440; 94 L.J. Ch. 66; 132 L.T. 86; 30 Digest 473, 1361.
- (6) *Batchelor v. Murphy*, [1925] Ch. 220; *affd.*, [1926] A.C. 63; 95 L.J.Ch. 89; 134 L.T. 161; 30 Digest 498, 1567.

APPEAL by defendant and cross-appeal by plaintiffs from a decision of **VAISEY, J.** The facts appear in the judgment of **MORTON, L.J.**

Christie, K.C., and **H. A. Rose** for defendant.

Montgomery White, K.C., and **E. M. Winterbotham** for plaintiffs.

MORTON, L.J.: The plaintiffs in this case are the legal personal representatives of James Frederick Hill, who died on Jan. 3, 1943, and was the father of the defendant. The first question which arises on this appeal and cross-appeal is: Did the father and the son enter into an effective and enforceable agreement that the son should have a new lease of a house called No. 9, Nimmings Road, which he held as tenant of his father, on the expiry, on Dec. 25, 1941, of a lease granted by the father to the son on Dec. 18, 1936? That first question can be divided into three sub-headings: (a) What was the contract between the father and the son?; (b) was it a contract which fell within s. 40 of the Law of Property Act, 1925?; and, (c) if so, is there a memorandum in writing of that contract signed by the party to be charged within the meaning of that section. The second question, which is quite separate, is: Assuming that the son succeeds on the issues which I have mentioned, did an option to purchase the house which was contained in the original lease form one of the terms of the new lease to be granted to the son? **VAISEY, J.**, decided, in favour of the defendant, that there was an agreement to grant such a new lease as I have described. He also decided that that agreement was not of such a character as to come within s. 40 of the Law of Property Act, so that no memorandum in writing was required. He, therefore, decided the first main question in favour of the son, and held that the son was entitled to have a new lease which would

begin as from Dec. 25, 1941. The learned judge, however, decided the second point against the son, and took the view that the option to purchase contained in the original lease would not be reproduced in the new lease. The result was that his decision in favour of the son on the first question was of little use to the son, because the really vital thing from the son's point of view was that he should have an option to purchase the house. In these circumstances, the son appeals, and there is a cross-appeal by the plaintiffs (the executors) who seek to say that any agreement that was made between the father and the son did require a memorandum in writing under s. 40 of the 1925 Act and that there is no such memorandum in existence. A

In 1936 the father and the son were living on the outskirts of Birmingham. The son lived at No. 9, Nimmings Road, and was carrying on a business there as well. The father was living next-door to him. On Dec. 18, 1936, the original lease was executed. It was made between the father, "hereinafter called 'the landlord' which expression shall where the context so admits include the persons deriving title under him", of the one part, and the son, "hereinafter called 'the tenant' which expression shall where the context so admits include the persons deriving title under him", of the other part. There was a demise by the father to the son of "all that shop and dwelling-house, known as No. 9, Nimmings Road and now in the occupation of the tenant." The *habendum* was : B

To hold the same unto the tenant from Dec. 25, 1936, for the term of five years paying therefor yearly during the said term the rent of £52 by equal weekly payments of £1 payable every Monday the first of such payments (being a proportionate part of such rent) to be made on Jan. 4, 1937. C

The material clauses are cl. 6 and 7. Clause 6 reads :

(a) If on the death of the landlord at any time during the term hereby granted the tenant shall be desirous of purchasing the fee simple of the demised premises and of such his desire shall within three calendar months after the death of the landlord deliver to the personal representatives of the landlord or leave for them or send by registered post to them at the last known place of abode of the landlord in England or Wales notice in writing then the personal representatives of the landlord will upon the expiration of such notice and upon payment of the sum of £900 with interest thereon at the rate of £5 per centum per annum from the expiration of the notice until the actual completion of the purchase and of all rent hereby reserved up to such expiration convey the demised premises to the tenant or as he shall direct for an estate in fee simple in possession [subject to certain covenants and restrictions] . . . (b) The landlord's title to the property having been already investigated by the tenant up to the date of this lease shall be deemed to be accepted by him up to such date and he shall only be entitled to investigate the subsequent title thereto an abstract whereof shall (if required) be delivered to him within three months after the service of the said notice. (c) The purchaser shall make all requisitions in respect of the title within seven days after the delivery of the abstract . . . (d) The sale shall be made in all other respects subject to the conditions of sale of the Birmingham Law Society in force at the date of this lease. D

By cl. 7 :

If the tenant shall be desirous of taking a new lease of the demised premises after the expiration of the term hereby granted and of such his desire shall deliver to the landlord or leave for him or send by registered post to him at his last known place of abode in England or Wales notice in writing not less than six months before the expiration of the said term then the landlord will at or before the expiration of the term hereby granted if there shall then be no subsisting breach of any of the tenant's obligations under this present lease at the cost of the tenant grant to the tenant a new lease of the premises hereby demised for a further term of five years to commence from and after the expiration of the term hereby granted at the same rent and with and subject to the same covenants and conditions as in this present lease reserved and contained (this present covenant for renewal excepted). E

I shall have to return to that clause later, but I observe at the moment, first, that what is contemplated is that in the event mentioned the tenant shall have a new lease and not merely a continuation of his present tenancy. Secondly, the reference to the "term" is to the term granted by the lease of Dec. 18, 1936, and when the clause refers to "this present lease," I think there is no doubt that the draftsman is referring to the document of Dec. 18, 1936, and not to the term granted thereby. Finally, and this is to my mind a very important G

point, it is to be noted that there is an express exception of cl. 7 of the lease. Apart from that express exception, the new lease is to be "at the same rent and with and subject to the same covenants and conditions as in this present lease"—that is, the document of Dec. 18, 1936—"reserved and contained."

That lease having been executed, the defendant continued to live at No. 9, Nimmings Road, until the lease expired. He paid his rent regularly, and the rent was entered in rent books which have been made an exhibit in the case. I might, perhaps, refer briefly to the rent books for 1937 onwards. The 1937 rent book contains the names of the father and the son on the outside, which were, according to the evidence, written by the son. Inside in the son's writing there is: "Underlease dated Dec. 18, 1936." The name of the tenant is "F. Hill." The rent is entered as 20s. per week, and on the right-hand side of the centre page there is week by week entered the sum of 20s., and the initials, "F.H." According to the evidence, these initials are the initials of the father, and he wrote them in week by week on receiving the rent, although in fact the father's full initials were J.F.H. Substantially similar entries appear in the rent books for 1938, 1939, 1940 and 1941. In the 1938 rent book the written heading is: "Lease Dec. 18, 1936"; in 1939: "Under lease 18/12/36"; in 1940: "Lease dated Dec. 18, 1936"; and in 1941, by an obvious clerical error: "Lease dated Dec. 12, 1936."

When the lease was drawing near to its end there occurred certain events, and I think the best course is to read the judge's findings of fact as to what happened. He said:

The son went into occupation of the property and there remained, and, when June 25, 1941, came, which was six calendar months before the expiration of the original term, he had not served any notice to extend the tenancy. There is no doubt that, as this document was dated after the coming into operation of the Law of Property Act, 1925, "month" means calendar month, so that, when the lease talks about "six months", it means six calendar months and not six lunar months. June 25 having elapsed, I find as a fact on the evidence that on Sunday, July 6, the father, who lived next door to the defendant, but who was, apparently, not on particularly good terms with him, sent a message to the defendant and asked him to come in and see him. The defendant went in and saw his father and there was some conversation which, perhaps not surprisingly after five years, was not very clearly described to me, in the course of which the father said: "What about your lease. I wish you would let me know what you want, because I would like you to renew it." Thereupon the defendant said: "Oh, all right; I will see to it tomorrow." The father said: "There is no time like the present." The defendant then went back to his own house next door and he wrote out a document on a sort of tear-off memorandum book, so that a carbon copy of it was preserved. Taking this document, there is, first of all, the printed heading of the defendant's notepaper, he being a newsagent, stationer, tobaccoist and fancy goods dealer. It then says: "Mr. James Frederick Hill", that is, the father, to whom it was addressed. "July 7, 1941. Ref."—that is short for "reference," or "referring to"—"the lease of shop premises, No. 9, Nimmings Road, Blackheath, dated Dec. 25, 1936. This is the six months' notice required to renew the said lease for a further five years from Dec. 25, 1941, to the Dec. 25, 1946, as the instructions on the present lease now held. (Signed) F. Hill"—that is, the defendant—"July 7, 1941."

I pause there to say that I think the words, "as the instructions on the present lease now held," must be intended to mean, "as per the instructions," and refer, as I think, to the latter part of cl. 7 of the original lease. VAISEY, J., went on:

The defendant, whose knowledge of the law on such matters seems to have been about as shadowy as that of most people in this country, had one idea firmly fixed in his mind that, if he dated this document on Sunday, it would have no operation, so that he dated it the 7th, which was the Monday following. The son, having brought the original memorandum to his father and retaining in his house a carbon copy, first read it out and then handed it to his father, and then, after some more casual conversation, he and his brother, who was present and who was called as a witness in the trial, went back. No one else was there, except the defendant and his brother and the father.

To that account of the matter I would add two further points: (1) that the renewal notice was found in the father's pocket when he died on Jan. 3, 1943; and (2) certain matters which are dealt with in the evidence. The defendant in his examination-in-chief, after giving an account of the interview on July 6, which is substantially that accepted by the judge, adds this: "It was made out on the Sunday and he"—that is the father—"accepted it, thanked me for it, and put it away, and I left it quite cheerfully." Then the judge asked where it

was made out, and he was told. Then he asked: "You took it back to your father. What did he say about it or what did he do?", and the answer was: "When I took it back to him I read it out to him, and he folded it up and put it away in his pocket." Again, the brother, Alfred, who was present, said: "He then read the notice out to my dad, and he handed it to him. My father read it, and then passed the remark: 'Well, that is quite satisfactory now. I am quite satisfied. That will be all right now.'"

In my view, the effect of that conversation, coupled with the terms of the notice, which has already been read, is that the father agreed to grant and the son agreed to take a new lease, "as per the instructions on the present lease now held." The instructions, as I understand the word, are that the new lease shall be, quoting cl. 7 of the original lease, "for a further term of five years . . . at the same rent and with and subject to the same covenants and conditions as in this present lease reserved and contained (this present covenant for renewal excepted)." I think that the father and son must both have realised that the date for giving notice under cl. 7 had passed, because the notice itself is dated July 7 and refers to a six months' notice, and also refers to the date Dec. 25, 1941. In the evidence it was stated that the father seemed worried because the renewal notice had not been given, but I do not suppose either of them cared in the least whether the time had expired or not. I think that what I have just stated was also the judge's view of the matter.

The judge also said in his judgment:

I do not know—it may be a very difficult and a very subtle point—but it seems to me as a matter of common sense that, if the arrangement between the father and the son was that the son could at any time before June 25, 1941, serve a valid notice on the father and thereupon become entitled to a further lease, it is almost ridiculous that the father and the son could not be competent to come together and to say: "Take the notice; never mind whether it is a day or two late; I ask for it; you give it and I accept it" . . . It seems to me, I must confess, idle to say that the father and the son, the testator and the defendant, were not to be competent, whether you call it waiver, whether you call it revision, whether you call it concession, or whatever you like to call it, to say: "This notice is a day or two out of date, I know; but you give it. I will accept it and we will not trouble any more about it" . . . I think that there was an agreement binding on the plaintiffs to grant the reversionary lease, in other words, that the defendant has the right to be tenant under a new lease following the terms of the old lease, from Dec. 25, 1941, to Dec. 25, 1946.

No new lease was ever executed in pursuance of that agreement, but owing to equitable principles that does not affect the son's position if the agreement was made. A very important event, however, occurred in 1942. In January, 1942, the father and son embarked on a new rent book, which was again the same form of rent book, "Chirm's Tenant's Rent Book, 1942." As before, the son wrote on the outside his own name and address as tenant, and his father's name and address as landlord, but the ink heading written in by the son this year was: "Renewed lease Dec. 25, 1941," and the father throughout that year, with the exception of one week when someone else initialled the rent payment, continued to put his initials on that document. There is evidence, too, on the question whether the words, "Renewed lease Dec. 25, 1941," were on the document at the time when the father was putting his initials week by week. The son gave evidence, and I think the judge accepted it, as follows. Referring to the beginning of 1942, he says: "I took him rent in as usual on Monday morning, and we were talking and he definitely called my attention to the fact that this was when the new lease began to operate, and would I mark it under the new lease." Then counsel for the defendant asked: "These initials, 'F.H.'—were they put in there after you had written the various things on the outside and in the body of the book?" (A.): "Yes."

The father having died at the beginning of 1943, the defendant continued in occupation paying the rent. The will was proved by the two plaintiffs on Jan. 29, 1943. On Feb. 9, 1943, the defendant gave notice exercising the option to purchase contained in cl. 6 of the lease, and it is common ground that, if the defendant was entitled to that option to purchase, it was a valid notice. On Mar. 29, 1943, the defendant registered an estate contract with His Majesty's Land Registry.

I refer very briefly to the pleadings to show the shape which the action took. By their statement of claim the plaintiffs claimed that there was no agreement

binding on them as executors of the father to sell the premises in question to the defendant, and that the registration of the estate contract should be vacated. The son, in his defence, set up the agreement which I have mentioned, and counterclaimed for a declaration that the plaintiffs, as executors of the father, were bound to grant the defendant a new lease containing a like option to purchase the fee simple as that contained in cl. 6 of the lease of 1936. In their reply and defence to counterclaim, the plaintiffs took the point that there was no memorandum in writing and that they would rely on s. 40 of the Law of Property Act, 1925. I have already stated the view which the learned judge took on the questions which arose, and I shall now consider each of these questions in turn.

The first question is : What was the contract between the father and the son ? I have already stated what the contract was, in my view, and I shall not repeat it. Secondly : Was that contract one which fell within s. 40 of the Law of Property Act, 1925 ? That section is in the following terms :

No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised.

It was contended on behalf of the plaintiffs that this contract was a new contract entered into after the option to take up a new lease had expired, and that it was, therefore, "a contract for the disposition of land or an interest in land." VAISEY, J., thought that the contract did not come within s. 40, and before counsel for the plaintiffs started his admirable argument I was inclined to think that the judge was right in this. I now incline strongly to the view that the agreement does come within s. 40, and that the observations of ASTBURY, J., in *Morrell v. Studd and Millington* (1) ([1913] 2 Ch. 648, at p. 659), may at some time require further consideration, although the actual decision in the case may well be correct on the first ground stated by ASTBURY, J., I refer in particular to the following sentence (at p. 659) :

Now s. 4 of the Statute of Frauds only requires a note or memorandum of the agreement referred to in the section, which agreement does not come into existence until the offer and acceptance are complete, and therefore an agreement to extend the time for acceptance, or an agreement that an acceptance, which by reason of its date need not be treated as an acceptance, shall be so treated so as to create a contract, is not an agreement which the statute requires to be evidenced in writing, if the note or memorandum contained in the signed offer is otherwise sufficient.

As at present advised, I have some difficulty in reconciling the words beginning, "and therefore," with the subsequent comment by the learned judge on the same page on *Goss v. Nugent* (Lord) (2) and other similar cases. He says :

They merely decide that when a contract falling within the Statute of Frauds is once made, no conduct or verbal waiver can be relied upon to substitute a different term from one appearing in the contract itself.

However, it is not necessary to express a concluded view on the question, and indeed it would not be right to do so, as we have not heard counsel for the defendant in reply on that point. As we were all of opinion that there is in this case a memorandum sufficient to satisfy s. 40, we were prepared to assume in favour of the plaintiffs that such a memorandum is necessary, but counsel for the defendant might have satisfied us that no memorandum was necessary, and that the observations of ASTBURY, J., which I have quoted can be supported.

The third question is : Assuming that a memorandum is necessary—and we are making that assumption—is such a memorandum produced ? It is, of course, well-established that the signature required by the section may consist only of the initials of the party to be charged. It does not signify in what part of the instrument the signature is to be found, if it is inserted in such a manner as would have the effect of authenticating the relevant parts of the instrument. In the present case, in my view, the initials inserted by the father week by week in the rent book of 1942 do refer to and authenticate the words : "Renewed lease Dec. 25, 1941," as well as acknowledging the receipt of the rent.

What is the meaning of the words : "Renewed lease December 25, 1941 ?" I think the effect is that this document, initialled by the father, recognises that his son is the tenant, paying 20s. a week, or £52 a year, under a document

or documents described as "renewed lease." I say, a document or documents," because, if there is a lease which has been renewed, it would ordinarily happen that the renewal was done by some document such as a notice. As to the date, December 25, 1941, that, I think, would *prima facie* appear to be the date of the "renewed lease," but it might be the commencing date of the new tenancy. As there is here a reference to a document or documents, that document or those documents can be identified by parol evidence. That is established by the decision of this court in *Long v. Millar* (3), where BAGGALLAY, L.J., said (4 C.P.D. 450, at p. 455):

The true principle is that there must exist a writing to which the document signed by the party to be charged can refer, but that this writing may be identified by verbal evidence.

THESIGER, L.J., said (*ibid.*, at p. 456):

When it is proposed to prove the existence of a contract by several documents, it must appear upon the face of the instrument signed by the party to be charged that reference is made to another document; and this omission cannot be supplied by verbal evidence. If, however, it appears from the instrument itself that another document is referred to, that document may be identified by verbal evidence.

A recent illustration of the application of that principle is to be found in *Stokes v. Whicher* (4).

To my mind, the document referred to by the words, "Renewed lease," is identified by the evidence as being the notice of July 7, 1941, plus the lease of December 18, 1936, which is referred to expressly in that document. The two documents are linked together by the reference in the notice to the lease of 1936. Looking at the three documents—the rent book, the notice and the lease of 1936—the whole of the terms of the contract plainly appear. There is, as I have said, the signature by the father in the form of initials, and the date, "December 25, 1941," is explained, when one looks at the documents referred to, as being the date of the commencement of the tenancy which is recognised by the father in the rent book. The description, "Renewed lease December 25, 1941," is a loose one, but it fits nothing else than those two linked documents, which together constitute, in rather loose parlance, a renewed lease, being a lease with its renewal notice. Notwithstanding the very ingenious arguments addressed to us by counsel for the plaintiff on this branch of the case, I do not think that there is, as they suggest, a gap as to the terms of the contract which has to be supplied by verbal evidence.

For these reasons, in my view, the son is a tenant under the new lease which has not been executed, but which he is entitled to have executed. The result is that on this part of the case I agree with the decision of the judge, though I have arrived at the same conclusion by a somewhat different route.

I must now deal with the counterclaim, which was dismissed by VAISEY, J., and consider whether the new lease, to which the son is entitled, should contain a reproduction of cl. 6 of the 1936 lease, conferring the option to purchase. The issue may be stated thus: Does cl. 7, conferring the option to extend the lease, contemplate a mere extension or a new lease corresponding in its terms to the lease of 1936, with one exception? The judge obviously felt considerable doubt on the matter. After referring to *Sherwood v. Tucker* (5), and *Batchelor v. Murphy* (6), he pointed out that there had been a conflict of judicial opinion in those cases, and said:

I hold that the option to purchase was not one of those terms which would have been included in the new lease had it been granted in pursuance of the executory contract which I have already decided came into existence.

I have arrived at a different conclusion. Looking at cl. 7 apart from any authority, it starts with the words: "If the tenant shall be desirous of taking a new lease of the demised premises"—not "of extending the term," but, "of taking a new lease"—after "the expiration of the term hereby granted . . .," that is, the term granted by the 1936 lease. Then there is the reference to the six months' notice, and the clause proceeds: "will . . . grant to the tenant a new lease"—again the same phrase—"of the premises hereby demised." Then the term is stated, and it concludes: "at the same rent and with and subject to the same covenants and conditions as in this present lease reserved and contained (this present covenant for renewal excepted)." I attach

great importance to two features of that clause—(1) the words, “a new lease,” and, (2) the exception contained at the end of it. Clauses 6 and 7 are alike in that they are not part of the ordinary terms of a tenancy. They give a collateral advantage to the tenant, and it seems to me clear that cl. 6 is intended to be included in the new lease when cl. 7, but not cl. 6, is expressly excepted.

I shall refer briefly to the two cases cited by the learned judge in his judgment. *Sherwood v. Tucker* (3) was, in my view, a very different case from the present. What happened there was that by a tenancy agreement in writing dated October 29, 1914, and made between the defendant landlord, of the one part, and the plaintiff tenant, of the other part, the landlord agreed to let and the tenant to take a certain house and premises for a term of three years from December 25, 1914, at £36 per annum rent. The tenant agreed to pay the rent and keep the interior in repair, fair wear and tear excepted. The landlord agreed to keep the exterior in repair. It was further agreed that “the said tenant shall have the right to purchase the said house and premises during the three years hereby provided for, for the sum of £700 sterling.” On June 17, 1917, during the pendency of this tenancy agreement the parties added and signed the following endorsement: “We the undersigned hereby agree that this lease be extended for three years expiring December 25, 1920.” There was a further extension in December, 1920, the endorsement being: “We the undersigned hereby agree that this lease be extended for three years expiring December 25, 1923.” These endorsements were settled informally by the parties. *ASTBURY, J.*, held, on the construction of the documents, that the parties intended to extend the lease or tenancy agreement with all its provisions, collateral or otherwise, and that the option was extended accordingly. The Court of Appeal took a different view, and I think that view was based on reasons which I can quote from a short passage in the judgment of *SARGANT, L.J.*, who said ([1924] 2 Ch. 440, at p. 449):

Turning to this document, the phrase is “this lease be extended for three years.” What does that mean? Does it mean that the term is to be extended or that the contract is to be extended with all its incidents? I think the word “extension” is not really strictly applicable, properly used, with regard to the document. You cannot extend the document. You cannot extend the actual lease. It is a word properly applicable to the extension of the term of years granted by the lease, though I incline to think that a very slight alteration of the terms here might have produced a different result. If the parties had agreed that the house should be taken for a further term of three years upon all the terms upon which it was taken under this contract the result might very likely have been different.

To my mind, the present case is just the sort of case that *SARGANT, L.J.*, is contemplating when he uses these words. He proceeds:

But on the whole I cannot find in this document anything more than an extension, and an extension is *prima facie* applicable to the term granted, and does not necessarily involve the further grant of an option of purchase which is not itself one of the incidents of a tenancy strictly speaking.

Batchelor v. Murphy (6) was a case in which the relevant words were: “The said Alfred Henry Murphy and C. L. Murphy to execute a new lease for the unexpired term of eight years and six months from Oct. 6 last”—that was the unexpired term of an existing lease—“on the same terms and conditions in all respects as the lease of October 17, 1913, with the exception of the rent.” Then there was a proviso for reduction of the rent. *TOMLIN, J.*, held, on the construction of the memorandum, that it only provided for a new lease containing the same tenancy provisions as the original lease, and that, as an option to purchase in a lease was not a term of the tenancy but a collateral bargain between the parties, the defendants had not acquired an option to purchase the freehold. The Master of the Rolls agreed with the view of *TOMLIN, J.*, but the other two members of the court, *WARRINGTON* and *SARGANT, L.JJ.*, differed from *TOMLIN, J.*, and the appeal was allowed. In the course of his judgment, *SARGANT, L.J.*, referred to his own observations in *Sherwood v. Tucker* (3), which I have already read, and he then said, after quoting that passage ([1925] Ch. 220, at p. 233):

In my judgment that is really precisely what has taken place in the case which we are now deciding. The parties agree to take a new document the contents of which

can be ascertained and determined by reference to the existing document—namely, the lease of Oct. 17, 1913. In that view of the matter, it appears to me that we must come to the conclusion, or I have to come to the conclusion, that the option passes, because there can be no doubt that the portion of the existing document which created the option formed a part of the terms and conditions broadly speaking of the existing document.

The case went to the House of Lords, and the House affirmed the decision of the Court of Appeal without calling on counsel for the respondent. I need only refer to one short passage in the speech of LORD ATKINSON. He said, ([1926] A.C. 63, at p. 69):

In my opinion when the parties used the words that the new lease is to contain all the terms and conditions in all respects as the lease of Oct. 17, 1913, which, of course, means contained in the lease of Oct. 17, 1913, they could use no words that are more expressive to convey the idea that the new lease is to be a replica of the old lease save and except in the two points of duration of the time and rent.

I think that those words are directly applicable to the present case, and that the new lease is to be a replica of the old lease, except that cl. 7 is not to be included in it.

Counsel for the plaintiffs drew attention to certain difficulties which might arise if cl. 6 were incorporated in the new lease. He pointed out, quite accurately, that if the words: "if on the death of the landlord at any time during the term hereby granted," were incorporated in the new lease they would refer to the term of the new lease, and that the words could have no effect at all if the father had happened to die before the new lease came into effect. That is true, but the only result is that in that event the option would be valueless. He also drew attention to the fact that under (b) the landlord's title had not been examined by the tenant up to the date of the new lease, and, therefore, the words would not accurately fit the facts, and that under (d) it was difficult to apply the reference to: "the conditions of sale of the Birmingham Law Society in force at the date of this lease," to a lease which was granted some five years later. These points are certainly points which would have to be carefully considered by the draftsman in drafting the new lease, but I personally feel no doubt that, on the true construction of cl. 7 of the 1936 lease, the parties intended cl. 6 to be inserted in the new lease which the son chose to take, and they intended that the clause in the new lease should begin with the words: "If on the death of the landlord at any time during the term hereby granted . . ." How the draftsman would have resolved the minor difficulties to which counsel called attention, I need not pause to consider, but I think an observation made by WARRINGTON, L.J., in the course of the argument in *Batchelor v. Murphy* (4) applies very aptly to the present case. WARRINGTON, L.J. said, ([1925] Ch. 120, at p. 224):

If a solicitor had been instructed to prepare a new lease, would he have been justified in omitting the option?

In my view he would not. For these reasons, I think that the cross-appeal must be dismissed, and the appeal succeeds.

SOMERVELL, L.J.: I agree with the judgment which has been delivered and the reasons for the conclusions arrived at expressed in it by MORTON, L.J. On the question whether the agreement between father and son was within s. 40 of the Law of Property Act, 1925, and on the question of the counterclaim, that is to say, whether the option to purchase is to be treated as included in the lease, I do not desire to add anything to what has been already said. I wish, however, to add a few observations on the question of the note or memorandum, particularly in view of the fact that the learned judge, although he did not think a memorandum was necessary on the view which he took, expressed in the course of his judgment a view adverse to the conclusion to which we have come, namely, that the rent book can be regarded as a memorandum, not, of course, complete, but as a memorandum which may be made the basis of an answer to the defence under s. 40. Taking the words "Renewed lease" as they appear in 1942 with the father's initials, in my view, those words denote either a new lease or an agreement to grant a new lease, and I think they are capable of meaning either.

My Lord has already cited the principle as laid down by BAGGALLAY, L.J., in *Long v. Millar* (3), and I will not repeat it. The evidence shows that the son expressed his willingness to renew the lease and embodied that in the document of July 7, 1941. I think there are two ways in which this document can be looked at, but, treating it as a notice (albeit out of time) under the lease of December 18, 1936, the rent book signed by the father seems to me to show that he accepted it as a good notice as he clearly could and thereby became under a liability to grant a new lease. As the document of July 7, 1941—and there was no dispute about this—refers to the lease of 1936, and as that document sets out the terms on which the renewed lease was to be granted, the memorandum of agreement required by the section seems to me to be complete.

Another way in which it could be looked at occurred to me in the course of the argument, particularly in the light of the argument of counsel for the plaintiffs that once the date six months before the end of the first lease had been passed the whole machinery of notice under that document was dead. Under that document the son had a right to have the lease renewed if he gave the notice as provided for in it before the period stipulated expired. He had allowed that time to pass and counsel submitted that that machinery was, as it were, dead and nothing could revive it except something in writing signed by the parties and directed to the particular point of the extension of time. On that basis, I again start from my view that the rent book is evidence of an agreement between the parties for a new lease. That agreement must have resulted from an offer and acceptance. The evidence—and one is entitled on the authorities to have regard to this evidence—shows that the offer was made by the son at the request of the father and was embodied in the document of July 7, 1941. On this view the son is not exercising a right out of time under the original lease, but the agreement evidenced by the notice is to be treated as an offer by the son accepted by the father. On this view the form of the document of July 7 is admittedly misconceived in that the son is wrong in thinking that he could put forward a notice under the original lease, but I think on this view this document can and should be treated as an offer by the son to take a renewal of the lease which was accepted verbally by the father, the rent book of 1942 and the father's initials in it being a memorandum of the agreement which resulted from that offer and acceptance.

Those are the reasons which led me to the conclusion that there was here a sufficient memorandum and, as I say, I do not desire to go into the other points.

COHEN, L.J.: I agree with the conclusions reached by my brethren and the reasons on which they base those conclusions. I confess that my mind fluctuated during the course of the hearing, but I have come to the conclusion that the father was bound to renew the lease of the premises on the terms specified in cl. 7 of the lease of December 18, 1936; that, on the true construction of cl. 7, the renewed lease must include the option to purchase conferred by cl. 6; and that, if a memorandum in writing of the agreement to grant the new lease was necessary, that memorandum is to be found in the documents indicated by MORTON, L.J.

I only desire to add that on its natural construction the word "lease" in cl. 7 refers to a document and not merely to a relation of landlord and tenant, and that, in view of the words in brackets at the end of the clause, there is no justification for omitting cl. 6 from the renewed lease, notwithstanding that it is a collateral term and would not bind assignees of the reversion. I do not think we should be justified in departing from the natural meaning of the words used merely because the insertion of the clause in the new lease might not have helped the son if, for instance, the reversion had been assigned before the option to purchase was exercised.

I arrive at this conclusion without regard to the circumstances, but if and so far as it is permissible to look at them, they seem to me to support the conclusion we have reached. This was a lease by a father to his son of premises which, to the father's knowledge, were both the residence and place of business of the son. The father desired to give his son the certainty of being able, if the father died, to retain the premises, and it seems to me highly unlikely that he would have wished the son to have this opportunity if the father died during

the original term and not to have it if he died during the extended term.

Appeal allowed: cross-appeal dismissed.

Solicitors: *Dennison, Horne & Co.*, agents for *B. H. Bate & Son*, Birmingham (for defendant); *Stafford Clark & Co.*, for *G. Green*, Birmingham (for plaintiffs).

[*Reported by R. L. ZIAR, Esq., Barrister-at-Law.*]

Re ARNO, HEALEY v. ARNO.

[COURT OF APPEAL (Morton, Somervell and Cohen, L.JJ.), November 29, December 2, 3, 1946.]

Rentcharges and Annuities—Annuities given by will—To “be paid without deduction of income tax up to a maximum of 5s. in the £”—Reliefs and allowances—Whether annuitant accountable to trustees.

A testator directed that certain annuities should be paid by his trustees “without deduction of income tax up to a maximum of 5s. in the £” :—

HELD: (i) on a true construction of the will it was intended that the trustees should wholly indemnify each annuitant against the income tax, referable to the annuity, which he actually bore in each year in which the standard rate of income tax was 5s. in the £ or less, and if in any year the standard rate of income tax exceeded 5s. in the £ it was intended that the trustees should partly indemnify each annuitant against the income tax, referable to the annuity, which he actually bore.

(ii) as income tax at the standard rate was deducted in respect of the whole amount of the annuities when they were paid over, the proper proportion of any reliefs or allowances which the annuitants might recover from the Revenue had to be accounted for to the trustees on the principle laid down in *Re Pettit* (2).

Decision of ROXBURGH, J. [1946] 2 All E.R. 278, reversed.

Re Pettit (2) and *Re Williams* (6) applied. *Re Bates’ Will Trusts* (5) approved.

[AS TO TAX-FREE ANNUITIES, see HALSBURY, Hailsham Edn., Vol. 28, pp. 214—216, paras. 386—388; and FOR CASES, see DIGEST, Vol. 39, pp. 166—168, Nos. 572—593.]

Cases referred to:

- (1) *Re Williams, Midland Bank Executor & Trustee Co., Ltd. v. Williams*, [1945] 2 All E.R. 102; [1945] Ch. 320; 115 L.J.Ch. 101; 173 L.T. 132; Digest Supp.
- (2) *Re Pettit, Le Fevre v. Pettit*, [1922] 2 Ch. 765; 91 L.J.Ch. 732; 127 L.T. 491; 39 Digest 167, 587.
- (3) *Re Tatham, National Bank Ltd. & Mathews v. Mackenzie*, [1945] 1 All E.R. 29; [1945] Ch. 34; 114 L.J.Ch. 9; 172 L.T. 14; Digest Supp.
- (4) *Re MacLennan, Few v. Byrne*, [1939] 3 All E.R. 81; [1939] Ch. 750; 108 L.J.Ch. 364; 160 L.T. 612; Digest Supp.
- (5) *Re Bates’ Will Trusts, Jenks v. Bates*, [1945] 2 All E.R. 688; [1946] Ch. 83; 115 L.J.Ch. 142; 174 L.T. 305; Digest Supp.
- (6) *Re Williams, Williams v. Templeton*, [1936] 1 All E.R. 175; [1936] Ch. 509; 105 L.J.Ch. 362; 154 L.T. 640; Digest Supp.
- (7) *Re Jones, Jones v. Jones*, [1933] Ch. 842; 102 L.J.Ch. 303; 149 L.T. 417; Digest Supp.
- (8) *Re Reckitt, Reckitt v. Reckitt*, [1932] 2 Ch. 144; 101 L.J.Ch. 333; 147 L.T. 275; Digest Supp.

APPEAL from a decision of ROXBURGH, J. reported [1946] 2 All E.R. 278. ROXBURGH, J., held that the form of direction in the will postulated freedom from income tax up to 5s. in the £ as a constant factor for the purpose of ascertaining the amount of the annual payment and made the decision in *Re Pettit* (2) inapplicable. Each of the annuitants, therefore, was entitled to retain the benefit of any income tax reliefs or allowances to which he might be entitled. The residuary devisees and legatees under the will now appealed.

Cyril King, K.C., and *L. M. Jopling* for the residuary devisees and legatees. *J. Neville Gray, K.C.* and *Wilfrid Hunt* for the annuitants.

W. G. H. Cook for the trustees.

MORTON, L.J. : Thomas Arno made his will on Mar. 31, 1937. By cl. 1 the testator appointed the Worshipful Company of Haberdashers, his wife Beatrice, Frank Gray Healey, and Frank Kirby Coppard to be the executors and trustees of his will. The Worshipful Company of Haberdashers was thereafter called "the company." By cl. 9 :

(A) I give to my trustees free of duty on my death and on the death of any person interested for life therein the following four annuities namely—one of £1,600 and three of £500 each to be increased to £1,200 each as from the expiration of three years from my death . . . (B) The £1,600 annuity shall be held on protective trusts for the benefit of my wife during her life and after her death one equal moiety thereof shall be appropriated to each of my grandsons Thomas Arno and Samuel Arno whether or not surviving me. (C) One of the £500 (rising to £1,200) annuities shall be appropriated to each of my three grandchildren Thomas Arno, Samuel Arno and Mary Bertha Arno whether or not surviving me. (D) Each annuity and part of share of an annuity in this clause directed to be appropriated to any one of my grandchildren shall be held on such of the trusts next hereinafter declared as shall at my death be capable of taking effect in reference thereto (that is to say) :—(1) On protective trusts for the benefit of such grandchild during his or her life . . . (E) All the said annuities shall be primarily charged on my said real estate at Stoke Newington, Leyton and Eastbourne . . . and shall be paid without deduction of income tax up to a maximum of five shillings in the pound.

It is on that last short phrase that the questions arising in this case depend. In cl. 10 there is a residuary gift in favour of the company.

For the sake of simplicity, I shall take as an example the annuity, now £1,200 a year, which is appropriated to the first defendant, Thomas Arno, the trusts of that annuity at the moment being to pay it to Thomas Arno although under the protective trusts there may hereafter arise a discretion in favour of other persons. The testator died on May 30, 1937, and his widow died on Feb. 10, 1944, her legal personal representative being the defendant, Norah Goodchild.

To see how far the testator's directions in regard to the annuities fit in with the Income Tax Acts, it is necessary to refer to rr. 19 and 21 of the All Schedules Rules in the Income Tax Act, 1918. Rule 19 (1) provides :

Where any yearly interest of money, annuity, or any other annual payment . . . is payable wholly out of profits or gains brought into charge to tax, no assessment shall be made upon the person entitled to such interest, annuity, or annual payment, but the whole of those profits or gains shall be assessed and charged with tax on the person liable to the interest, annuity, or annual payment, without distinguishing the same and the person liable to make such payment, whether out of the profits or gains charged with tax or out of any annual payment liable to deduction, or from which a deduction has been made, shall be entitled, on making such payment, to deduct and retain thereout a sum representing the amount of the tax thereon at the rate or rates of tax in force during the period through which the said payment was accruing due.

It is to be observed that the words used there are "shall be entitled," but plainly it would be the duty of trustees paying an annuity to make that deduction. Rule 21 (1) provides :

Upon payment of any interest of money, annuity, or other annual payment charged with tax under sched. D, or of any royalty or other sum paid in respect of the user of a patent, not payable, or not wholly payable, out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment.

The materiality of that rule in the present case is that there has been a deficiency of income in certain years since the death of the testator for the purpose of meeting the annuities. The system under the Acts, therefore, is that there is a deduction of tax at the standard rate on payment. The recipient of the annuity, for the purpose of surtax and reliefs, has to make a return of his total income, including therein the gross amount of the annuity payment, and his reliefs are then computed. It is clear, from this brief summary of the statutory provisions, that the words "shall be paid without deduction of income tax up to a maximum of five shillings in the pound" do not fit in to the provisions of the Income Tax Acts.

A question has arisen which I must now state, and I think the most convenient way of stating it is to refer to the summons taken out in this case. The first question raised by the summons is :

(a) Whether, on the true construction of the said will and in the events which have happened, the amount of the annuity payable by the trustees of the said will to each of the annuitants mentioned in cl. 9 of the said will (whereby the said annuities were directed to be paid "without deduction of income tax up to a maximum of five shillings in the pound") should be ascertained by calculating, first, the sum which, after deduction therefrom of income tax at the rate of five shillings in the pound thereon, will leave the net amount of the annuity bequeathed, and, secondly, by deducting from the gross amount so arrived at income tax at the standard rate in force for the year in which the annuity becomes due.

At the hearing before ROXBURGH, J., both parties were agreed that, so long as the standard rate of income tax does not fall below 5s. in the £, the method of ascertaining the sum to be paid to the annuitant in the first instance should be that set out in the question which I have just read. Accordingly, without argument, as I understand, ROXBURGH, J., made a declaration to that effect. From that part of his order there is no appeal.

The second question is expressed as follows :

Whether on the true construction of the said will and in the events which have happened (a) each or any of the said annuitants is entitled to retain for his or her own benefit any reliefs or allowances by way of repayment of income tax to which he or she may be entitled ; or (b) whether each or any of the said annuitants must account for the said reliefs or allowances or any (and, if any, which) part thereof to the trustees of the said will.

ROXBURGH, J., answered para. (a) of that question in the affirmative and from that decision the company, as residuary legatee, appeals.

It follows from what I have already said that I cannot construe this phrase on the footing that it is possible for the trustees to carry out literally the directions given to them by the will. It is the duty of the trustees on payment to deduct tax at the standard rate, and it is not easy to see exactly what the testator intended them to do. If I were construing this will apart from any authority, I should say that he intended that the trustees should wholly indemnify Thomas Arno against the income tax, referable to his annuity, which he actually bears in each year in which the standard rate of income tax is 5s. in the £ or less, and if in any year the standard rate of income tax exceeds 5s. in the £ that the trustees shall partly indemnify him against the income tax, referable to his annuity, which he actually bears. To give an illustration, if the standard rate of income tax in any year is 6s., it is intended that the trustees shall indemnify Thomas Arno against five-sixths of the income tax, referable to his annuity, which he actually bears. By "actually bears" I mean this. From tax on the annuity at the standard rate one deducts all the reliefs referable to the annuity to which Thomas Arno establishes his right. One is then able to say that the resulting sum represents the income tax, referable to the annuity, which has been borne by Thomas Arno in any particular year. That is my impression of the testator's intention, gathered from the words he has used. I will add that I reach a second conclusion, also gathered from the words he has used and apart from authority, namely, that he did not intend Thomas Arno to be freed from any liability to surtax. First, he uses the word "deduction" (which is not apt as applied to surtax), and, secondly, he imposes the maximum of 5s. in the £.

The former of these two conclusions differs from that reached by the judge. It seems to me that we have approached the problem from rather different angles. I have endeavoured to concentrate on the question which was conveniently and clearly stated by UTHWATT, J. in *Re Williams* (1). UTHWATT, J., said ([1945] 2 All E.R. 102 at p. 104) :

... that question [i.e. the question of construction to be determined] is in substance whether the reference to income tax is a reference to the standard rate of income tax merely as an arithmetical factor in the calculation of the gross amount of the annuity given by the will, or whether the provision as to income tax merely indemnified the annuitant against such part of the annuitant's income tax (other than surtax) which is properly referable to the annuity. If construed in the former sense, the actual income tax ultimately suffered by the owner of the annuity does not enter into the picture. Tax at the standard rate is deducted from the gross amount resulting from the calculation and the annuitant receives £X in cash and the income tax referable to the gross amount paid for his account.

The judge then goes on to point out that if the phrase is construed in the latter sense complete effect cannot be given to the bequest by payment to the annuitant.

Concentrating my mind on the question as stated by UTHWATT, J., I cannot find in this will that the reference to income tax can be said to be a reference to the standard rate of income tax merely as an arithmetical factor in the calculation of the gross amount of the annuity given by the will. I can find no words in the will which justify me in coming to that conclusion. ROXBURGH, J., has, I think, approached the problem from a different angle. To give an illustration, he has directed a good deal of attention to what he has described as the annuitant's "effective rate of tax." He says ([1946] 2 All E.R. 278, at p. 279) :

By his "effective rate" I mean this. When the income tax liability of an annuitant has been finally ascertained in respect of any financial year, after taking into account all appropriate reliefs and allowances, it is possible to predicate, by comparing the total amount of income tax suffered (by payment or deduction) with the total gross income from all sources, that the effective rate of tax borne by him has been at the rate of X shillings in the £. This rate of course (surtax apart) will be less than the standard rate, and it may be convenient to call it his "effective rate."

For my part, while entirely accepting these statements, I cannot find that calculating the effective rate of tax borne by the annuitant assists me at all in the construction of this will. Following somewhat different lines, ROXBURGH, J. and I have arrived at a different result. I may, perhaps, give an illustration of the difference between the judge's view and mine by taking a year in which the standard rate of tax is exactly 5s. in the £. In such a year, on my construction of the will, Thomas Arno would get his £1,200, and would be wholly indemnified in respect of the tax, referable to the annuity, which he actually bore, but he would not get anything more. On the judge's construction, however, he would get something more : see, as to this *Re Pettit* (2).

As the construction of a short phrase like this is so much a matter of first impression, especially when the testator's directions cannot be carried out quite literally, I do not propose to go through the judgment of the judge in detail. I propose, however, now to consider the current of authority, assisted by the review of the cases which were given by EVERSLED, J., in *Re Tatham* (3). I turn to the authorities because I think it is as well to see whether the *prima facie* view that one has formed as to the meaning of the will fits in with the current of authority or seems to constitute a departure from the current of authority. It rarely, if ever, happens that the wording of two wills is exactly the same, but I think it is helpful to see whether the construction which I am disposed to place on this will runs counter to the construction which has been placed on wills somewhat similar in their terms.

I shall first go to the well known case of *Re Pettit* (2) which I have already mentioned. In that case the testator directed his trustees to stand possessed of the trust premises and the annual income thereof upon trust to pay an annuity of £1,000 free of duty and income tax to his wife, the defendant Jane Pettit, for life. ROMER, J., held that the residuary estate of the testator was entitled to such proportion of the reliefs which the annuitant claimed as the annuity bore to the total income of the annuitant. After giving certain figures, the judge said ([1922] 2 Ch. 765, at p. 769) :

As has already been stated, the £1,000 was paid out of income that had already been brought into charge to tax, the tax having been deducted at source before the income was received by the trustees. But, as has often been pointed out, payment at the source is nothing more than the machinery by which the Revenue collects the tax from the person ultimately liable to pay, and the rights of the parties are, as between themselves, precisely the same as though the trustees received the gross income and had themselves to pay the tax to the Revenue. In that case, and treating the annuity of the defendant Jane Pettit as the only one payable, the trustees would in each year have had to set aside in respect of her annuity such a sum as, after payment of the tax properly payable thereon, would leave a clear sum of £1,000. Out of this sum the trustees would pay the tax to the Revenue and the £1,000 to the annuitant. The remainder of the gross income after payment of tax thereon would belong to the residuary legatees. It would, however, be impossible for the trustees to ascertain what rate of tax was ultimately payable in respect of the annuitant's income, and in any case they would, under the provisions of the Income Tax Acts, be bound, in the first instance, to treat that income as liable to the ordinary rate. In the year 1918-19, for instance, when the ordinary rate of income tax was 6s. 0d. in the £, the trustees would have had in the first instance to set aside £1,428. 11s. 5d. and to pay £428 11s. 5d. to the Revenue and the balance to the annuitant. But this sum might in the end prove to be too little or too much. If the annuitant were

liable to pay super tax it would be too little and the proper proportion of her super tax referable to her annuity would, when ascertained, have to be paid to her by the trustees and would so go to reduce the income payable to the residuary legatees. It might, on the other hand, turn out that the circumstances of the annuitant were such that she was not liable in respect of her income to the full rate of income tax, that, in my opinion, being the true effect of the provisions for relief and abatement contained in the relevant taxing Acts. In that case, the sum so set aside and the £428 11s. 5d. paid in the first instance to the Revenue would be too much, and if, in consequence of this, the annuitant is repaid the excess by the Special Commissioners, I cannot understand on what ground it can be suggested that such excess should be retained by the annuitant who has not paid it, and not be handed back to the residuary legatees who have. If the annuitant were to retain the excess she would in the end have received out of the estate more than 20s. in the £ on the £1,000 given to her by the will.

The reasoning in *Re Pettit* (2) was expressly approved by this court in *Re Maclellan* (4). In that case the court had to construe a deed in which Lady Byrne covenanted to pay Mrs. Boyd :

such an annual sum as together with the amount of the annuity of £250 payable to or for the benefit of Mrs. Boyd under the will of the testator would (if such annual sum and annuity respectively were payable to Mrs. Boyd absolutely) after deduction of income tax but not sur-tax, leave in her hands the sum of £500 clear of all deductions for income tax but not surtax.

It was held that the principle of *Re Pettit* (2) ([1939] 3 All E.R. 81, at p. 88) applied, and SIR WILFRED GREENE, M.R., expressed approval of the reasoning of ROMER, J. in *Re Pettit* (2).

I propose to go straight from that case to *Re Tatham* (3), which I have already mentioned, where EVERSHED, J., reviewed the authorities. In that case the will provided that the trustees should pay to the annuitant free of duty "such a sum in every year as after deduction of income tax for the time being payable in respect thereof will leave a clear sum of £350 to begin from my death and to be payable by equal quarterly payments in advance." EVERSHED, J., after reviewing a number of cases, held that the annuitant was accountable to the trustees for a due proportion (in respect of the annuity) of all reliefs from and allowances of income tax to which she might be from time to time entitled. Next came the decision of UTHWATT, J., in *Re Williams* (1) where the words were "free from income tax at the current rate for the time being deductible at source," and the judge held that the annuitants were liable to account for a due proportion of their reliefs and allowances.

So far the question where the will directs, not a complete indemnity, but a partial indemnity, had not been considered, but that question had to be considered by ROMER, J., in the very recent case of *Re Bates* (5). In that case the testator gave to his wife and two other persons annuities of £1,000, £500 and £400 respectively "clear of all death duties and income tax up to but not exceeding 5s. 6d. in the £, but not surtax." ROMER J., held that the principle of *Re Pettit* (2) applied. After referring to *Re Pettit* (2), *Re Tatham* (3) and *Re Williams* (1) ROMER, J. said ([1945] 2 All E.R. 688, at p. 689):

In my judgment there is no sufficient indication in the present will that the testator had in mind the former of the two conceptions to which UTHWATT, J. refers. It is, in my opinion, reasonably clear that the testator intended to do no more than extend a partial indemnity to the annuitants, at the expense of his estate, against the income tax which is found ultimately to be payable in respect of their annuities. With the standard rate of income tax at 10s. in the £, he was unwilling that his estate should be saddled with the heavy burden that a complete indemnity would involve, and that was the reason, and in my judgment, the sole reason, for the introduction of the limiting words "but not exceeding 5s. 6d. in the £."

In my view *Re Bates* (5) was rightly decided, and those observations apply to the present case, except that in the present case the testator, making his will at a time when the standard rate of income tax was 4s. 9d. in the £, was unwilling that his estate should be saddled with the heavy burden that a complete indemnity would involve if and when the standard rate of income tax rose above 5s. 0d. in the £. That, I think, was the sole reason why he introduced the limiting words "up to a maximum of 5s. 0d. in the £." It is common ground before us that, if the reasoning of ROMER, J., is applicable to the words used in the present will, the result which is set out by ROMER, J. ([1945] 2 All E.R. 688, at p. 690)

would also be applicable *mutatis mutandis* to the present will. In my view, it would be drawing too fine a distinction between the words of the present will and the words in the will before ROMER, J., if I were to arrive at a different result in the present case. Feeling, as I do, that the testator intended to free the annuitant from a proportion of the income tax borne by him, and that he did not intend to free the annuitant from any part of the surtax which might be borne by him, it seems to me that the present case is really indistinguishable from *Re Bates* (5). Further, in my judgment, the view which I have formed in the present case is in accordance with the current of authority from *Re Pettit* (2) onwards.

I shall add this, as the words here are "without deduction of income tax," and the words in *Re Bates* (5) were "clear of . . . income tax." In one case at least this court has not regarded these two phrases as conveying a different meaning, and that is *Re Williams* (6). It is true that the court was there considering these phrases from a different point of view and a different problem had arisen, but ROMER, L.J., said ([1936] Ch. 509, at p. 513) :

Under the clause in question, as I read it, the trustees are directed to set aside a sum sufficient to produce the income of £1,000 per annum and to hold the same upon trust for certain beneficiaries, the first of whom is the widow, to whom they are to pay the annual sum of £1,000 "without deduction of income tax." Can that mean anything but that she is to receive the net amount of £1,000 free of tax ?

GREENE, L.J., said (*ibid*, at p. 514) :

The phrase "without deduction of income tax" [referring, of course, to the particular document before him] has the same meaning as free of income tax.

That strengthens me in my view that the present case is not really distinguishable from *Re Bates* (5).

I should mention one other case which I think stands alone, but which has been expressly approved by this court in *Re Maclellan* (4). That is the decision of Eve, J., in *Re Jones* (7). That was a case, to my mind, of a very different character. There the trustees were directed to pay or apply for the benefit of the daughter of the testatrix, Mabel Lloyd Jones, such an annuity as, after deducting therefrom income tax at the current rate for the time being, would amount to the clear yearly sum of £350 free of duty. That seems to me to be a case which comes precisely within UTHWATT, J's., first category, a case where the reference to "income tax" is a reference to the standard rate of income tax merely as an arithmetical factor in the calculation of the gross amount of the annuity given by the will. It is, I think, on that footing that it was approved in this court in *Re Maclellan* (4).

For these reasons, I am unable to agree with the decision of the judge or to accede to the argument put before us by counsel for the annuitants.

I should, however, refer to one argument put forward by junior counsel for the annuitants which is directed to a different part of the will. He pointed out that, although Thomas Arno is at the moment in receipt of his annuity, in events which may happen that annuity will be applicable, at the discretion of the trustees, among a number of persons, and he suggested that that is an indication that the construction which the residuary devisees and legatees seek to put on this will is the wrong construction. I appreciate the point, but it does not shake me in the view which I have formed of the will. If the principle of *Re Pettit* (2) applies, it happens that many inconveniences result. The trustees have to inquire into such matters as the total income of the annuitant, and the reliefs which the annuitant receives. If the protective trusts here come into operation, the only result is that those inconveniences may be somewhat increased, because, if the trustees decide to split the annuity among, let us say, three persons, there will have to be a consideration of the reliefs received by each of these three persons. That is merely an extension of the inconvenience which is always caused where the decision in *Re Pettit* (2) is held to apply to a will.

For these reasons, I think that this appeal must be allowed, and that the order should be on the same lines as that made by ROMER, J., in *Re Bates* (5).

SOMERVELL, L.J. : I agree with the judgment which has just been delivered, and the reasons given in it for the conclusion which we have reached, but, as we are differing from the judge, I will add a few observations of my own.

In dealing with provisions of the kind in question in this appeal, there are two possible constructions, as appears from the cases. First, the provision may be construed as conferring an annuity of a gross sum which, after deduction of tax at the standard rate, leaves the named sum. Such a construction, as my Lord has pointed out, was put on the words in question in *Re Jones* (7). When the annuity falls into that category, any reliefs or allowances which the annuitant may recover from the Inland Revenue do not enter into the picture. They are retained by him and the payor is not concerned with that. The second possible construction is, if I may say so, very well set out in a sentence in the judgment of ROMER, L.J., in *Re Reckitt* (8) where the court came to the conclusion that the annuitant was to be indemnified against surtax as well as against income tax. There is, therefore, a reference to surtax in the sentence which I am going to read. I might, perhaps, say that, in my view—and, indeed, neither counsel contended the contrary—the words with which we have to deal cannot be regarded as referring to surtax. I think that is clear for two reasons: first, the reference to “deduction”—there is no question of surtax being “deducted”—and, secondly, perhaps, the reference to 5s. 0d. which, in my opinion, is a reference to a standard rate and, whereas there is a standard rate of income tax, there is no standard rate of surtax. Therefore, in applying the sentence which I am going to read to the circumstances of the present case, one disregards the reference of ROMER, L.J., to super tax. He says this ([1932] 2 Ch. 144, at p. 153):

It [*i.e.* the gift which he was construing] is, indeed, a gift to the annuitant of such a sum as will, after all questions as between the annuitant and the Crown in respect of income tax and super-tax for that year have been settled, leave the annuitant with the sum mentioned.

Where that is the true construction, as income tax at the standard rate is deducted in respect of the whole amount of the annuity when it is paid over, the proper proportion of any reliefs or allowances which the annuitant may recover from the Revenue has to be accounted for to the payor, on the principle laid down in *Pettit's* case (2), to which reference has already been made.

The question in the present appeal is whether the words used in this will fall within category 1 or category 2. I think myself it is worth bearing in mind that the formula for category 1 is a formula which is very familiar because for some years now it has been very common for people to enter into covenants for annual payments to charities on the lines of category 1. I think, therefore, the fact that the formula to produce the first result is so familiar may raise some presumption in favour of construing words which are dissimilar from that formula as words which are intended to bring about the result which I have set out and referred to as category 2. I am not saying, of course, that it is not possible for words to be used which, though not the usual and familiar formula, lead to the same result.

I do not propose to go through the cases, to the most important of which my Lord has already referred, but I think, reviewing them as a whole, as well as, I hope, giving all due weight to them in detail, that they rather tend to support the view that words, some of them inapt, as in this case, have usually been construed as bringing about the second result to which I have referred unless they clearly bring about the result which was arrived at in *Re Jones* (7).

I would like to say a word or two about an argument which I think weighed with Roxburgh, J., and which was pressed on us by counsel for the annuitants in the course of this appeal. The argument was that where you find, as here, a partial exemption from tax, you should approach it with a presumption that probably you will find that the construction is the category 1 construction. I myself do not feel that the fact that it is a partial exemption leads to that presumption or to that approach. It seems to me perfectly natural that a testator, or a covenantor, should wish to bring about the result that, so long as income tax does not exceed a certain amount, the annuitant should get a complete indemnity, no more and no less, in respect of the income tax which he actually bears attributable to the annuity which he is getting, but, if income tax exceeds that amount, he should bear his own tax. As I say, on that matter I differ from the judge. Though he gave other reasons for his conclusion, it may be that that is one of the factors, and I think it was, which led him to arrive at a different conclusion from that to which I have come.

As has been pointed out, the words in the present case are inapt, in that

trustees cannot pay the sums in question without making the deductions that they are entitled to make under r. 19 or are compelled to make under r. 21. As I understand that in the present case the annuity is being paid partly out of capital and partly out of income, r. 21 is applicable here.

out of capital and partly out of income, r. 21 is applicable.

Turning to the words in the will, I attach some importance, though perhaps not very much, to the fact that the named sums are set out in previous paragraphs in the will before one comes to the dozen or so words at the end of cl. 9 (E) which have given rise to the present dispute. Those words, to my mind, plainly do not point to category 1, and I think the natural meaning to give them is the meaning which I have sought to state under category 2. In the result, that seems to me to be the natural construction and in accordance with the authorities which were cited to us, and the appeal, therefore, in my opinion, should be allowed. I have given my reasons for saying that I think they clearly do not apply to surtax, and I do not desire to add anything further on the other arguments in the case.

COHEN, L.J.: I also agree that the appeal should be allowed, and for the reasons stated by my brethren, but, as we are differing from the judge, I will state, shortly, my reasons for reaching that conclusion.

Counsel for the annuitants sought to support the decision of the judge on two grounds. First (and this is the argument to which SOMERVELL, L.J., referred), he argued that the *ratio decidendi* of *Re Pettit* (2) only applies where there is total exemption from tax. He went on to say that, where it was a partial exemption, the bias should be the other way. I do not think that that argument is well founded. I will take as the *ratio decidendi* that portion of the judgment of ROMER, J., to which counsel himself referred. The judge said ([1922] 2 Ch. 765, at p. 770):

... I cannot understand on what ground it can be suggested that such excess [*i.e.*, the excess over the sum stated] should be retained by the annuitant who has not paid it, and not be handed back to the residuary legatees who have.

I see no reason in principle why this *ratio decidendi* should not apply also in the case of a partial exemption. If the annuitant has only borne part of the tax, why should he retain the whole of the allowances and reliefs? Secondly, counsel presented an argument on the construction of the particular will, and he relied, in particular, on the fact that sub-cl. (E) (which is the material passage of the will) directed that the annuity should be paid "without deduction of income tax up to a maximum of 5s. 0d. in the £." He admitted that neither the direction to pay nor the words "without deduction of income tax" would by themselves have justified us in holding that *Re Pettit* (2) does not apply, but he said that, taken as a whole, it pointed clearly to the position of the trustees making the payment and not to the position of the annuitant receiving it. He relied on a passage in the judgment in *Re MacLennan* (4) of SIR WILFRED GREENE, M.R., who said ([1939 3 All E.R. 81, at p. 87):

It is perfectly true that the word "deduction" taken by itself, would appear to point to the act of deduction as the only relevant matter to be taken into account, and, if that were the true view, the result would be that the only tax factor which would come into calculation would be the factor of standard rate of tax . . .

Counsel pointed out that neither of the two factors on which the Master of the Rolls relied in that case are present here, at any rate expressly, so as to justify us in departing from the normal and natural meaning of the words. As MORTON, L.J., pointed out, however, it is plainly impossible to give effect to this clause in the will in its strict sense, having regard to the provisions of the Income Tax Acts, and we really have to consider in what sense, other than the *prima facie* meaning of the words, we ought to construe them.

I approach the problem from the point of view stated by UTHWATT, J., in *Re Williams* (1), to which MORTON, L.J., referred. I will not read the quotation from the judgment again. Suffice it to say that I do not think we are justified in treating this case as falling within the first category, which is the *Re Jones* (7) category. The will gives an annuity of £1,200 a year. If the matter had rested there, the annuitant would have borne tax at the standard rate. The effect of sub-cl. (E), in my view—and I do not wish to repeat the reasons given by my

brethren—is merely to grant relief against tax borne by the annuitant up to 5s. 0d. in the £. If that is the right view, I think, as ROMER, J., did in *Re Bates* (5) that the principle in *Re Pettit* (2) should apply, and that the order ought to take the form of the order made by him in that case.

Appeal allowed. Costs of all parties as between solicitor and client out of the estate.

Solicitors: *Eagleton & Sons* (for the appellants and the trustees); *Field, Roscoe & Co.* (for the respondents).

[Reported by RONALD ZIAR, ESQ., Barrister-at-Law.]

Applied. Re A DEBTOR (No. 400 of 1940). [1949] 1 All E.R. 510.

JARRETT v. BARCLAYS BANK LTD.

NASH v. JARRETT.

[COURT OF APPEAL (Morton, Somervell and Cohen, L.JJ.), November 26, 27, 1946.]

Emergency Legislation—Courts (Emergency Powers)—Exercise of remedy—Realisation of security—Mortgage by wife to secure joint banking account of herself and her husband—Bankruptcy of wife—Husband allowed by trustee to reside and carry on business on mortgaged property—Death of wife—Husband appointed executor—Sale of property by mortgagee—Sale alleged to be at undervalue—Right of husband to complain of sale—Right of husband and wife to be made respondents to mortgagee's application for leave to realise security—"Person affected"—Courts (Emergency Powers) Act, 1943 (c. 19), s. 1 (2) (a) (v)—Courts (Emergency Powers) Rules, 1943 (S.R. & O., 1943, No. 1113), r. 20 (1), (2).

In 1939 a wife mortgaged property of which she was the sole owner to secure a joint banking account of herself and her husband. In 1940 she became bankrupt. The official receiver was appointed her trustee in bankruptcy, and he gave her husband authority to reside and carry on his business on the mortgaged premises. In August, 1945, the mortgagee bank applied under the Courts (Emergency Powers) Act, 1943, for leave to realise their security by exercising their power of sale. No notice of the application was given to either the husband or the wife, nor were steps taken to make either of them a respondent to the application or to leave at the judge's chambers a statement giving the name of either of them and showing his or her interest in the mortgaged property. On Oct. 12, 1945, the wife died, and, by her will, her husband was appointed her executor. On Oct. 18, the mortgagees obtained the leave of the court to realise the security. In Dec., 1945, the property was sold at a price alleged by the husband to be a gross undervalue. The husband claimed on his own behalf and as his wife's executor rescission of the contract of sale and conveyance, an injunction restricting any disturbance to himself, and damages.

Held: (i) the husband was not entitled, in his capacity of the executor of his wife, to have the sale set aside on the ground that it was effected at an under-value, for when the wife became bankrupt her property vested in the trustee in bankruptcy who thereafter alone could deal with it and complain about the sale by the mortgagees.

(ii) whether the husband was a tenant at will of the property or a bare licensee occupying it, he could not object to a sale of the property by the mortgagees, for in neither capacity did he have any interest in the proceeds of the sale or in the price obtained.

(iii) in his capacity as a person liable on the joint banking account of himself and his wife, the husband could not object to the sale, for he was not the owner of the property and had no beneficial interest in it.

(iv) the husband, as his wife's executor, was not entitled to complain because neither he nor his wife was made a party to the mortgagees' application for leave to realise their security because, at the date of the application, his wife was a bankrupt and express provision was made by r. 20 (1) (iv) of the Courts (Emergency Powers) Rules, 1943, for the trustee in bankruptcy to be made a respondent in those circumstances, and, further, the wife, as a bankrupt, had no interest in the property, and was not, therefore, a person within r. 20 (2) or (3) whose interest could be included in a statement by the mortgagees showing her interest in the mortgaged property.

(v) nor, assuming in the husband's favour that he was a tenant at will of the property, could he complain of the proceedings on the application, for the mortgagees applied, not to take possession of the property, but to sell it, and, whatever the nature of the husband's tenancy as against the seller, he would remain in the same position as against the purchaser, and so was not "affected" by the exercise of the remedy within r. 20 (2) or (3).

(vi) nor could the husband complain of the proceedings on the application as a person jointly liable for the overdraft, because he was not one of the persons mentioned in r. 20 (1) nor did he come within r. 20 (2) and (3), for no person came within those sub-rules unless he had a legal or equitable right in the mortgaged property, and the husband had no such interest.

Decision of WYNN-PARRY, J. ([1946] 2 All E.R. 266) affirmed.

[FOR THE COURTS (EMERGENCY POWERS) ACT, 1943 (c. 19), see HALSBURY'S STATUTES, Vol. 36, p. 461. For the Courts (Emergency Powers) Rules, 1943, see BUTTERWORTH'S EMERGENCY LEGISLATION [8].

Cases referred to :

- (1) *Re Leadbitter* (1878), 10 Ch.D. 388 ; 48 L.J.Ch. 242 ; 39 L.T. 286 ; 4 Digest 205, 1886.
- (2) *Bird v. Philpott*, [1900] 1 Ch. 822 ; 69 L.J.Ch. 487 ; 82 L.T. 110 ; 4 Digest 500, 4504.
- (3) *National Provincial Bank Ltd. v. Liddiard*, [1941] Ch. 158 ; *sub nom. Re National Provincial Bank Ltd.* [1941] 1 All E.R. 97 ; Digest Supp.
- (4) *Re Midland Bank, Ltd.'s Application* [1942] 3 All E.R. 299 ; [1942] Ch. 61.
- (5) *Anchor Trust Co., Ltd. v. Bell*, [1926] Ch. 805 ; 95 L.J.Ch. 564 ; 135 L.T. 311 ; 35 Digest 572, 2425.

APPEAL by the plaintiff from a decision of WYNN-PARRY, J., reported [1946] 2 All E.R. 266. The plaintiff in the action was the husband mentioned in the summary of facts in the headnote. WYNN-PARRY, J., gave judgment in favour of the defendants and the plaintiff appealed. The facts appear fully in the judgment of MORTON, L.J.

Robert Fortune for the plaintiff.

Milner Holland for the defendant bank (the mortgagees).

D. L. Jenkins, K.C. and *B. M. Cloutman, K.C.*, for Nash, the purchaser of the mortgaged premises.

MORTON, L.J. : These two actions came on for trial together before WYNN-PARRY, J. The first was an action by Mr. Jarrett, on his own behalf and as executor of Emily Margaret Jarrett (his wife), as plaintiff, against Barclays Bank Ltd. and Gerald Kimber Nash as defendants. In view of the course which the proceedings took before the judge, I must turn at once to the statement of claim :

(1) The plaintiff is the executor of his wife Emily Margaret Jarrett who died on Oct. 12, 1945, and the plaintiff brings this action on his own behalf and as such executor. (2) On Apr. 26, 1939, and at all material times before that date the said Emily Margaret Jarrett (hereinafter called 'the testatrix') was the owner of the freehold hereditaments comprising the dwelling-house, shop and garage premises known as Niton Undercliff Garage, Isle of Wight, and there carried on the business of a garage, tobacconist and confectioner. (3) By a legal charge dated Apr. 26, 1939, the testatrix charged the said hereditaments by way of legal mortgage to the defendant bank to secure any balance of account due to the defendant bank on the joint banking account of herself and the plaintiff.

I pause there to say that it is plain from that pleading that the plaintiff was not a party to the legal charge and that his wife was the sole owner of the property thereby charged.

(4) On May 15, 1940, the testatrix was adjudicated a bankrupt upon her own petition and thereafter the official receiver as trustee in the said bankruptcy sold all the furniture, stock in trade and effects of the said business and gave authority to the plaintiff to open the plaintiff's business upon the said hereditaments at once and confirmed the same by a letter from his agents Sir Francis Pittis & Son to the plaintiff dated May 20, 1940. (5) Thereafter with the full knowledge authority and consent of the said official receiver and of the defendant bank the plaintiff carried on his own business in the shop and garage premises and with his wife resided in the dwelling-house comprised in the said hereditaments.

I pause there to say that for the purpose of this judgment I am prepared to give to those two paragraphs the construction which is most favourable to the plaintiff, that is to say, I am prepared to assume that the statements made there amount to a statement that the plaintiff was a tenant at will of these hereditaments. I am by no means expressing the view that that is their true construction or that that was the actual position. It does not appear that the plaintiff ever paid rent, and he may have been merely a licensee.

(6) On Aug. 23, 1945, the defendant bank, in the matter of the Courts (Emergency Powers) Act, 1943, applied to the Chancery Division of this court for leave to exercise its statutory power of sale as mortgagee under the said legal charge dated Apr. 26, 1939, without the knowledge of and without notice to the plaintiff or the testatrix as the defendant bank at all times by its servants and agents well knew and well knowing that the plaintiff and the testatrix would be affected thereby and without taking proper or any steps to make the plaintiff or the testatrix a respondent to the said application or to leave at the chambers of the judge any statement giving the name of either the plaintiff or the testatrix or the interest of either in the said hereditaments or requesting or taking any directions in respect thereof as provided for by the Courts (Emergency Powers) Act, 1943, s. 4 (3) and (4) and the Courts (Emergency Powers) Rules, 1943, made thereunder, and on Oct. 18, 1945, in the circumstances aforesaid obtained from Master Holland an order that the defendant bank be at liberty to proceed to exercise any remedy which might be available to it by way of the realisation of the security created by the said legal charge.

That paragraph contains certain statements of fact and it also contains, either expressly or impliedly, an expression of the plaintiff's view as to the construction of the Act and rules in question.

Paragraph 7 of the statement of claim turns to a new branch of the case :

(7) Recklessly and without taking proper or any steps to ascertain the fair value of the said hereditaments or to secure a proper price therefor by a contract dated Apr. 27, 1945, and by a conveyance dated Dec. 12, 1945, the defendant bank by its servants and agents caused to be conveyed the said hereditaments to the defendant Nash in consideration of the sum of £2,250 which was a price so low as to constitute a fraud upon the plaintiff and on the estate of the testatrix. (8) Further the defendant Nash by himself and his agents Sir Francis Pittis & Son and Messrs. Buckell & Drew at all times had full knowledge of all the foregoing matters.

Paragraph 9 alleges loss to the plaintiff and the estate of the testatrix, and the plaintiff submits that the sale and the conveyance should be set aside. Then the plaintiff on his own behalf and as such executor claims :

(i) rescission of the said contract of sale and conveyance ; (ii) an injunction restraining the defendants their servants and agents and each and all of them from taking any steps to interfere with or to disturb the plaintiff in his occupation of the said hereditaments ; (iii) alternatively, damages ; (iv) further or other relief ; (v) costs.

It is to be observed that the plaintiff, in that statement of claim, construing it most favourably for him, claims two branches of relief. First, he says that the proceedings under the Courts (Emergency Powers) Act, 1943, were defective, because neither he nor the testatrix was made a party, nor was any statement in regard to them left in chambers, and, secondly, he says that the sale of the property was at a gross undervalue. He makes those two complaints in three capacities—first, as I will assume, as a tenant at will of the property in question ; secondly, as his wife's executor ; and, thirdly, as a person liable on the joint banking account of his wife and himself.

The second action was an action by Mr. Nash, the purchaser, claiming as against Mr. Jarrett (who was in possession) possession of the Undercliff Garage, mesne profits and an injunction. So that it is plain that the second action by Mr. Nash must depend for its result on the result of the first action.

When the two actions came on for trial before WYNN PARRY, J., counsel for the plaintiff (Mr. Jarrett) opened the case and read certain correspondence and then referred the judge to the pleadings. Thereupon counsel for the two defendants in the first action made a submission to the judge which he expressed as follows :

Mr. Milner Holland on behalf of the bank, and Mr. Jenkins on behalf of the defendant Nash, took a preliminary point and submitted, on the basis of the allegations in the statement of claim, that the whole action was misconceived and that there was no case to answer. As that submission, if well founded, would conclude the whole case, I considered it desirable to hear argument on that preliminary point before any witnesses were called.

The judge then considered this preliminary point and formed the conclusion that it was well founded and that the action should be dismissed.

The proceedings which I have outlined were unusual, but it may well be that, in the circumstances of the particular case, they were well calculated to save expense. There had never been, so far as we are told, any application to strike out the statement of claim, but the defendants may well have thought that, although the submission which I have mentioned could be made at the trial, still the statement of claim did not so plainly and obviously fail to disclose any reasonable cause of action that it could be struck out. If they did think so, they were right. The statement of claim set out matters which were properly the subject for legal argument before the judge. In his judgment WYNN-PARRY, J., referred to some of the letters which had been read to him by counsel for the plaintiff, but, in view of the fact that the submission was made simply on the allegations in the statement of claim, I think it is right to exclude altogether from consideration the letters in question. In so doing I think I am really tending to assist the plaintiff because the judge, having read the letters, came to the conclusion that the plaintiff was nothing more than a licensee, and I must say it seems to me that the letters afford very strong ground for that view.

Dealing simply with the statement of claim, I shall follow the order taken by the judge and consider, first, the contention that the sale should be set aside on the ground that it was effected at an under-value. The judge considered the claim of the plaintiff to relief under that head as executor of his wife who had been, until her bankruptcy, the owner of the property. I entirely agree with the reasons which the judge gave for holding, as he did hold, that in that capacity the plaintiff was not entitled to have the sale set aside. He said this :

Upon Mrs. Jarrett being adjudicated bankrupt the whole of her property passed to and vested in the official receiver under the Bankruptcy Act, 1914, s. 53. Thereafter it was only the trustee who could deal with the property ; it was only he who could in any way effectively complain against the mortgagee, and it was only he who could settle accounts with the mortgagee. The bankrupt could not go behind the trustee.

The judge then referred to *Re Leadbitter* (1) both in the High Court and in the Court of Appeal and continued :

The mere fact that a bankrupt has a future interest in a possible surplus does not mean that he has a present interest, and there is, in my view, nothing but confirmation of this proposition to be found in *Bird v. Philpott* (2) which was cited by Mr. Fortune in favour of his argument. I am, therefore, of opinion that the plaintiff, as the executor of his wife, an undischarged bankrupt, has no *locus standi* to assert that the sale was made at an under-value.

The judge then considered, and I shall now consider, the plaintiff's claim to set aside the sale on the ground that he, the plaintiff, was a tenant at will of the property. In my view, it is immaterial for this purpose whether the plaintiff was a tenant at will or a bare licensee. In neither capacity, in my view, could he object to any sale of the freehold which the mortgagee might care to carry out. He had no interest in that capacity in the proceeds of sale at all and it did not matter to him as tenant whether the property was sold at a high or a low price.

Turning to the position of the plaintiff as regards the alleged sale at an under-value in his capacity as a person liable on the joint account of himself and his wife at the bank, here, again, I entirely agree with the decision of the judge and with the reasons which he has given for that decision. In my opinion, the plaintiff in that capacity could not object. He was not the owner of the property and he had no beneficial interest at all in it. I agree with the judge's view on that point, but I need not read all his reasons for that view.

I now come to the Courts (Emergency Powers) Act, 1943, and it is necessary to refer to the relevant sections omitting immaterial provisions. By s. 1 :

(2) Subject to the provisions of this Act, a person shall not be entitled, except with the leave of the appropriate court—(a) to proceed to exercise any remedy which is available to him by way of . . . (v) the realisation of any security.

By s. 1 (4) :

If, on any application for such leave as is required under this section for the exercise of any of the rights and remedies mentioned in sub-ss. (1), (2) and (3) of this section, the appropriate court is of opinion that the person liable to satisfy the judgment or order, or to pay the rent or other debt, or to perform the obligation, in question is unable immediately to do so by reason of circumstances directly or indirectly attributable to any war in which His Majesty may be engaged, the court may, subject to the provisions of this Act, refuse leave for the exercise of that right or remedy, or give leave therefor subject to such restrictions and conditions as the court thinks proper.

By s. 4 (3) :

Where an application is made by the mortgagee of any property for leave to exercise against the property any of the rights or remedies mentioned in s. 1 (2) of this Act, being a right or remedy arising by virtue of a default in the payment of any mortgage money or a breach of any mortgage obligation, the appropriate court may, for the purposes of this Act, treat any person appearing to the court to be affected by the exercise of the right or remedy as if he were the person liable to pay the mortgage money or to perform the mortgage obligation or, as the context may require, as if he were the mortgagor, and may grant relief accordingly.

By s. 4 (4) :

The last foregoing subsection shall not be taken as requiring all the persons so affected to be made parties to the application, and rules made under this Act shall make provision for the persons who are to be made parties to any such application, and may provide that, in such cases as may be prescribed by the rules, and in particular in cases where the mortgagor has died and no person has taken out representation in respect of the property, the application may be made *ex parte*.

Reference must, therefore, be made to the Courts (Emergency Powers) Rules, 1943, to see who are the persons who must be made parties to any such application. The material provisions are to be found in r. 20, sub-rr. (1), (2) and (3). By r. 20 (1) :

Subject to the provisions of para. (2) of this rule, the persons to be made respondents to an application by a mortgagee of property for leave to exercise against the property any right or remedy shall be as follows :—(i) where the mortgagor (whether under personal liability or not) is the owner of the equity of redemption, the mortgagor ; . . . (iv) where the equity of redemption is vested in a trustee, the trustee : Provided that if the equity of redemption is vested in a trustee as trustee in bankruptcy and the applicant has before making the application obtained from such trustee a written statement that he has no objection to the leave sought being given, the application may be made *ex parte*.

I pause there to say that in the present case, as the equity of redemption was vested in a trustee—the trustee in bankruptcy—the trustee was asked whether he desired to oppose the leave being given. He gave a written statement that he did not object and the application was made *ex parte*. In saying that as a matter of history, I am travelling outside the allegations made in the statement of claim, but I am not relying for my decision on any fact outside the statement of claim. Rule 20 (2) provides :

In any application in which a person who is not a respondent to the summons under the provisions of para. (1) of this rule would be affected by the exercise of any such right or remedy as aforesaid, the applicant shall, on applying at the chambers of the judge for an appointment to hear the application, leave at chambers with a copy of the summons a statement giving the name of such person and showing what his interest is in the mortgaged property, and the court or a judge may direct that such person, or any other person who the court or a judge may think would be affected by the granting of the application, be added as the respondent to the application.

Rule 20 (3) deals with the position where the mortgagee is uncertain as to what persons would be affected by the granting of the application. The only other

provision which has any materiality, I think, is s. 9 of the Act of 1943 which defines "mortgage money" as including "any part thereof and any interest thereon" and "mortgage obligation" as "any obligation arising under or by virtue of the mortgage other than an obligation to pay the mortgage money."

Having regard to the wording of the Act and the Rules, is the plaintiff entitled to complain because neither he nor his wife was made a party to the summons nor was any statement as to them left at chambers? The application was issued while the wife was alive and the order was made shortly after her death. First, was the plaintiff as executor of his wife entitled to object? In my view, he was not, in that capacity. I agree with the reasons which the judge gave for his decision under that head. I shall read them because I do not think I can improve on them. He said:

Treating him first as suing as executor of his wife, it is, in my view, plain that he is not entitled to any relief. His wife, at the relevant time, was alive, and she was an undischarged bankrupt. Express provision is made under r. 20, para. (1) (iv) for making the official receiver as her trustee in bankruptcy a respondent. If she was also to be entitled to be heard, it must be under para. (2) or para. (3). In view of the earlier provision of r. 20 (1) (iv) it would, in my view, be startling to find that the applicant must bring in the bankrupt or his or her personal representative. To do so would, I think, be to increase many-fold the difficulties of administering the bankruptcy laws, even if not to make it impossible, and there is a very good reason for not doing so, the reason being that, as appears from the authorities to which I have already referred, at the date of the application the bankrupt had no interest in the property, and, therefore, was not a person in respect of whom it could be specified in the statement referred to in paras. (2) and (3) what her interest was in the mortgaged property.

In regard to the plaintiff's position as tenant at will or licensee—and I will assume that he was tenant at will—in my view, his claim under that head must fail. The bank did not apply for leave to take possession of the property. They applied for leave to sell it, and, whatever the nature of the plaintiff's tenancy as against the seller, he would remain in the same position as against the purchaser. He was not, therefore, "affected" by the exercise of that remedy.

I now come to the last point, which is whether the plaintiff can say that, as a person jointly liable for the overdraft, he is a person who comes within the rules. In the first place, the plaintiff plainly is not a person who comes within r. 20 (1). Turning to r. 20 (2) it appears to me (and in this respect I again agree with the judge) that no person comes within that sub-rule unless he has a legal or equitable interest in the mortgaged property. I think that that is made reasonably clear by the requirement that the applicant shall leave at chambers "a statement giving the name of such person and showing what his interest is in the mortgaged property." Would it be right to say that the plaintiff, because he was jointly liable on the banking account and the mortgage was given by his wife on her property to secure the banking account, had an interest in the mortgaged property? It is suggested that he had because he might have paid off the bank, and, if he had paid off the bank, he would have been able to stand in the bank's shoes as mortgagee. In my view, it would be stretching the words "interest in the mortgaged property" to an unwarrantable extent to apply them to such a case as that. The words are in the present—"what his interest *is* in the mortgaged property"—and I think it true to say that the plaintiff, in his capacity as a person jointly liable on the banking account, never had an interest in the mortgaged property, though he could have acquired an interest if he had taken a certain step and paid a large sum of money. If that is so, then he did not come within the rules.

I would add that, although I should have arrived at that conclusion simply on the wording of the Act and Rules, one is assisted by the earlier cases to which counsel for the defendant bank referred. They are *National Provincial Bank Ltd. v. Liddiard* (3) and *Re Application by Midland Bank, Ltd.* (4). In each of these cases it was pointed out that there seemed to be an omission in the 1939 Act. In the circumstances which prevailed, for instance, in the *Midland Bank* case (4), s. (1) (4) of the Courts (Emergency Powers) Act, 1939, which corresponds to s. (1) (4) of the Act of 1943, gave no protection to the owner of property who had mortgaged that property to secure another person's debt but had not himself entered into any covenant for the payment of that debt. It seems to me to be very likely that the Act of 1943, no doubt among other objects, had the

object of giving some relief to a person in that position. The mortgagor is expressly mentioned in r. 20 (1) (i), but the legislature may have had in mind the protection of other persons having a beneficial interest in the property subject to the mortgage. However that may be, I think that, on the construction of the Act and the rules, the plaintiff did not come within them in any of the three capacities which I have mentioned.

The result is that, in my view, the submission of the defendants at the trial of the action was well founded, the judge was right in dismissing that action, and this appeal fails.

SOMERVELL, L.J.: I agree. I will not repeat either the facts or the relevant sections of the Act, but I wish to add a few observations on the one point which I think was a difficult one—the question whether the Courts (Emergency Powers) Rules, 1943, cover the plaintiff in that he was jointly liable for the debt in respect of which the mortgage was given. I agree with what has been said by MORTON, L.J., that it is r. 20 which must be looked at. Section 4 (4) of the 1943 Act contemplates that the rules to be made may restrict the operation of subs. (3) in that those who might fall within the words of subs. (3) need not necessarily, under the rules, be persons who have to be made parties. One has to consider under r. 20 (2): What is the effect of the words, “what his interest is in the mortgaged property.” At one time in the course of the argument I thought that those words might be used in what I may call a popular sense as the equivalent of “his relation to the transaction” or some general phrase of that kind. On looking at them carefully and on consideration of the cases which were suggested by counsel for the second defendant as cases which this rule might have been made to cover, I have come to the conclusion that the proper construction of these words is that which has been given to them by MORTON, L.J. Applying that construction, I do not think the plaintiff comes within them.

The cases in question are *National Provincial Bank Ltd. v. Liddiard* (3) and *Re an Application by the Midland Bank Ltd.* (4). We were invited to assume that the legislature may well have had these cases in mind, with other matters. It is to be noted that in *National Provincial Bank Ltd. v. Liddiard* (3) FARWELL, J. in the concluding paragraph of his judgment, expressly raised the question whether a debtor who had not given the security might be a proper party. That was, of course, under the words in the Act of 1939. In the second case, MORTON, L.J., at the conclusion of his judgment, I think, had in mind a slightly different point, though related. I think he was considering whether the mortgagor, who in that case also was under no personal liability to the creditor, might pray in aid the war circumstances of the debtor. I think it is relevant to bear in mind, therefore, that the position of a debtor in respect of whose debt (or, in this case, in respect of whose joint liability) a mortgage had been given on property which was not his but somebody else's was directly raised for consideration in the two cases which we are invited to regard as cases which the legislature, among other points, must have had in mind. I think that that supports the construction which has been put on this rule and with which I am expressing my agreement. If the legislature had intended to make a debtor in that position a necessary party, it would have been easy to say so, and I cannot think it would have been left to be covered by words which I think, on the view most favourable to the argument of counsel for the plaintiff, are not apt to cover a case of that sort. For these reasons I agree that the appeal should be dismissed.

COHEN, L.J.: I also agree. Counsel for the plaintiff argued that, if we had taken a different view on the point of construction of the Act and rules, he would have been entitled to relief by reason of the decision in *Anchor Trust Co., Ltd. v. Bell* (5). In that case a mortgagee had proceeded to enforce his security without seeking to obtain the leave of the court. Counsel for the second defendant sought to distinguish that case on the ground that in the present case there was an order of the court giving leave to sell which remained in force. Having regard to our decision on the main point, I find it unnecessary to express any opinion whether this distinction is well founded.

Solicitors: *Lake & Son*, agents for *Roach, Pittis & Co.*, Newport, I.O.W. (for the plaintiff); *Woolley & Whitfield*, agents for *John Robinson & Jarvis*, Ryde, I.O.W. (for the defendant bank); *Warren & Warren*, agents for *Buckell & Drew*, Newport, I.O.W. (for the purchaser Nash).

[Reported by RONALD ZIAR, ESQ., Barrister-at-Law.]

LLOYD'S BANK, LTD. AND ANOTHER v. ELLIOT

C [KING'S BENCH DIVISION (Macnaghten, J.), November 8, 1946].

Emergency Legislation—Agricultural holding—Notice to quit—Contract of sale—Validity of notice—Defence (General) Regulations, 1939, reg. 62 (4A).

D An agricultural holding was demised to a tenant for a term of three years from Lady Day, 1943, and by notice dated Mar. 20, 1945, the landlords gave the tenant notice to quit on Lady Day, 1946. Under contracts of sale, part of the land was sold in Sept., 1945, and part in December of that year. In an action in which the landlords sought to recover possession of the holding and mesne profits, it was contended by the tenant that the notice to quit was void under, *inter alia*, the Defence (General) Regulations, 1939, reg. 62 (4A). The landlords argued that the regulation ought not to be read literally as hardship might or would ensue, and that the regulation was not aimed at a situation in which the notice to quit was given before the contracts of sale were concluded.

E HELD: the words of reg. 62 (4A) were plain and unambiguous, and there was no reason to construe them in any but their ordinary meaning; the conditions of the regulation were fulfilled; and the notice was void.

[FOR DEFENCE (GENERAL) REGULATIONS, 1939, reg. 62 (4A), see HALSBURY'S STATUTES, Vol. 37, p. 789.]

F ACTION for recovery of possession of an agricultural holding and for mesne profits.

Dingle Foot for the landlords.

G. A. Thesiger for the tenant.

G MACNAGHTEN, J.: This is an action by Lloyds Bank, Ltd., and Gertrude Violet Wienholt, trustees under the will of the late Major E. A. Wienholt, to recover possession of an agricultural holding which the testator demised to the defendant, Ivan Charles Henry Elliot, for the term of three years from Lady Day, 1943. The landlords, by a notice to quit dated Mar. 20, 1945, gave notice to the defendant to quit on Lady Day, 1946. The question at issue is whether or not the notice to quit is valid.

H It is said on behalf of the tenant that the notice to quit is void under s. 26 of the Agricultural Holdings Act, 1923, and also under the Defence (General) Regulations, 1939, reg. 62 (4A), which runs thus:

Where the whole or any part of an agricultural holding is subject to a contract of sale made since Sept. 3, 1939, or has been sold in pursuance of a contract of sale made since that date, any notice to quit that holding or any part thereof given to the tenant so as to expire at any time after the end of the year 1941 shall be null and void . . .

The land in question was sold under a contract of sale, as to part in Sept., 1945, and as to part in Dec. of that year. It would seem clear, therefore, that the

conditions prescribed by reg. 62 (4A) were fulfilled since she contract of sale was made since Sept. 3, 1939. The notice to quit expired on Lady Day, 1946, that is, after the end of the year 1941. There seems to be no ambiguity about the words of the regulation. They are plain, simple and intelligible.

It is argued that the regulation ought not to be construed in what appears to be the reasonable and proper way, because it might or would create hardship in certain cases. I cannot see that that is an argument of much weight, because the Defence Regulations often create hardships on certain individuals. It is, further, contended that to obviate that hardship the word "thereafter" ought to be inserted towards the end of the regulation so that it would read thus: "Where the whole or any part of an agricultural holding is subject to a contract of sale . . . any notice to quit that holding or any part thereof given *thereafter* to the tenant so as to expire," etc. That is to say, to be void the notice to quit must be subsequent to the contract of sale. I do not see any reason for inserting that word, and I think it would be improper to do so.

It was submitted that the regulation was not aimed at any situation which could be created where the notice to quit was given before the contract of sale. I am by no means satisfied that that is so. The defendant also relied on s. 26 of the Agricultural Holdings Act, 1923, but, in view of my decision already expressed, it is not necessary to pursue that matter. There will be judgment for the defendant.

Judgment for the tenant, with costs.

Solicitors: *Elvy Robb & Co.* (for the landlords); *Blyth, Dutton & Co.*, agents for *Menneer, Idle, Brackett, & Williams*, St. Leonards-on-Sea (for the tenant).

[*Reported by B. ASHKENAZI, Esq., Barrister-at-Law.*]

RODWELL AND OTHERS v. MINISTER OF HEALTH

[KING'S BENCH DIVISION (Morris, J.) December 10, 11, 17, 1946.]

Public Health—Housing—Compulsory acquisition of land—"Persons employed or paid by county council"—Superintendent of police—Housing Act, 1936 (c. 57), s. 97.

By s. 97 of the Housing Act, 1936: "A county council . . . shall have power to provide houses for persons employed or paid by, or by a statutory committee of, the council . . . and for that purpose may be authorised to acquire or appropriate land in like manner as a local authority may be authorised to acquire or appropriate land for the purposes of [part V] of this Act." Part V of the Act is headed: "Provision of housing accommodation for the working classes."

In February, 1946, the Lancashire County Council made an order for the compulsory acquisition of a house and its grounds to provide a residence for a police superintendent of the Lancashire county police whose annual income amounted to £800, and, after a public inquiry had been held, the Minister of Health confirmed the order. On an appeal by the applicants, the executors of the owner of the house, against the confirmation,

HELD: (i) the police superintendent did not come within the group designated by the phrase "working class," but

(ii) the persons for whom houses might be provided under s. 97 need not be persons of the "working class," and

(iii) the police in a county are paid by the county council, and, therefore, the police superintendent came within s. 97 of the Act, and the order was validly made and confirmed.

[FOR THE HOUSING ACT, 1936, see HALSBURY'S STATUTES, Vol. 29, p. 638.]

Cases referred to :

- (1) *Lewis v. Cattle*, [1938] 2 All E.R. 368; [1938] 2 K.B. 454; 107 L.J.K.B. 429; 159 L.T. 166; Digest Supp.
- (2) *Fisher v. Oldham Corpn.*, [1930] 2 K.B. 364; 99 L.J.K.B. 569; 143 L.T. 281; 94 J.P. 132; Digest Supp.
- (3) *Hall v. Taylor* (1858), E.B. & E. 107; 27 L.J.Q.B. 311; 31 L.T.O.S. 151; 13 Digest 417, 1370.
- (4) *Ex parte Somerset County Council* (1889), 58 L.J.Q.B. 513; 61 L.T. 512; 54 J.P. 182; 33 Digest 107, 719.
- (5) *Ex parte Leicestershire County Council*, [1891] 1 Q.B. 53; 60 L.J.M.C. 45; 64 L.T. 25; 33 Digest 108, 723; 37 Digest 179, 16.
- (6) *Glamorgan Coal Co. v. Glamorganshire Standing Joint Committee and Others*, [1916] 2 K.B. 206; 85 L.J.K.B. 1193; 114 L.T. 717; 80 J.P. 289; 33 Digest 721; 37 Digest 185, 191.

APPEAL by applicants against the confirmation by the Minister of Health of a compulsory purchase order for the acquisition of a house and grounds made by the Lancashire County Council. The facts appear in the judgment.

Willink, K.C. and *J. J. Somerville* for the applicants.

H. L. Parker for the Minister.

MORRIS, J.: On Feb. 7, 1946, the Lancashire County Council made an order for the compulsory acquisition of a freehold residence at New Longton, together with the land in which it stood. In the compulsory purchase order, the property to be acquired was described as follows: "Plot of land containing 2,982 acres at New Longton together with the dwelling house known as 'The Laund,' Saunders Lane, New Longton, and other buildings erected thereon." The order was made to provide a residence for a police superintendent. The officer in question is in charge of communications in the area, and the residence to be acquired would be highly convenient in that it is closely adjacent to police headquarters. The residence is vacant, and the applicants, in this originating notice of motion, who are the executors of the late owner-occupier, were proposing and were about to sell the property by auction. The applicants objected to the compulsory purchase order. The Minister directed the holding of an inquiry and thereafter, on July 2, 1946, he confirmed the compulsory purchase order.

The contention of the applicants is that the order which the Minister has confirmed is not within the powers conferred by part V of the Housing Act, 1936. Two main submissions are urged. In the first place, it is said that s. 97 of the Housing Act, 1936, does not give authority to a county council to acquire a house for someone in the position and with the status of a police superintendent. In the second place, it is said that s. 97 cannot be invoked, for the reason that members of a county police force are not employed or paid either by the county council or by a statutory committee of the county council. No argument was addressed to the court in support of a ground raised in the notice of motion, namely, that the consent of the Minister of Health should have been obtained before the county council made their compulsory purchase order. It was, however, additionally submitted that the Minister ought not in any event to have authorised the acquisition of more than the residence itself, and that the Minister had not recorded or recited that it appeared to him likely that the land acquired would be needed within a period of ten years. In the course of the inquiry directed by the Minister, it was indicated that houses for police purposes could, if necessary, be erected on the land in future. A tentative plan for the erection of seven pairs of houses had been prepared. In my view, there is no validity in this additional submission. The land being acquired is no more than what was regarded as the land in which the house stood, and which normally would pass with the house on a sale. In this connection it is to be observed that s. 75 of the Housing Act, 1936, provides as follows:

Nothing in this Act shall authorise the compulsory acquisition for the purposes of this part of this Act of any land which . . . at the date of the compulsory purchase order forms part of any park, garden or pleasure ground, or is otherwise required for the amenity or convenience of any house.

The land being taken does not appear to be more extensive than the land which was regarded by the late owner-occupier as being the park or garden of the

house, or as being land required for the amenity of the house. In these circumstances, no question arises as to land being taken which is not immediately required, and the project of building further houses for police occupation on the land in the future need not be considered. The residence is now needed, and the property to be acquired does not consist of any greater quantity of land than can reasonably be regarded as the land in which the residence stands.

I pass, therefore, to consider the two main arguments which were presented on behalf of the applicants. In support of the first of these, attention was directed to the fact that s. 97 appears in part V of the Housing Act, and it was urged that the powers under s. 97 only apply where property is being acquired for the housing of the working classes. The evidence showed that the salary and allowances of the superintendent in question amounted to £800 per annum. The heading of part V of the Housing Act, 1936, is as follows: "Provision of housing accommodation for the working classes. General powers and duties of local authorities." The Act does not contain a definition of the phrase "working classes" other than in sched. XI, para. 11 (e), where the phrase is defined to include:

... mechanics, artisans, labourers, and others working for wages, hawkers, costermongers, persons not working for wages, but working at some trade or handicraft without employing others, except members of their own family, and persons other than domestic servants whose income in any case does not exceed an average of £3 a week, and the families of any of such persons who may be residing with them.

That definition, is, however, laid down for the purposes of sched. XI. As an effort in selectiveness, the phrase "working classes" appears to me to be neither happy nor precise. It does not seem that the superintendent comes within the grouping designated by the phrase, and on behalf of the Minister of Health it was not so suggested.

Section 97 of the Act is in the following terms:

A county council or mental hospitals board shall have power to provide houses for persons employed or paid by, or by a statutory committee of, the council or board, and for that purpose may be authorised to acquire or appropriate land in like manner as a local authority may be authorised to acquire or appropriate land for the purposes of this part of this Act.

The section, and others which follow it, appear under the sub-heading "Miscellaneous," and under the general heading of part V, the terms of which I have read. These headings may be regarded as preambles to the sections appearing under them: see MAXWELL ON INTERPRETATION OF STATUTES, 9th ed., p. 46. As such, they may form a guide to intention where words admit of doubt or ambiguity: *ibid.* p. 40, where the following passage occurs:

The preamble of a statute has been said to be a good means of finding out its meaning, and, as it were, a key to the understanding of it; and as it usually states, or professes to state, the general object and intention of the legislature in passing the enactment, it may legitimately be consulted to solve any ambiguity, or to fix the meaning of words which may have more than one, or to keep the effect of the Act within its real scope, whenever the enacting part is in any of these respects open to doubt.

See also HALSBURY'S LAWS OF ENGLAND, vol. 31, p. 464, para. 565, where the following passage occurs:

Headings . . . frequently precede clauses of enactments, or *fasciculi* of clauses, applicable to special objects. They govern, and may generally be read before, each of the sections which are ranged under them. They are to be regarded as parts of the statute itself, and may be read not only as explaining the sections which immediately follow, but as affording an even better key to the general construction than a mere preamble. Further, as being found and sometimes referred to in the enacting parts, they are deserving of greater consideration than marginal notes. The clear meaning and natural operation of words found in the various sections under headings must, however, according to the general rule, not be restrained or confined by them.

It has, therefore, to be considered whether there is doubt or ambiguity as to the meaning and construction of s. 97. The section begins by giving power to provide houses for certain persons, and then provides that for such purpose of providing houses there is to be authority to acquire land in like manner as a local authority may be authorised to acquire land for the purposes of part V of the Act. The latter part of the section is, in my view, dealing with the manner in which authority to acquire land is given, and is not dealing with the question

as to the persons for whom houses may be provided. The earlier part of the section deals with this. The persons are those who are "employed or paid by, or by a statutory committee of, the council or board." These words are, in my view, clear, and the persons designated are defined by such words. There is no limitation so as to confine the persons to persons of the working class who are employed or paid by, or by a statutory committee of, the council or board. A reading of s. 98 of the Act shows how such a limitation could have been imposed if such had been the intention. In my judgment, therefore, the persons for whom houses may be provided, if they are otherwise within the statutory designation, need not be persons of the working class.

I pass now to a consideration of the second main submission of the applicants, which concerns the question whether members of a county police force are employed or paid, either by a county council or by a statutory committee of a county council. On behalf of the Minister of Health, it was not sought to argue that a member of a county police force is employed by a county council, or is either employed or paid by a statutory committee of a county council. It is not, therefore, necessary to consider the status of the members of such a force, though it may usefully be noted that in *Lewis v. Cattle* (1) it was held that a police officer, whether he be a member of the metropolitan police force or a member of the police force of a county, city or borough, holds the office of constable and as such is a "person who holds office under His Majesty" within the Official Secrets Act, 1911.

In *Fisher v. Oldham Corporation* (2), McCARDIE, J., had occasion to consider the position of police officers in a borough, and he held that the police appointed by the watch committee of a borough corporation, if they arrest and detain a person unlawfully, do not act as the servants or agents of the corporation so as to render that body liable to an action for false imprisonment. In connection with the part of the case with which I am about to deal, it is to be observed that in his judgment McCARDIE, J., said ([1930] 2 K.B. 364, at p. 376):

Only in a special and limited sense can a police officer be said to be in the employ of a municipal corporation. With respect to the action for "wages", as they are called in that case—and I do not forget sched. V of the Municipal Corporations Act—I think the point may well be raised some day whether any such action will lie in so far as it is framed upon an alleged contract of service in the ordinary sense. Any such action may perhaps be more properly brought on a special footing—namely, on the duty of the defendants to pay such sum as is due by virtue of statutory obligation plus a certain degree of contractual relationship.

The learned judge goes on to refer to the decisions recorded in *LUMLEY'S PUBLIC HEALTH*, vol. 1, 9th ed., pp. 450 and 451, and also to *Hall v. Taylor* (3).

It now becomes necessary to consider the position as regards the payment of members of a county police force. The County Police Act, 1839, provided that it should be lawful for the justices assembled in general or quarter sessions, with the consent of one of Her Majesty's Principal Secretaries of State, to increase or diminish the number of constables first appointed under such Act for their county. The Act provided that a Principal Secretary of State might make rules for the government, pay, clothing and accoutrements and necessities of the constables, and that such rules should be binding on all persons whom they might concern. By its various provisions, the Act dealt with the establishment of county and district constables by the authority of justices of the peace. This Act was followed in 1840 by the County Police Act of that year, which enabled justices to make a police rate, and which otherwise dealt with the powers of justices in general or quarter sessions in regard to county police.

The Local Government Act, 1888, under which county councils were established, contains provisions of great consequence as affecting the matter now under consideration. By s. 3 of that Act it was provided:

There shall be transferred to the council of each county on and after the appointed day, the administrative business of the justices of the county in quarter sessions assembled, that is to say, all business done by the quarter sessions or any committee appointed by the quarter sessions, in respect of the several matters following, namely, (i) The making, assessing, and levying of county, police, hundred, and all rates, and the application and expenditure thereof, and the making of orders for the payment of sums payable out of any such rate, or out of the county stock or county fund, and the pre-

paration and revision of the basis or standard for the county rate . . . (iv) Shire halls, county halls, assize courts, judges' lodgings, lock-up houses, court houses, justices' rooms, police stations, and county buildings, works, and property, subject as to the use of buildings by the quarter sessions and the justices to the provisions of this Act respecting the joint committee of quarter sessions and the county council.

Section 8 dealt with the reservation of business to quarter sessions, and by s. 9 (1) it was provided :

The powers, duties and liabilities of quarter sessions and of justices out of session with respect to the county police shall, on and after the appointed day, vest in and attach to the quarter sessions and the county council jointly, and be exercised and discharged through the standing joint committee of the quarter sessions and county council appointed as hereinafter mentioned.

Section 30 provided for the setting up of the standing joint committee. Section 30 (1) is in these terms :

For the purpose of the police, and the clerk of the peace, and of clerks of the justices, and joint officers, and of matters required to be determined jointly by the quarter sessions and the council of a county, there shall be a standing joint committee of the quarter sessions and the county council, consisting of such equal number of justices appointed by the quarter sessions and of members of the county council appointed by that council as may from time to time be arranged between the quarter sessions and the council, and in default of arrangement such number taken equally from the quarter sessions and the council as may be directed.

By sub-s. (3) it is provided that :

Any matter arising under this Act with respect to the police, or to the clerk of the peace, or to clerks of the justices, or to officers who serve both the quarter sessions or justices and the county council, or to the provision of accommodation for the quarter sessions or justices out of session or to the use by them or the police or the said clerks of any buildings, rooms, or premises . . . and any other matter requiring to be determined jointly by the quarter sessions and county council, shall be referred to and determined by the joint committee under this section ; and all such expenditure as the said joint committee determine to be required for the purposes of the matters above in this section mentioned, shall be paid out of the county fund, and the council of the county shall provide for such payment accordingly.

Attention must necessarily be closely directed to the concluding words of sub-s. (3) which I have just read—the words providing that expenditure as determined to be required by the standing joint committee shall be paid out of the county fund and that the county council shall provide for such payment. It is clear that a standing joint committee, though a statutory committee, is not a statutory committee of a county council. As its name clearly denotes and as its constitution shows, it is a joint committee of justices appointed by quarter sessions and of members of the county council appointed by the council.

Certain other statutory enactments call for mention. The Police Act, 1890, made provision respecting the pensions, allowances and gratuities of police constables. The provisions of s. 33 of and sched. III to that Act show that in a county, the police authority is recognised to be the standing joint committee, and that the police fund is the county fund. The Police Act, 1919, under which the Police Federation was established, provided by s. 4 that the Secretary of State might make regulations as to the government, mutual aid, pay, allowances, pensions, clothing, expenses and conditions of service of the members of all police forces within England and Wales, and that every police authority should comply with the regulations so made. This section is analogous to s. 3 of the Act of 1839, though in 1919 the matters to be dealt with in regulations were wider in scope than in 1839. Such matters included, for example, pensions, which were not mentioned in 1839. The Act of 1839 had provided that the regulations of the Secretary of State should be binding on all persons whom they might concern. In 1839 such persons would include the justices. In 1919 the standing joint committee had in a county become the police authority, and every police authority is, by the terms of the 1919 Act, required to comply with the regulations.

It is submitted on behalf of the applicants that the conclusion to be drawn is that police are paid by the police authority, and that in a county this payment comes out of the county fund. It is submitted that the police authority determine what expenditure is required, and, so to speak, indent on the county fund, but that they have a statutory duty to comply with regulations as to pay, and

that, therefore, payments to police for their services ought properly to be regarded as made by the police authority, and that it would not be correct to say that police in a county are paid by the county council. It was agreed by both sides that the words "paid by" in s. 97 of the Housing Act, 1936, following as they do the words "employed or" must reasonably be read as referring to payment for services. In support of their contentions, the applicants referred to the various provisions of the Police Pensions Act, 1921, in which occur such phrases as "in respect of a pension from a police authority" and "pension allowance and gratuity payable by a police authority." On behalf of the Minister of Health, it was submitted that since police in a county are paid out of the county fund, it is correct to say that they are paid by the county council. It was pointed out that there are no statutory provisions dealing with payments by a standing joint committee, or establishing a treasurer for them, or providing for an audit of any payments to be made by them. Attention was called to ss. 182, 183 and 184 of the Local Government Act, 1933, as well as to the provisions of s. 181 dealing with a county fund. Section 181 is in these terms:

(1) All receipts of a county council, whether for general or special county purposes, shall be carried to the county fund, and all liabilities falling to be discharged by the council, whether for general or special county purposes, shall be discharged out of that fund. (2) Separate accounts shall be kept of receipts carried to, and payments made out of, the county fund (a) for general county purposes; (b) for each special county purpose, except that, where as respects any two or more special county purposes the part of the county chargeable is the same, one separate account may be kept as respects both or all of those purposes; and the account for general county purposes shall be called the general county account, and an account for any special county purpose shall be called a special county account.

Section 184 (1) is in these terms:

All payments to and out of the county fund shall be made to and by the county treasurer.

On a consideration of the various statutory provisions, the view that I have formed is that it is correct and appropriate to say that members of a county police force are persons who are paid by the county council concerned. The expenditure which their service involves must be paid out of the county fund, and the payment must be made by the county treasurer. It is, in my view, the county council who are paying. The statutory direction that every police authority must comply with regulations to be made by the Secretary of State, and that such regulations may deal with a number of topics, including that of pay, does not purport to enact that the police are to be paid by the police authority. The position remains, in my view, that county police are paid out of the county fund, and that payments out of that fund must be made by the county treasurer.

I must give effect to this view which I have formed unless there are any authorities which have laid down a contrary view. I pass, therefore, to consider certain cases which are in point. After the Act of 1888, a question arose in Somerset whether it was the county council or the standing joint committee who had control of buildings and premises for the accommodation of quarter sessions or justices out of session or for the use of the police or clerks to justices. The question was submitted to the Queen's Bench Division, where it was decided that it was the standing joint committee that had control. The matter is reported under the name *Ex parte Somerset County Council* (4), and in his judgment MATHEW, J., (58 L.J.Q.B. 512, at p. 515) said:

They are, therefore, to have complete control, as it seems to me, of the questions arising within the meaning of the section, "and all such expenditure as the said joint committee determine to be required for the purposes of the matters above in this section mentioned shall be paid out of the county fund, and the council of the county shall provide for such payment accordingly." Their duty is to say what expenditure shall be required, and then, upon requisition, the county council are to supply the funds, and it is the duty of the county council to obey the requisition made.

CAVE, J. (at p. 516), used these words:

... all questions arising with regard to them, or with respect to anything incidental to them, are to be determined by the standing joint committee, and not by the county council, and that, with regard to all such matters, the only thing which the county

council have got to do is to pay the bill, and that, as I understand, necessarily because the county council alone has the power to raise money, and to pay that money when it has been raised. But, with the solitary exception of having the privilege of paying the bills, it seems to me that the council have nothing to do with the buildings or rooms or premises which are required . . .

In *Ex parte Leicestershire County Council* (5) it was decided that the control over the division of a county into police districts is vested in the standing joint committee of the county. HAWKINS, J., referred to ss. 3 (1) and 9 (1) of the Act of 1888, and went on ([1891] 1 Q.B. 53, at p. 56) :

I have given the matter attentive consideration, and I have come to the conclusion that the effect of this section is to give the standing joint committee control over the division of the county into police districts. The payment of the county police is one thing; the distribution of the county police into districts is another. The administrative duty of making and assessing the rates for the maintenance of the police force, and of directing the application and expenditure of them is, in my opinion, vested under the new Act in the county council, and the control of the division of the county into police districts is vested in the standing joint committee.

What the learned judge said about payment was doubtless said *obiter*, but it is reasonable to read his words as showing that he did not consider that the county police were being paid by the standing joint committee.

In *Glamorgan Coal Co. v. Glamorgan Standing Joint Committee and Others* (6) the question concerned the liability of the standing joint committee to pay for the expenses of housing and feeding certain additional police brought from outside to assist the county police. The housing accommodation and the meals supplied had been provided by the plaintiffs at the request of the chief constable. The county council was sued as well as the standing joint committee. No question, however, arose in regard to the payment of the police. It was held in that case by the majority in the Court of Appeal that the standing joint committee had power to enter into the contracts so as to bind themselves, and that they were, therefore, rightly sued upon them, the county council being properly joined as parties to the action as they were the persons who would have to pay the amount found due and against whom an order for payment might be necessary. The order made by the Court of Appeal was in these terms ([1916 2 K.B. 206, at p. 225]) :

Allow the appeal, vary order of the court below. Decide in favour of the plaintiffs against the defendants, the standing joint committee and the county council, on the questions of liability raised on the pleadings so far as these relate to police other than metropolitan police, and against the plaintiffs and in favour of the said defendants so far as these questions relate to the metropolitan police. Declare that the defendants, the standing joint committee, are liable for the expenditure incurred by the plaintiffs as in the pleadings mentioned in respect of the police other than the metropolitan police, but not in respect of the metropolitan police. Refer the claim of the plaintiffs to an official referee, unless otherwise arranged, to ascertain the true amount thereof. Direct judgment to be entered in favour of the plaintiffs against the said defendants for the amount when ascertained. Order that the costs in the court below be plaintiffs' in any event . . .

It is helpful to read a passage in the judgment of PICKFORD, L.J. ([1916] 2 K.B., at p. 231) :

This only leaves the question whether under the statutes the standing joint committee or the county council can be sued upon the agreements made by the chief constable. If, as I think, he had created an obligation upon the county to pay, the question of whether it can be enforced by action or otherwise is purely technical, and would, I think, never have been raised but for the fact that the defendants were unwilling to pay for the untenable reason which I have already mentioned. Still, if it is a good point, they are entitled to the benefit of it. The standing joint committee is a statutory body, and its duties and liabilities are in substitution for those of the justices before the Local Government Act of 1888. Before that Act the justices under various statutes, chiefly the County Police Act, 1839, and the County and Borough Police Act, 1856, were the police authority, and were charged with the duty of supporting the police force. In order to discharge this duty they could and did make contracts for buildings, clothing, etc., for police purposes, and by s. 2 of 21 and 22 Vict. c. 92, except where otherwise provided for, contracts were made on their behalf by the clerk of the peace, and he could sue or be sued upon them, payment being made out of the county fund. In 1888 the Local Government Act, s. 9, transferred these powers, duties and liabilities to the quarter sessions and county council jointly to be exercised by the standing joint committee . . . It seems to me that if the duties and liabilities which required the making of contracts before are transferred to the standing joint committee.

there must be implied a power of contracting, and this is consistent with s. 25 of the Police Act, 1890, which gives them the power of making a particular kind of contract. It cannot, I think, be a correct construction of this legislation that the standing joint committee had no power of contracting except in the one instance mentioned in that Act. It was necessary to give them that power expressly, because it extended beyond the support of their own police.

A more difficult question is who is bound by a contract made by them. They are not an incorporated body, and it could not have been intended that the members should be personally liable, and they have no seal under which they can contract when a seal is required. In ordinary cases no difficulty arises. The standing joint committee indent, so to speak, for what they want, and the necessary contract is made by the county council, who cannot object to the requirements of the standing joint committee, but there is no provision in the Acts that the county council shall be a party to all their contracts as the clerk of the peace was a party to those of the justices. I think that the agreements mentioned in s. 25 are intended to be contracts of the standing joint committee on their own behalf and not as agents for the county council, and if that be so I think that this section, considered in connection with the latter part of s. 30 of the Local Government Act, 1888, points to all contracts made by the standing joint committee being their contracts, payment for which is to be made by the county council. I think that when the standing joint committee made a contract by doing so they determined the proper expenditure under that contract, which must be ascertained in case of dispute by the ordinary tribunals to be necessary expenditure, and the county council must pay it, but that the contract remained that of the standing joint committee. The question is not, in my opinion, very important, as the same result is obtained in each case, and the only difference is that the form of recovery is by means of a declaration that the standing joint committee are liable for the amount and an order on the county council to pay it instead of by means of a direct judgment against the county council.

Reference may also usefully be made to the judgment of BRAY, J. ([1916] 2 K.B., at pp. 241, 242):

I think the judgment should declare that the standing joint committee are liable to pay all the claims of both plaintiffs in respect of all the police other than the metropolitan police (subject to the inquiry as to the items) and that they are not liable to pay the claims in respect of the metropolitan police. As regards the county council, they were in my opinion proper parties to this action for two reasons: one because they as the paymasters are the persons really interested, and the other because I think that the plaintiffs are entitled to an order that the county council should pay to the plaintiffs the sums for which the standing joint committee are found to be liable. In my view, this case, though not dealing with any question of the payment to be made to members of the police force in respect of their services, tends to support the view which I have expressed.

For the reasons which I have given, I consider that the superintendent was and is a person paid by the Lancashire County Council, who, therefore, have power to provide a house for him. The Minister, in confirming the acquisition order, did not overstep his powers. In my judgment, therefore, this application fails.

Application dismissed with costs.

Solicitors: *Bird & Bird*, agents for *T. H. & T. Dodd & Buckley*, Preston (for the applicants); *Solicitor, Ministry of Health* (for the respondent).

quished. HARRISON v. HOPKINS. [Reported by B. ASHKENAZI, ESQ., Barrister-at-Law.]
[2 All E.R. 597.]

PARKER AND OTHERS v. ROSENBERG.

[COURT OF APPEAL (Scott, Tucker and Bucknill, L.JJ.), December 10, 18, 1946.]

Landlord and Tenant—Rent restriction—Recovery of possession—House required by landlord—"Landlord"—Beneficiary under will—Trustees enabled to permit beneficiary use of house or to receive net rents and profits—Beneficiary not party to letting of house—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), sched. 1 (h) (i).

By her will, J.M., who died in 1937, demised to two trustees a freehold dwelling-house on trust for sale and conversion with power to postpone and in the meantime to permit M.C.M. during her life either to have the use and enjoyment of the house or to receive the net rents and profits thereof. From and after the death of the survivor of herself and M.C.M., the testatrix gave the trust fund to N.K.M. absolutely. In 1941 the trustees let the house to the defendant for a year, and the tenancy was extended

from time to time and finally terminated on May 19, 1946. The property being within the Rent Restriction Acts, the two trustees and M.C.M. claimed possession from the defendant under sched. I (h) (i) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, on the ground that M.C.M., as landlord, required the house as a residence for herself.

HELD: (i) the trustees, being personal representatives having no beneficial interest in the house, could not avail themselves of sched. I (h) of the Act of 1933: *Sharpe v. Nicholls* (1) followed.

(ii) M.C.M. was not a party to the tenancy agreement; she was not entitled to the reversion of the property; she was not, and would not be, "entitled to possession of the house" but for the Rent Restriction Acts, within the definition of "landlord" in s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and apart from the Acts would not be entitled to sue in ejectment; and, therefore, she could not obtain possession under sched. I (h).

[AS TO POSSESSION REQUIRED BY LANDLORD FOR HIS OWN OCCUPATION, see HALSBURY, Hailsham Edn., Vol. 20, p. 332, para. 396; and FOR CASES, see DIGEST, Vol. 31, p. 580, Nos. 7283-7291.]

Case referred to:

(1) *Sharpe v. Nicholls*, [1945] 2 All E.R. 55; [1945] K.B. 382; 114 L.J.K.B. 409; 172 L.T. 363; Digest Supp.

APPEAL from Worthing County Court.

The plaintiff claimed from the defendant possession of a dwelling-house within the Rent Restriction Acts at Worthing. The county court judge made an order for possession against the defendant, who now appealed.

E. S. Fay for defendant.

B. E. Dutton Briant and *F. K. Glazebrook* for plaintiffs.

Cur. adv. vult.

Dec. 18. TUCKER, L.J., read the following judgment of the court: This is an appeal by the defendant from a decision of His Honour Judge Archer whereby he made an order for possession in favour of the plaintiffs against the defendant in respect of a dwelling-house known as "Denmaro," St. Thomas Road, Worthing.

The plaintiffs are Alan Rodgson Parker, Warren Edward Lovesey and Edith Marianne Christine Marsh. The first two plaintiffs are trustees of the will of Emma Jessie Marsh, who died on February 20, 1937, and the third plaintiff is a sister of the testator and a beneficiary under her will. The relevant words of the will are as follows:

I devise and bequeath to my trustees (free of all estate legacy and succession duty and the duties, if any, on such duty) my freehold bungalow and land known as Denmaro St. Thomas Road Worthing aforesaid Upon trust to sell and convert the same into money at such time and in such manner as my trustees shall think fit and so that my trustees shall have the fullest power to postpone such sale or conversion for so long as they may think proper without being responsible for loss and I direct my trustees to stand possessed of the said freehold property or the proceeds of sale thereof or the investments for the time being representing the same (hereinafter called the trust fund) Upon trust to permit my sister Edith Marianne Christine Marsh during her life until sale of the said property to have the use and enjoyment thereof or to receive the net rents and profits thereof and thereafter during the remainder of her life the income of the net proceeds of sale thereof or of the investments from time to time representing the same and from and after the date of the death of the survivor of myself and my sister I give the trust fund both capital and income thereof to my niece Nora Kathleen Marsh absolutely and I hereby declare that it is my wish but without in any way limiting the discretion hereby conferred upon my trustees and without creating any trust or legal obligation that as far as possible no sale of the said property shall take place during the lifetime of my sister the said Edith Marianne Christine Marsh.

By an agreement in writing dated Feb. 19, 1941, the trustees let the premises in question to the defendant for a term of one year at a weekly rent of £1 2s. 6d. The tenancy was extended from time to time and was finally terminated on May 19, 1946. During the tenancy the third plaintiff (hereinafter referred to as "Miss Marsh") received the rents and profits from the house by permission of the trustees. The tenancy was determined by the trustees for the purpose of allowing Miss Marsh to go into occupation of the house pursuant to their discretion under the will to permit her to have the use and enjoyment thereof

during her life. The house was within the Rent and Mortgage Interest Restrictions Acts and the plaintiffs claimed to be entitled to possession under para. (h) of sched. I to the Act of 1933 on the ground that the house was required for occupation as a residence for Miss Marsh. The relevant words of sched. I to the Act of 1933 are as follows :

A court shall, for the purposes of s. 3 of this Act, have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply . . . without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if . . . (h) the dwelling-house is reasonably required by the landlord . . . for occupation as a residence for (i) himself . . .

There follows a proviso with regard to "greater hardship," to which it is not necessary for the present purposes to refer.

In *Sharpe v. Nicholls* (1), it was held by this court that personal representatives having no beneficial interest in the dwelling-house in question cannot avail themselves of the provisions of para. (h) of sched. I. It follows that the trustees in the present case could not have obtained an order for possession if they were the only plaintiffs. Can they remedy this by joining Miss Marsh as plaintiff, and was she properly joined ?

Under the will of the testator Miss Marsh had no right to compel the trustees to give her possession of the house. The trustees held the property under a trust for sale and conversion with power to postpone and in the meantime to permit Miss Marsh in their discretion during her life either to receive the net rents and profits or to have the use and enjoyment thereof and they were not bound to postpone the sale until after Miss Marsh's death. It is further to be observed that Miss Marsh was not a person with the sole beneficial interest, as the testator's niece, Nora Kathleen Marsh, was ultimately entitled to the trust fund which included the proceeds of sale of this house.

Reliance was placed by counsel for the plaintiffs on the definition of "landlord" in s. 12 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. It was contended for the defendant that the definition in that Act was inapplicable to the Act of 1933 since that Act itself has a definition section, viz., s. 16, which does not repeat the 1920 Act definition of "landlord," and, further, s. 18 of the 1933 Act, which provides that the Act may be cited together with the principal Acts, does not say, as in the case of s. 4 of the 1923 Act, that the Act is to be construed as one with the principal Act. This matter was discussed by MORTON, L.J., in *Sharpe v. Nicholls* (1). We do not consider it necessary to decide this question because we are of opinion that Miss Marsh has no title to the premises and is not a person who is or would, but for the Act, be entitled to possession of the same. She is, accordingly, not within the definition. It is clear that neither the definition section of the 1920 Act nor para. (h) of sched. I to the 1933 Act confer on anyone any right to an order for possession which he does not possess at common law. Paragraph (h) is designed to relax in certain cases the previously imposed statutory restrictions on the common law right of recovery. In the present case Miss Marsh, apart from the Rent Restrictions Acts, would not have been entitled to sue in ejectment. She was not a party to the lease and was not entitled to the reversion. There is nothing in para. (h) enabling her to sue or be added as a plaintiff. As the proper plaintiffs, the trustees, cannot bring themselves within para. (h) and Miss Marsh cannot herself sue, it follows that no order for possession could properly be made in the present case.

A further point was taken on appeal to the effect that in any event there was no evidence on which the learned county court judge could hold that the granting of the order would not cause greater hardship than its refusal. There was, in our view, evidence on which the judge could have found either way. It was a pure question of fact and there is nothing in this ground of appeal. In the result, the appeal succeeds.

Appeal allowed with costs.

Solicitors: *Jackson & Jackson*, agents for *H. D. Grey*, Worthing (for defendant); *Waller, Neale & Houlston*, agents for *Marsh & Ferriman*, Worthing (for plaintiffs).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

Re DAVEY.

[COURT OF APPEAL (Scott, Tucker and Cohen, L.JJ.), December 17, 1946.]

Emergency Legislation—Liabilities adjustment order—Relief from payment of rent—Quantum—Discretion of court—"Lettable value"—Development of shopping centre arrested—Liabilities (War-Time Adjustment) Act, 1941 (c. 24), s. 6—Liabilities (War-Time Adjustment) Act, 1944 (c. 40), s. 6.

The quantum of reduction of rent under the Liabilities (War-Time Adjustment) Act, 1941, as amended by the Liabilities (War-Time Adjustment) Act, 1944, is in the discretion of the county court judge. The fact that the contemplated development of a shopping centre is arrested and that some prospective tenants are prepared to take a risk and pay full rent immediately, in the hope of success later on, is in no way inconsistent with the current lettable value being comparatively low.

[FOR THE LIABILITIES (WAR-TIME ADJUSTMENT) ACT, 1944, s. 6, see HALSBURY'S STATUTES, Vol. 37, p. 18.]

APPEAL by the creditor from an order made at Willesden County Court under the Liabilities (War-Time Adjustment) Act, 1944, reducing the rent payable for a house and shop from £200 to £150 a year.

M. Levene for the creditor.

L. Stranger-Jones for the debtor.

SCOTT, L.J.: This is a case in which, under the Liabilities (War-Time Adjustment) Acts of 1941 and 1944, the judge reduced the rent payable for a house and shop in Wembley from the £200 a year provided for by the lease, which was for 21 years with options to determine it, to £150 a year. He did so under the provisions of s. 6 of the Act of 1944, which put a new s. 6 into the earlier Act of 1941. It runs as follows:

(1) Where at the date of the protection order the debtor is the tenant of any premises, the court may in the liabilities adjustment order provide that, in respect of any period whether before or after the making of the order, the debtor shall be wholly or partly relieved from the payment of rent—Provided that: (a) in the case of a period before the making of the order, the court shall not grant relief under this subsection unless in its opinion the lettable value of the premises was depreciated during that period as a result of war circumstances, and shall not wholly relieve the tenant from the payment of rent unless in its opinion the premises had no lettable value during that period, or reduce the rent below such amount as in the opinion of the court represents the average lettable value during that period.

The definition of "lettable value" is contained in sub-s. (2):

"Lettable value" in relation to any premises of which the debtor is tenant, means the rent at which in the opinion of the court the premises might reasonably be expected to let, or, as the case may be, might reasonably have been expected to let, under a tenancy for one year granted upon the same terms and conditions (so far as applicable) as those upon which the debtor is holding the premises.

The creditor, who was the landlord and had his rent reduced, appeals on two grounds. The first is that there was no evidence on which the judge could come to the conclusion to which he did and make a reduction of the rent. It is to be observed at once that, if there was any evidence, the quantum of reduction was a matter of discretion for the judge and, therefore, one on which we cannot interfere, even if we would. In my view, there was in this case evidence on which the judge could proceed to make the order he did. The evidence of the tenant himself, I think, was sufficient by itself for us to say that there was some evidence. Whether we should in his place have made the same reduction I express no opinion. We might have, we might not.

The other submission was that the judge misdirected himself in applying the definition of "lettable value" which predicates a hypothetical tenancy for one year granted on the same terms and conditions, so far as applicable to a one year tenancy, as those on which the debtor is holding. The judge thus referred to that in connection with the contemplated development of the neighbourhood as a shopping centre in competition with others, for which object the debtor had taken the shop and house:

The development was arrested and has not yet really commenced. The fact that certain people are willing to take a risk and pay full rent immediately, no doubt in the

hope of success later on, is in no way inconsistent with the present value of a year's letting being comparatively low.

A From that expression I cannot think that he has in any way misapplied the provision of the Act. I regard the intention of the subsection which contains the definition as comparable, as TUCKER, L.J. pointed out in the course of the argument, to the measure of value afforded by the ordinary rule in rating law of the hypothetical tenant from year to year. I, therefore, see no reason for supposing that the judge has gone wrong, and the appeal must be dismissed with costs.

B TUCKER, L.J.: I agree. It is, of course, important to bear in mind that the machinery of these Acts is designed to assist debtors who have got into difficulties. It is, no doubt, the desire of the liabilities adjustment officer and of county court judges so far as they can, without doing any injustice to anybody else, to get the debtor on his feet again. One of the ways in which they are enabled to do that is by making reductions in the rent payable by the tenant, but, of course, great care has to be taken to see that, in endeavouring to achieve that laudable purpose, no injustice is done to the landlord who is under a contractual relationship with the tenant and at whose expense the tenant is not entitled to surmount his obstacles, subject only to this, that special provision is made in the Act for a reduction of rent in the circumstances there laid down. C I need not refer to the subsections, but they define lettable value and they require that the lettable value of the premises in question should have been depreciated as the result of circumstances due to the war. It is, therefore, very necessary for the county court judge in all these cases to see that those requirements have, in fact, been fulfilled before he makes a reduction in the rent payable by any tenant at the expense of the landlord.

D At one time I did feel some doubt with regard to these proceedings because the concluding paragraph of the liabilities adjustment officer's report of June 28, 1946, draws attention to a deed entered into on Oct. 30, 1941, between the landlord and the tenant, when bombs were dropping not very far from Wembley, whereby the parties agreed to a reduction of the rent, and continues:

E Having regard to the provisions of para. 3 of the release and waiver and the provisions of the Tenancy Agreements Order, 1946, the liabilities adjustment officer submits that para. 3 (b) of the said release and waiver shall apply and, therefore, the annual rent payable by the debtor for the premises shall be at the rate of £130 a year.

F He is there recommending, so far as I can see, that simply because the landlord and tenant, when the bombs were falling in 1941, agreed to a reduction of the rental to £130, that shall be taken to be the figure now that the bombs have stopped dropping, and the county court judge is confined to the grounds set out in s. 6 of the Act of 1944. It appears to me that everything referred to in the concluding paragraph of that report is completely irrelevant to anything with which the county court judge had to deal. However, having approached the case from that angle, I think it was necessary to see carefully what evidence there was before the county court judge, and we have been taken through every piece of evidence which was before him. I am satisfied that there was material which justified him as the tribunal of fact in making an order within the limits laid down in s. 6 of this Act. There is nothing to indicate that he in any way misdirected himself as a matter of law. This was a pure question of fact and his finding cannot, in my view, be disturbed on appeal to this court. G For those reasons, I agree the appeal fails.

I COHEN, L.J.: I also agree. Counsel has said all that could be said on behalf of the creditor. I am unable to find any indication that the county court judge misdirected himself as a matter of law, and I entirely agree with my brothers that there was evidence on which he could reach his conclusion. Counsel's argument was largely based on the suggestion that the debtor had been allowed to give evidence as an expert and that he was not qualified as an expert as to the value of the premises. I do not think that is a true view of his evidence. I think he was giving his evidence as a tobaccoist who was perfectly competent to say what he as a tobaccoist would be prepared to give for premises which were to be let on the terms that they were only to be used for the purposes of the business specified in cl. 11 of the draft lease. To that extent I think his evidence was admissible. Its value was a matter for the judge.

He had that evidence and other matters which I need not specify before him. I entirely agree, in those circumstances, that it is impossible for us to disturb his finding on this question of fact. I, therefore, agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Montague, Adler & Arnold* (for the appellant); *H. R. Hodder & Son*, Willesden (for the respondent).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*] A

SUTTON v. BOOTLE CORPORATION

[COURT OF APPEAL (Scott and Asquith, L.JJ., and Vaisey, J.), November 26, 27, December 16, 1946.]

Negligence—Licensee—Infant—Recreation ground—Injuries caused by defective swing—Local authority ignorant of defect—Liability. B

The plaintiff, a child of 9, while playing in the playground in one of the defendant corporation's public parks, was boarding a swing when her finger, the top joint of which was later amputated, was caught between the unguarded lug and socket of a checking device designed to prevent the swing going too far. The defect was one which could easily have been remedied. The defendants, who had no knowledge of the danger, had obtained the swing from an old-established firm of manufacturers, and the model was one which had been in use for years without any previous accident of a similar nature: C

Held: the defendants owed the plaintiff the obligation of a licensor to a licensee, and since, as such, they were bound to do no more than warn her of dangers actually known to them, no liability attached to them. D

[AS TO DUTY OF TAKE CARE IN RELATION TO CHILDREN, see HALSBURY, Halsham Edn., Vol. 23, p. 584, para. 836; and FOR CASES, see DIGEST, Vol. 36, pp. 68-71, Nos. 433-462.]

Cases referred to:

- (1) *Addie (R.) & Sons (Collieries) v. Dumbreck*, [1929] A.C. 358; 98 L.J.P.C. 119; 140 L.T. 650; Digest Supp.
- (2) *Ellis v. Fulham Borough Council*, [1937] 3 All E.R. 454; [1938] 1 K.B. 212; 107 L.J.K.B. 84; 157 L.T. 380; 101 J.P. 469; Digest Supp.
- (3) *Purkis v. Walthamstow Borough Council* (1934), 151 L.T. 30; 98 J.P. 244; Digest Supp.
- (4) *Coates v. Rawtenstall Borough Council*, [1937] 3 All E.R. 602; 157 L.T. 415; 101 J.P. 483; Digest Supp.
- (5) *Glasgow Corp'n. v. Taylor*, [1922] 1 A.C. 44; 91 L.J.P.C. 49; 126 L.T. 262; 86 J.P. 89; 36 Digest 70, 453.
- (6) *Wilsons & Clyde Coal Co., Ltd. v. English*, [1937] 3 All E.R. 628; [1938] A.C. 57; 106 L.J.P.C. 117; 157 L.T. 406; Digest Supp.
- (7) *Francis v. Cockrell* (1870), L.R. 5 Q.B. 501; 10 B. & S. 950; 39 L.J.Q.B. 291; 23 L.T. 466; 34 Digest 166, 1296. E F

APPEAL by the defendant corporation from a decision of STABLE, J., given at Liverpool Summer Assizes on June 4, 1946, in favour of the plaintiff, on the ground that it was the duty of a corporation, which provided implements for children to play with in a public recreation ground maintained by them, to provide safe and proper implements so far as skill and care could effect that result. The facts appear in the judgment of SCOTT, L.J. G

W. Clothier, K.C., and *R. S. Nicklin* for the appellants.

E. Wooll, K.C., and *R. Heilbron* for the respondent.

Cur. adv. vult.

Dec. 16. The following judgments were read. H

SCOTT, L.J.: This appeal is by the defendant corporation against a judgment of STABLE, J. in an action brought on behalf of a girl of 9 years old, claiming damages for a personal injury alleged to have been caused to her by the negligence of the corporation. The judge decided in her favour and awarded her £404 19s. 6d. The appeal is on liability only. The injury was the loss of the first and second parts of the index finger of her left hand, which was crushed in a "plank" swing belonging to and maintained by the defendants. The accident happened on the afternoon of Sunday, July 1, 1945, in a public

playground reserved and specially equipped with children's delights for their recreation and amusement known as "Miller's Bridge Playground." If the judgment below is right it will have far-reaching consequences all over the country for the innumerable local authorities who have playgrounds equipped with the many varieties of such appliances, although that consideration cannot affect our decision.

A The defendants' liability, as claimed on behalf of the plaintiff and found by the judge, was that which modern text-books on the law of torts put under the general heading of "Dangerous structures and premises," where the responsibility of the occupier varies according to the relationship in which the plaintiff stands towards him, *i.e.*, according as it is that of invitee or of licensee or of trespasser. I have no doubt that the general relationship of children coming to play in a children's playground by the public invitation of the local authority is that of licensees, and that, therefore, it was that measure of responsibility which alone was borne by the defendants. In the case of a licensee liability attaches, in my opinion, only if the occupier knows of the danger and fails to protect or warn. To decide in any particular case whether liability attaches, it is therefore essential to understand the nature of the danger very clearly. The court cannot otherwise safely decide the issue of knowledge or no knowledge.

C The story of the accident is this. This child was standing by on the ground, waiting her chance to board the swing, which held five but was only carrying four children at the moment—two of 13 years and two of 11. Eventually she tried to stop the swing as it came past her from right to left, presumably as it came near its bottom point and before it began to rise on the opposite half of its swing. I say from right to left although that is not found by the judge or even mentioned by the eye witnesses, because I think it must have been so, in view of the construction of the swing, which I will explain presently. She caught hold of something with her right hand, was carried partly off her legs, half fell, and tried to save herself with her left hand. The finger of that hand was caught and crushed. How and by what was, in my opinion, never proved with any certainty. The judge, however, held that it was in a part which was christened by the plaintiff's expert witness "the nutcracker." On the other hand, he found that the defendants had no knowledge of the existence of danger and acquitted them of any want of care in relation to the swing.

E He held that the plaintiff was a licensee; none the less he held that they were liable on the ground that because of the "nutcracker" the swing was "defective," saying that it was "a serious defect in this particular type of swing which could easily be remedied." He rejected the defendants' contention that to the plaintiff as a licensee they were only under a duty to warn or protect the plaintiff if they knew of the defect, and consequently imposed upon the defendants a measure of duty which was, in my opinion, erroneous in law. I might limit this judgment to that question of law, but having regard to the very widespread and highly desirable provision by local authorities of these playgrounds with mechanical amusements for children I think it better to state the facts with particularity. The plank-swing in question is shewn in three excellent photographs, which made it possible for the court to understand its mechanism, although it is not easy to describe it in words. I will, however, do my best.

G It consists of a long plank, about 11 ins. wide by 3 ins. thick, suspended from two tubular steel cross bars about 10 ft. above the ground, each supported by four strong tubular legs well splayed out so as to make each carrying structure rigid. The suspension of the plank is effected near each end of it by two slighter tubes carrying rings at the top which enclose the cross bar, and thus can swing freely about it. These are called the "hanger bars," because the plank hangs by them on the cross-bar. In order that the plank may be free to swing backwards and forwards, the attachment of the hanger bar at its lower end must leave it free to oscillate. That is effected by jointing it like the spoke of a wheel on to a hub which turns freely around the cross-bar which supports the plank and thus also forms an axle for the hanger bar. The latter does not revolve right round it, of course, but only backwards and forwards through a circular arc determined by the length of the hanger bar and the scope of the upward swinging movement of the swing from zero. Each end of the plank thus moves in absolute unison with the other, with the necessary result that the plank

always remains horizontal however near to the level of the upper cross-bar the children may swing it. When at rest the plank is only 2-ft. above the ground and the hanger bars then hang in a vertical position.

Such plank-swings have been in use for a long time, but some twenty or so years ago it was apparent that there was danger to the children if they swung the plank very high up, and a clever braking device was invented which had the effect of bringing the upward swing quite gently to an end, before it got too high, by means of a gradual automatic increase in the braking resistance to the upward momentum. The mechanism consists of an iron stirrup, placed across but under the plank, with upturned ends enclosing the sides of the plank. It is set near to but outside the supporting cross-bar on which the hanger bar turns. The upper part of each upturned end of the stirrup carries a projecting and rounded piece called a "lug" jutting out an inch or so towards the hanger bar, which is there rectangular in section and has the side facing the lug of the stirrup hollowed out slightly, so as to make a socket against which the lug will lie when each alternate upward swing brings the hanger bar into contact with it. As the momentum of the swing presses the oscillating hanger bar harder and harder against the lug, that pressure is transmitted through the stirrup to a group of leaf springs attached to it at their top end and rigidly fixed at their lower end to the underside of the plank beyond the cross-bar. These springs exert increasing resistance against the pressure of the hanger bar on the lug, until in the end they completely stop its upward swing. The evidence does not enable us to say at what point in the upward swing the spring resistance begins to operate nor when it brings the upward swing to a dead stop, but as a guess I will assume 55 and 70 degrees respectively. The hanger bar is a pendulum, 8 ft. in length (on my figures). Adding 2 ft. for the height of its lower end above the ground when the swing is at zero, I will assume that the angles of 55 and 70 degrees represent respectively points 5 ft. 6 ins. and 8 ft. above the ground. On these figures it seems *prima facie* unlikely that the child's tiny finger could ever have been caught between the lug and the socket—what the expert who gave evidence for the plaintiff called "the nutcracker." For *ex hypothesi* its jaws are $1\frac{3}{4}$ ins. apart when the pendulum is at zero, and would not quite close till the moment before the brake begins to act. On this as on other issues of fact the burden of proof was on the plaintiff to prove that the danger point for her was near enough and low enough to be within reach of her hand, but no expert evidence was given to prove the height above the ground at which the nutcracker closed enough to grip her tiny finger if it was there to be caught. I am not a mathematician, but on my suppositions how much lower than 5 ft. 6 ins. above the ground would the mouth of the nutcracker close enough to grip the tiny finger? I can see no evidence which would indicate danger even to a skilled engineer. *A fortiori* there was no evidence that the defendants or their playground attendant had the faintest notion of the presence of the danger indicated by the question-begging word "nutcracker" used by the plaintiff's expert. Whereas the nutcracker was always open $1\frac{1}{2}$ ins. at the bottom of the swing (in whichever direction the swing was moving), it is clear that the plaintiff was standing with her face towards the swing as it was coming down past her (as I think) from right to left, and therefore that the nutcracker, which at the top had been open $3\frac{1}{2}$ ins., was in process of closing to its width of $1\frac{1}{2}$ ins. at its bottom position, and would not close altogether till (on my supposed figure) the swing up to the left reached 55 degrees. The fact that she had half fallen and so reduced her upward reach makes it still more difficult for her to get her hand up to anywhere near the point where the "lug" and the "socket" would come close enough together to grip the finger. The judge's comment that the defect was one "which could quite easily be remedied" following on his earlier observations makes me wonder whether he really appreciated the working of the mechanism. I certainly did not until I had thought about it quite a lot. The plaintiff's evidence is: "The girls were swinging the jerking boat, and I was trying to get on. I got hold with that hand and my hand slipped right down and got in between the two bars. The two bars got close together, and my finger came right off." My comment is that if her left hand got hold of the hanger bar and slipped down it, it could not have been caught, for the very simple reason that at the bottom of the swinging movement the socket on the hanger bar was $1\frac{3}{4}$ ins. away from the lug of the stirrup. As I have already

said, it seems probable that the two would not approach each other near enough to grip the child's finger until the hanger bar had swung onwards and upwards to a height some feet above the bottom point. There is no indication of anybody pointing out this apparent misapprehension of the mechanical possibilities, but it throws *prima facie* doubt on the inference of fact at which the judge arrived. On the other hand, the case for the defendants presents comparable, though different, difficulties. The place where they contend that the finger was caught is between the underside of the plank and the topside of the stirrup. That gap too comes into and out of existence like the "nutcracker" as a result of the same cause, *viz.*, the compression or release of the brake springs. It opens as the springs are compressed and closes as they are released, *i.e.*, the precise opposite action to that of the "nutcracker." As the latter closes, the stirrup opens, and *vice versa*. If (as I have inferred was the fact) the accident happened in point of time just as the right-hand pair of hanging bars came past the plaintiff from right to left, it is important to remember, first, that there had been no compression at any time during that downward swing, and, secondly, that compression did not begin till after the upward half of the same oscillation had (on my guessing) taken the hanger bar to—say—55 degrees from the vertical (or thereabouts). These facts seem to me to make it equally, or even more, unlikely that she got her left hand really under the plank at a time and point when and where the plank had risen enough on the upward swing for the hanger bar not only to have come into contact with the lug, but, also, to have compressed the springs enough to depress the stirrup and produce the necessary gap to admit the finger.

The other children who gave evidence said that it was the "nutcracker" where the finger was caught. The park attendant said it was between the stirrup and plank, because he saw there what he thought was a piece of skin. The judge found as a fact that it was the former. In spite of my assumed figures of angle and height, I do not think that we can differ from him. The only reason why I have at such length discussed the probability on this issue of fact is that it seems to me to compel the inference that the defendants had neither knowledge nor suspicion that this danger was present in the spring, and there was no evidence of anything to put them on enquiry. The view taken by the judge would make the defendants' legal position almost that of an insurer of all children against all accidents caused by amusement plant, though bought from first-class suppliers and well-maintained as this was. The suppliers of this swing were a well-known, thoroughly competent firm of manufacturers making and dealing in such plant and apparatus. They had supplied 150 to 200 such swings all over the country. There had never been any similar accident. There was nothing to suggest that the swing was not maintained in perfect condition. In the absence of expert evidence on the points I have raised I find it very difficult to see how the accident happened, but it did happen.

Since writing the above explanation of the facts, so far as I can understand them, I have read the discussion of the law in the draft judgment of ASQUITH, L.J. I agree with all he says and it is unnecessary for me to add anything. The appeal must be allowed because the defendants have incurred no legal liability.

ASQUITH, L.J. (read by VAISEY, J.) : Counsel for the plaintiff has conveniently summarised the judge's findings of fact as follows : (1) That the child's finger was nipped between the "lug" and the socket ; (2) that the swing was defective and dangerous ; (3) that the defendants did not know this ; (4) that the defect could have easily been remedied ; (5) that there was no contributory negligence by the plaintiff. Like SCOTT, L.J., I see no justification for disturbing any of these findings, though, as he has pointed out, the first might be open to some question. Plaintiff's counsel, on the argument of the appeal, accepted all except the third. I propose, first, to consider the legal position on the assumption that all of the findings, including the third, stands, and, secondly, the question whether finding (3) can be successfully impeached.

I agree with my Lord that the defendants owed the plaintiff the obligation of a licensor to a licensee and no more. A licensor is bound to do no more than warn a licensee entering land in his occupation of dangers actually known to him, and, since in this case the licensors have been found not to have known

the danger, if any, the appeal should be allowed. LORD HAILSHAM's *dictum* in *Addie v. Dumbreck* (1) ([1929] A.C. 358, at p. 365), which purports to impose on the licensor a duty to warn not only of dangers known to him but of any dangers of which he ought to have known, is inconsistent with other House of Lords' decisions and has been recognised by this court as uttered *per incuriam*: *Ellis v. Fulham Borough Council* (2).

The first issue of law is whether the plaintiff was a licensee and no more. The statement of claim is based entirely on the allegation that she was an invitee, though the argument for the plaintiff on the appeal exceeded the ambit of this allegation, and the judge, in my view, gave judgment for her on a basis inappropriate in law to the rights either of a licensee or of an invitee. The effect of the authorities as to who is an invitor and who a licensor is summarised in SALMOND ON TORTS, 10th ed., p. 476, in a well-known passage, which in *Ellis v. Fulham Borough Council* (2) was approved by this court and embodies the following neat test:

The invitor says: "I ask you to enter upon my business." The licensor says: "I permit you to enter on your business."

Judged by this test it seems plain that the plaintiff was a licensee.

Two factors were relied on in this court as imposing on the defendants a more stringent liability than that of licensors. These factors are said (it was not clear to me from the argument whether severally or in their combination, but I will assume the former) to constitute the defendants inviters or to invest them with equivalent liabilities. The first is that the plaintiff entered the recreation ground not by mere leave and licence but "as of right." The second is that the swings constituted in relation to a child an "allurement" and as such may "step up" the obligations of the defendants. I will consider these contentions in turn.

(1) The suggestion that persons entering on publicly or municipally owned parks or recreation grounds enjoy a special privileged status superior to that of licensees would seem to be ill-founded. Text-book authority is opposed to the existence of such a separate class: see SALMOND ON TORTS, 10th ed., pp. 485-487, WINFIELD ON THE LAWS OF TORTS, 2nd ed., pp. 616-620. As to the authorities, *Addie v. Dumbreck* (1) appears to decide that persons entering on premises in the occupation of others (otherwise than under a contract) are classifiable exhaustively as either trespassers, licensees, or invitees, and that there are no intermediate or hybrid classes such as that envisaged by MAUGHAM, L.J., in *Purkis v. Walthamstow Borough Council* (3). *Coates v. Rawtenstall Corpn.* (4) is a direct decision of this court that a municipal authority owning or occupying a recreation ground (in that case, as in this, supplying thereon swings for children) is a licensor and not an invitor. I know of no decision of the Court of Appeal to the contrary. *Ellis v. Fulham Borough Council* (2) is, I think, certainly not such a case, in spite of the doubts expressed by GREER, L.J., and SLESSER, L.J., and MACKINNON, L.J., are emphatic the other way. Nor, I think, can *Purkis'* case (3) be so construed. Unless *Coates v. Rawtenstall* (4) can be shown to be inconsistent with a decision of the House of Lords we are bound by it. The only House of Lords decision with which it might be argued that it was inconsistent is *Corp'n. of Glasgow v. Taylor* (5). For reasons which follow it is not, in my view, inconsistent. The opinion of LORD ATKINSON in that case certainly lends some colour to the view that a person entering a municipally owned park is an invitee, but the opinions of the majority, though some of them certainly use the expression entering "as of right," are very far from amounting to a clear-cut decision that persons entering public parks are more than licensees. The *Glasgow Corp'n.* case (5) was argued in effect on demurrer, and all it decided was that the pursuer's averments could not be struck out as disclosing no cause of action. The headnote ([1922] 1 A.C. 44) is as follows:

The father of a boy, aged seven, who died from eating the berries of a poisonous shrub growing in some public gardens in Glasgow, sued the corporation as the proprietors and custodians of the gardens for damages for the death of his son. The pursuer averred that on a piece of fenced ground in the gardens the defenders grew, among other specimen plants, a shrub bearing poisonous berries which presented a tempting appearance to children; that this enclosed piece of ground was open to the public, access thereto being by a gate which could be easily opened by young children, and was

in a part of the gardens much frequented by children ; that the pursuer's son, with some other children, entered the gardens and ate some of the berries of this poisonous shrub and died ; that the defenders knew that these berries were a deadly poison, but took no precautions to warn children of the danger of picking the berries of this shrub or to prevent them from doing so ; and that there was no adequate notice in the gardens warning the public of the dangerous character of the specimen shrubs growing therein :—*Held*, the pursuer's averments disclosed a good cause of action against the defenders, and that the action ought to proceed to trial.

The actual averments as set out, not in the headnote, but afterwards, do, it is true, allege that the defenders knew or ought to have known that the berries were a deadly poison. But the case proceeded on the footing that actual knowledge had been alleged. No one seems to have adverted to the distinction between actual and constructive knowledge. Thus LORD BUCKMASTER says (at p. 50) :

... thirdly, that the danger was known to the appellants.

And LORD ATKINSON (at p. 53) says :

The defenders were, therefore, aware of the existence of a concealed or disguised danger to which the child might be exposed.

And he repeats this on p. 56. The suggestion which recurs in the speeches of their Lordships that the children entering this public park entered "as of right" was the result of an admission by counsel which in the language of LORD SUMNER (at p. 64) :

... may have meant no more than that the child was not doing wrong in being in the Botanic Gardens, having an unconditional leave and licence from the defenders.

It is obvious from these circumstances that the case was very far from deciding that a person entering on a public park is an invitee or necessarily more than a licensee. It merely decides that an averment of the facts of entry plus an allegation that the defenders knew of the danger was not demurrable. Obviously, so far as it averred actual knowledge, it was not, and no issue was raised as to whether the additional words "or ought to have known" made any difference, for their Lordships either did not appreciate that those words were included or treated their inclusion as immaterial. Before leaving *Glasgow Corpn. v. Taylor* (5), I would point out a further and vital distinction between that case and the present, namely, that, in the first, knowledge by the defenders of the danger was alleged (and for the purposes of a demurrer such allegation had to be assumed to be true) whereas in the present case it has been found as a fact not to exist.

(2) Before, however, passing to the issue of knowledge *vel non* (which the last sentence anticipates), I must briefly deal with the issue raised by the word "allurement"—the other factor relied on as raising the obligations of the defendants to a higher level than that of licensors. The presence of this element, which is, of course, only relevant when the entrant on the defendant's premises is a child, would seem, where it exists, to affect the occupier's duty to this extent, that a danger which is patent to an adult may not be apparent to a child. To a child it may be a concealed trap, accordingly and a warning or other preventive measure may be called for in the case of a child when it would not be called for in the case of an adult, or a warning of a more emphatic or coercive character than would suffice in the case of an adult. What objects are and what are not in law "allurements"? An exhaustive catalogue has not been laid down. Turntables, escalators and paddling pools have been held to "allure." Rivers, ponds and piles of paving stones have been held insufficiently seductive. CLERK AND LINDSELL ON TORTS, 10th ed., pp. 545, 546, place swings in the unalluring class, citing as authority *Ellis v. Fulham Borough Council* (2). If this classification is right it disposes of this branch of the argument, but I doubt if the case goes so far. If a swing or this swing is an allurement it is sufficient to say that no case would appear to exist in which a plaintiff relying on allurement has succeeded, save where there was actual knowledge by the defendants that the alluring object was dangerous. There was, for instance, knowledge in *Glasgow Corpn. v. Taylor* (5), *Coates v. Rawten-stall Corpn.* (4) (if a swing is an allurement), and *Ellis v. Fulham Borough Council* (2).

It would seem, then, that the plaintiff was a mere licensee. The other

point is whether the finding that the defendants did not know the dangerous character of the swing, if dangerous it was, ought, as counsel for the plaintiff argues, to be disturbed. My Lord, in the judgment just delivered, has given a detailed description of the mechanism of the swing, which I respectfully adopt and will not repeat. Having regard to its construction and working, the occurrence of an accident to a small child with a very limited reach was, in my view, extremely unlikely and there were ample materials on which to base a finding that neither through the attendant nor otherwise can knowledge of its dangerous character—if, indeed, it can be held to have possessed any—be properly imputed to the defendants. A

In conclusion, I would remark that the trial judge, in pronouncing for the plaintiff, has assumed a standard of duty on the part of the defendants which is higher than any due even in the case of an invitor. On the stricter of the two alternative views an invitor's duty goes no further than that he shall use reasonable care to see that the premises are safe. He, however, has held in effect that the occupier warrants that the premises shall be as safe as reasonable care and skill (on the part of anyone) can make them, and he invokes in support of this decision, apart from a *dictum* of SCRUTTON, L.J., in *Purkis'* case (3), the speech of LORD MAUGHAM in *Wilson & Clyde v. English* (6), which, like that case, concerned purely the rights and duties as to safe plant, system of working, etc., as between employer and employee, a relationship not involved in this case. The other case in which this high standard of duty is exacted is that typified by *Francis v. Cockrell* (7), a case of entry under a contract and equally remote from that under review here. I agree that the appeal should be allowed. C

VAISEY, J.: I have had the advantage of reading the judgments just delivered, and I agree that on the grounds therein stated this appeal must be allowed. I would only add a few supplementary observations. D

So far as the facts of the case are concerned, I share my Lord's perplexity as to the precise manner in which the plaintiff's finger came to be injured. Each of the two rival theories ("nutcracker" and "stirrup") is supported by some evidence, and while I am not prepared to dissent from the judge's finding in favour of the former, I think that each presents difficulties of a somewhat formidable character. So much so, that I should not be indisposed to postulate a third possibility, such, for example, that the plaintiff's finger was crushed between the upper surface of the plank and the heel of the child who was standing upon it—which might, I think, quite easily have happened without either of the children becoming aware of it. All that is really certain is that the accident did in fact happen somehow, and the very uncertainty as to its exact cause convinces me that the defendants did not know, and, indeed, could not have known, of the existence of any defect, if defect there was, or of any latent danger in the mechanism of the swing. The number of "journeys" which had been made by this swing, and by the 150 to 200 other swings of similar construction, must be of almost astronomical magnitude, running, I suppose, into millions. Queues of heedless small people waiting their turn by the side of the moving "boat" must have formed on tens, or perhaps hundreds, of thousands of occasions, and many thousands of children must have tried to arrest its movement with their hands. Why, then, had this particular kind of accident never occurred before? It is extremely difficult to say and equally difficult (to my mind) to suppose that its occurrence could possibly have been foreseen. I agree in the view that the effect of the judgment under appeal was to put the defendants in the position of an insurer of the plaintiff against an utterly unpredictable risk. The authorities binding upon this court appear to me clearly to establish that on the defendants' playground the plaintiff had the status of a licensee and was, as such, entitled to no greater protection than that afforded to her by being warned against such of the dangers which she might encounter there as (being latent as opposed to apparent or obvious dangers) were actually known to the defendants. A swing must always be a source of danger to children who incautiously get in its way while it is in motion, but that is an apparent or obvious danger against which no special warning would be necessary or appropriate. I am satisfied that no knowledge can be imputed to the defendants of any danger, or any risk of danger, or of any defect of any E F G H

kind in the swing, and that there has been no breach of any duty owed to the plaintiff by the defendants to form a foundation for her action.

Appeal allowed with costs.

Solicitors: *P. F. Walker*, agent for *Weightman, Pedder & Co.*, Liverpool (for the appellants); *Isadore Goldman & Son*, agents for *Silverman & Livermore* (for the respondent).

[*Reported by C. St.J. NICHOLSON, ESQ., Barrister-at-Law.*]

OUZMAN v. KENNEDY.

[COURT OF APPEAL (Scott, Tucker and Cohen, L.J.J.), December 16, 1946.]

County Courts—Adjournment—Action for recovery of possession—Vested right of action—Application by tenant for registration of premises under Defence Regulations—Refusal by local authority—Adjournment pending application to High Court for order of mandamus—Defence (General) Regulations, 1939 (S.R. & O. 1939, No. 927 as amended) reg. 68 CB.

In breach of a covenant in his lease, the tenant of a house sub-let rooms in the house to several tenants. After the commencement of proceedings by the landlord to recover possession of the house on that ground, the tenant applied to the local authority, under the Defence Regulations, reg. 68CB., for registration of the house as accommodation available for occupation by tenants or lodgers, which would have the effect of nullifying any covenant against sub-letting, but an order for registration was refused. The county court judge, considering that, if the local authority did register the premises, he would be precluded from giving effect on the trial of the action to the landlord's claim for forfeiture of the lease, granted an adjournment at the request of the tenant, pending an application to the High Court by way of *mandamus* to compel the local authority to reverse their previous decision:—

HELD: before the application by the tenant for registration the landlord had a vested right of action in respect of the breaches of covenant; reg. 68CB. had no retrospective effect; and, therefore, the landlord was entitled to have the issue of forfeiture of the lease on the ground of breach of covenant decided as a matter of law by the competent tribunal and the judge erred in law in granting an adjournment.

[AS TO COUNTY COURT JUDGE'S POWER TO ADJOURN, see HALSBURY, *Hailsham Edn.*, Vol. 8, p. 286, para. 585; and FOR CASES, see DIGEST, Vol. 13, p. 503, Nos. 536-538; and FOR THE DEFENCE (GENERAL) REGULATIONS, 1939, reg. 68CB, see HALSBURY'S STATUTES, Vol. 38, p. 782.]

APPEAL from Brentford County Court.

The county court judge granted, at the request of the tenant, an adjournment of proceedings for the recovery of possession of premises pending an application to the High Court for an order of *mandamus* to a local authority calling on them to reverse a previous decision refusing registration of the premises under the Defence (General) Regulations, 1939, reg. 68CB. The landlord appealed against the order for the adjournment. The facts appear in the judgment of Scott, L.J.

H. H. Harris for the landlord.

Stephen Murray for the tenant.

SCOTT, L.J.: This is an appeal from a decision of the county court judge in an action by a landlord for possession of a house against the sitting tenant. In the course of that action, and before trial, the judge was asked by the tenant to make an order adjourning the trial generally. The judge made that order, and the appeal is by the landlord against it. Ordinarily an order by a county court judge in regard to the conduct of proceedings is a matter within the judge's discretion, and this court is very slow to interfere with the exercise of his discretion, but in this case a question of principle of great importance is involved, and, in our view, it was transgressed by the judge.

The facts of the case relevant to this question are these. The action in the county court was on the ordinary lines. The particulars of claim, in para. 1, alleged that the landlord was entitled to possession. Paragraph 2 set out his title, namely, that on Aug. 21, 1940, he let the house to the tenant for a term

of 3 years from May 27, 1940, at a yearly rent of £70 payable by monthly instalments in advance. On the expiration of the term the tenant held over subject to the terms of the agreement, *i.e.*, she held over under common law rights. Paragraph 3 says that by the agreement the tenant undertook that she would not, without the written consent of the landlord, assign, underlet, sublet, or otherwise part with possession of the premises or any part thereof. Before us that paragraph has been slightly enlarged by the production of the agreement itself, under which, by cl. 4, the tenant covenanted to keep and use the premises as a private dwelling-house only, and, by cl. 6, covenanted in the terms of the allegation I have just read from the particulars of claim. Paragraph 4 of the particulars of claim says that the agreement contained a proviso for re-entry in the event of any breach. That is followed by an allegation of serious breaches which would be the subject-matter for trial before the judge. The defence was a denial, an alternative of waiver, and, in the further alternative, an application for relief against forfeiture. Those were the issues for trial.

As the application for adjournment was made before the county court judge had investigated the question on the merits, we must assume for this purpose that the claim by the landlord was well founded. The application by the tenant for the adjournment was made in a manner and in circumstances which, in my view, show that it was a tactical manoeuvre made to obtain an indirect advantage out of emergency legislation. The Defence (General) Regulations, 1939, reg. 68CB. provides as follows :

(1) Where a local housing authority have established a register for the purposes of this regulation, any person having in any dwelling in the area of the authority occupied by him living accommodation which he is willing to make available, whether with or without furniture for use therein, for occupation by tenants or lodgers, may apply to the authority for registration of the accommodation and of the terms on which the householder is willing to make it available as aforesaid. (2) On application being made under the last foregoing paragraph, the local housing authority shall, if they are satisfied that the accommodation is, or will be rendered, suitable for accommodation as aforesaid and approve the said terms, enter the accommodation and terms in the register . . . Provided that the authority shall not be required to register any accommodation and may cancel the registration of any accommodation, if it appears to them that it would be likely to be made available for occupation as aforesaid without being registered under this regulation. (3) The registration . . . shall be cancelled on the application of the person for the time being entitled, subject to the rights over the accommodation of any tenant or lodger . . . (4) While accommodation is registered for the purposes of this regulation, it shall be lawful, notwithstanding any provision to the contrary in any lease or tenancy or in any covenant, contract or undertaking relating to the use to be made of any land, and notwithstanding any restriction imposed by or under any enactment, for the accommodation to be made available for occupation, and to be occupied, as aforesaid in accordance with the registered terms and conditions.

The breach in question in the action was the sub-letting to several tenants who were occupying the house in breach of the covenant. The tenant's object in obtaining the adjournment was to go to the registration authority, get an order for registration, and obtain the advantages, as it was supposed by the tenant, of those provisions.

The proceedings in the county court by the landlord to obtain possession were started on June 6, of this year. On June 27 the tenant applied orally to the Chiswick Borough Council, the authority under the regulations, for registration. At first the committee of the council were disposed to grant the application, but the town clerk looked into the matter and on July 3, 1946, wrote a letter to the tenant's solicitor. After saying that the housing and town planning committee had not power to act in the matter and that their recommendation could not become effective until the meeting of the council later in the month, he says, *inter alia*, that he has considered the matter very carefully and come to the conclusion that the order for registration could not be made. His reasons for so thinking were that, if the order were made, it would enable the regulation to be used either (a) to prevent the application of the Rent Restriction Acts to an existing letting, or (b) to regularise a breach of contract committed before the registration of the premises. I think that the town clerk expressed the law correctly.

Paragraph 4 of the regulation, in my opinion, makes it clear that it is not

intended to be retrospective because it says: "While accommodation is registered" various things may be done. That presupposes that registration will already have been effected, and lawfully effected, and thereupon makes provision for the powers to be conferred as a result of registration. Even without that paragraph, I should have been disposed to hold that the registration was not intended to act retrospectively in regard to any accrued right of action such as that of a landlord arising on the breach of a covenant which gives him a right of re-entry. Quite clearly the application for registration was not a matter which the judge ought to have treated as relevant to the application before him, and that is sufficient reason in itself for saying that he ought not to have made the order appealed from. It is essential, I think, that the question of the rights of the two parties to the tenancy agreement then existing should be tried out by the county court judge without regard to any possible proceedings under the Defence Regulation. I express no opinion in regard to the operation of the Defence Regulation should any application be made hereafter, but, in my view, it was wrong to anticipate any results of that particular application for registration.

We were asked to say that the judge's order directing an adjournment was right simply because of the proceedings which were then already pending to obtain registration. In my view, whatever might be the result of a registration if and when properly effected, the first step to be taken was to ascertain what were then the rights of the parties before the county court. For these reasons, I think that the order should be set aside with costs here and below.

TUCKER, L.J.: I agree. I think the county court judge erred as a matter of law in granting this adjournment. Were it not so we should have had no authority to interfere with the exercise of his discretion, provided that no injustice had manifestly been done thereby. The error of law was that he clearly considered that, if the local authority did register these premises, he would be precluded from giving effect on the trial of this action to the landlord's claim to forfeit this lease. I think that in coming to that conclusion he was wrong. I express no opinion with regard to the power or duty of the local authority to register these premises. Proceedings with regard to that are pending in the Special Paper, but this landlord had started an action at common law claiming forfeiture of the lease on the ground of breach of contract. In my view, he was entitled to go to be asked to deal with this matter without Mr. Ouzman, who is to have that issue decided as a matter of law by the competent tribunal, and there is nothing in the Defence Regulations, reg. 68C, which can affect one way or another the proper rights with regard to the forfeiture of this lease as between the landlord and the tenant. I am expressing no opinion about the position of any sub-tenants there may be in the premises or the precise nature of the order which the county court judge might make if he decided the issue of forfeiture in favour of the landlord, but I have no doubt that the landlord is entitled to have that matter decided by a court of law in an action which he had commenced before this regulation was made and before any application to register had been made to the local authority. It is to be observed, furthermore, that when the application to adjourn this trial was made to the county court judge, an application had, in fact, been made to the local authority and had been refused. That is a matter which is, I think, of some significance, but, despite that refusal, the county court judge was asked to adjourn the trial pending an application to the High Court by way of *mandamus* to compel the local authority to reverse the decision at which they had already arrived.

As I say, that application is pending, and I express no views with regard to the probability of its success or otherwise, but I would make this observation with regard to those proceedings which I hope will be brought to the notice of the court which tries that case. The pleadings have been shown to us. It is an action by way of writ against the local authority, Chiswick Corporation, claiming a *mandamus* directing them to register these premises pursuant to this regulation, and, alternatively, for "a declaration that the defendants are empowered by the said regulation to register the said accommodation pursuant thereto." That is an action between the tenant in the present appeal and this local authority, and the landlord in this action, Mr. Ouzman, is not a party to those proceedings. We are told that the case is what is called a friendly action to decide the rights of the parties, and that the facts and questions of law have been set out in an

agreed Case pursuant to R.S.C., Ord. 34, r. 1. The result is that the judge is going to be asked to deal with this matter without Mr. Ouzman, who is interested in the matter, being heard. If application had been made to the Divisional Court for an order for *mandamus*, provision would have been made under R.S.C., Ord. 59, r. 5, for the service of the notice of motion on parties interested. Sub-r. (3) of that rule provides :

If on the hearing of the motion or summons the court or judge is of opinion that any person who ought to have been served therewith has not been served, whether or not he is a person who ought to have been served under the foregoing provisions of this rule, the court or judge may adjourn the hearing, in order that the notice of summons may be served on that person, upon such terms (if any) as the court or judge may direct.

So that under the *mandamus* procedure before the Divisional Court ample provision is made for seeing that all parties who may be interested in the *mandamus*, or *certiorari*, or other order, are before the court, but the present proceedings have been framed in such a way that, apparently, Mr. Ouzman will not be heard. I only mention that matter that it may be brought to the notice of the judge in considering that action when it does come on for trial. Apart altogether from those proceedings, I am of opinion that there was no ground in law which justified the county court judge in adjourning this claim for possession pending the result of these *mandamus* proceedings.

COHEN, L.J. : I entirely agree with what has fallen from my brethren, but, as we are differing from the county court judge on a matter which is one of discretion, I will state my reasons in my own words.

If the landlord establishes the fact, pleaded in his particulars of claim, that he had, before reg. 68CB was enacted, a vested right of action in respect of breaches of covenant against sub-letting, that vested right, it is conceded, was unaffected by the regulation. I express no opinion about what will be the relief to which the landlord will be entitled in the county court proceedings when they are heard if he establishes the facts on which they are based, but, in the circumstances, I am unable to see how the county court judge could properly come to the conclusion that any order made by him in the county court proceedings would be made a nullity by any order that a judge hearing the Special Case might make. That, however, we are told, is the reason for his decision to grant an adjournment. On the contrary, it might well be (though here again I am not expressing any concluded opinion on a point which the judge who hears the Special Case will have to decide) that the judge hearing that Special Case may consider it desirable that the facts in dispute in the county court proceedings should be ascertained before the Special Case is disposed of. It must be remarked that an application under para. (1) of reg. 68CB must be made by the person having living accommodation which could be made available for tenants or lodgers, but if the landlord succeeds in the county court action, the tenant will have forfeited any right to the living accommodation which he seeks to register. For these reasons, in addition to those given by my brethren, I agree that this appeal should be allowed.

Appeal allowed with costs.

Solicitors : *Chapman-Walker's* (for the appellant) ; *R. Raymond Pollard & Co.* (for the respondent).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

COUCHMAN v. HILL.

[COURT OF APPEAL (Scott, Tucker and Bucknill, L.JJ.), December 10, 11, 18, 1946.]

Sale of Goods—Warranty—Auction—Stipulations in catalogue and conditions of sale excluding auctioneer from responsibility for misdescription—Verbal assurance of condition—Breach—Right of buyer to damages.

The plaintiff bought at an auction sale a heifer belonging to the defendant and described in the sale catalogue as a "red and white stirk heifer, unserved." The catalogue contained the following words: "All lots must be taken subject to all faults or errors of description (if any), and no compensation will be paid for the same." By No. 3 of the conditions of sale: "The lots are sold with all faults, imperfections, and errors of description, the auctioneers not being responsible for the correct description, genuineness, or authenticity of, or any fault or defect in, any lot, and giving no warranty whatever." Before the sale and when the heifers were in the ring the plaintiff asked the defendant and the auctioneer: "Can you confirm heifers unserved?" and received from both the answer: "Yes." Between 7 and 8 weeks after the purchase the heifer suffered a

ADDENDUM.

COUCHMAN v. HILL.

Please insert where this is reported, [1947] 1 All E.R. at p. 103.

EDITORIAL NOTE. It appears that *Hopkins v. Tanqueray* (1854) 15 C.B. 130) was not cited to the Court of Appeal in the present case. In *Hopkins v. Tanqueray* the owner of a horse sent the animal to Tattersall's for sale by public auction. It was to be sold without warranty, but on the day before the sale the owner seeing H. examining the horse's legs said in perfect good faith: "You have nothing to look for. I assure you he is perfectly sound in every respect." H. replied: "If you say so, I am perfectly satisfied," and, on the faith of the representation so made to him by the owner, he bought the horse. In an action by H. for an alleged breach of warranty at the sale of the horse, it was held that the representation made by the owner on the day before the auction formed no part of the contract. MAULE, J., questioned the validity of such a secret bargain for a warranty where third parties attending the sale were bidding on the supposition that the sale was without warranty. It is possible that, if this authority had been before the court in the present case, the decision might have been the same.

which are invisible it is not reasonable.

[AS TO PARTICULARS AND CONDITIONS OF SALE BY AUCTION AND VERBAL STATEMENTS BY AUCTIONEERS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 705, 706, paras. 1161, 1162; and FOR CASES, see DIGEST, Vol. 3, pp. 15-18, Nos. 111-136.

AS TO CONDITIONS AND WARRANTIES GENERALLY, see HALSBURY, Hailsham Edn., Vol. 29, pp. 52-56, paras. 64-68; and FOR CASES, see DIGEST, Vol. 39, pp. 414-422, Nos. 480-546.]

APPEAL from Wincanton County Court.

On Dec. 15, 1945, the plaintiff bought at an auction a heifer, the property of the defendant, which was described in the sale catalogue as "unserved." The events summarised in the headnote having occurred, the plaintiff brought an action against the defendant in the county court claiming damages for breach of warranty on the sale of the heifer. The county court judge held that the plaintiff could not succeed because of the stipulations in the catalogue and the conditions of sale, and he gave judgment for the defendant. The plaintiff appealed.

Gilbert C. Dare for the plaintiff.

E. S. Fay for the defendant.

Cur. adv. vult.

Dec. 18. SCOTT, L.J. read the following judgment: It is a striking feature of county court appeals that they so often present features of great interest, whether of law or of practical importance to the community, and also raise quite difficult problems for solution by the court. The present appeal presents all three features.

On December 15, 1945, the plaintiff purchased at an auction sale held at Grove Farm, Castle Cary, Somerset, a heifer, the property of the defendant, for the sum of £29. The heifer in question was one of two heifers comprised in lots 26/27 in the sale catalogue described as "two red and white stirk heifers, unserved." There can be no question on the facts found by the county court judge but that, in the absence of some special agreement to the contrary, when the hammer fell the resulting contract was subject to the printed conditions of sale exhibited at the auction and to the stipulations contained in the sale catalogue. The latter document contained these words:

Note.—The sale will be subject to the auctioneers' usual conditions, copies of which will be exhibited. The auctioneers will not be responsible for any error or misstatement in this catalogue, or in the dates of calving of any cattle. The information contained herein is supplied by the vendor and is believed to be correct, but its accuracy is not guaranteed, and all lots must be taken subject to all faults or errors of description (if any), and no compensation will be paid for the same.

No. 3 of the printed conditions of sale was as follows:

The lots are sold with all faults, imperfections, and errors of description, the auctioneers not being responsible for the correct description, genuineness, or authenticity of, or any fault or defect in, any lot, and giving no warranty whatever.

On February 6, 1946, a six months old foetus was removed from the heifer in question, and on February 26 the heifer died as a result of the strain of carrying a calf at too young an age for breeding. There was no suggestion that at the time of the sale either the defendant or the auctioneer did not honestly believe that the heifer was unserved. On the other hand, the plaintiff's evidence, which was accepted by the judge, was that he would not have bought it had he had any reason to doubt the accuracy of the description as he required an unserved heifer for service by his own bull at a time of his own choosing.

So far it is, in my opinion, clear that the plaintiff, by reason of the stipulations in the catalogue and conditions of sale, would have had no remedy by way of damages for breach of contract or warranty against the defendant unless the plaintiff is right in his contention that the language of these documents is effective only to protect the auctioneer from personal liability and affords no defence to the defendant in respect of any misstatements in the catalogue for which he would otherwise be liable. It is, no doubt, true that some of the printed conditions of sale deal only with the position of the auctioneer, and that the first part of the note in the catalogue is to the same effect, but it is, in my view, impossible to say that the words "the lots are sold with all faults, imperfections, and errors of description," and the words "and all lots must be taken subject to all faults or errors of description (if any), and no compensation will be paid for the same" are not to be incorporated as terms of the contract as between the vendor and purchaser when the hammer falls. Whether the word "unserved" amounts to a warranty or a condition is immaterial, because it is, I think, clear that it was, in any event, an error of description and as such expressly protected by the words to which I have referred. For these reasons it appears to me that, in so far as the plaintiff relied on the statement in the catalogue to support his claim for damages for breach of warranty, he necessarily failed.

The plaintiff, however, also alleged in his further particulars as follows: "The said warranty was also confirmed verbally both by the auctioneer and by the defendant on inquiry by the plaintiff prior to the sale." As to this the county court judge has accepted the plaintiff's evidence which was to the effect that at the sale and when the heifers were in the ring he asked both the defendant and the auctioneer: "Can you confirm heifers unserved?" and received from both the answer "Yes." There was no contract at that moment. There was an announcement of an auction of specific chattels. It was to the effect, first, that the auctioneer was about to make auction offers of the things and animals in the catalogue on behalf of the vendor to the public attending the auction on the terms of sale contained in the two documents, *viz.*, the catalogue and the printed advertisement of the terms of sale hung up at the auction, and, secondly, that the vendor had given authority to the auctioneer to sell the chattels by auction in those terms. There was no contract in existence until the hammer fell. The offer was defined, the auctioneer's authority was defined, but it was in law open to any would-be purchaser to intimate in advance before bidding

for any particular heifer offered from the rostrum that he was not willing to bid for the lot unless the defendant modified the terms of sale contained in the two documents in some way specified by him. There is no doubt that the plaintiff did make some attempt of the kind in order to protect himself from the risk of buying an animal that was not of the kind described.

The real question is: What did the parties understand by the question addressed to and the answer received from both the defendant and the auctioneer? It is contended by the defendant that the question meant "having regard to the onerous stipulations which I know I shall have to put up with if I bid and the lot is knocked down to me, can you give me your honourable assurance that the heifers have in fact not been served? If so, I will risk the penalties of the catalogue." The alternative meaning is: "I am frightened of contracting on your published terms, but I will bid if you will tell me by word of mouth that you accept full responsibility for the statement in the catalogue that the heifers have not been served, or, in other words, give me a clean warranty. That is the only condition on which I will bid." If that was the meaning there was clearly an oral offer of a warranty which over-rode the stultifying condition in the printed terms, that offer was accepted by the plaintiff when he bid, and the contract was made on that basis when the lot was knocked down to him. In some circumstances I concede that such a question might on its face be somewhat ambiguous, but I think in the present case the only inference that could properly be drawn by the judge or jury charged with the duty of finding the facts—and this is a question of fact as to the intention of the parties—is that the question was asked and answered with the alternative meaning indicated. That this is so follows, I think, conclusively from the plaintiff's evidence which was accepted by the judge, taken in conjunction with the admissions of the defendant that the words if used—which he denied—would have bound him. It is obvious that it was the stipulations that prompted the question. The plaintiff was not a lawyer, but he knew what he wanted. So did the defendant, and he got it. What the plaintiff wanted was to know where he stood before he made an offer which the fall of the hammer would turn into a contract.

The county court judge in a careful reserved judgment has found that this oral statement was made, and he refers to it as a warranty, but holds that its value was destroyed by the qualifying stipulations. He has not in terms put the question to himself: "Did the parties by this question and answer intend to exclude the stipulations from the contract that resulted on the fall of the hammer?" I have, accordingly, felt some doubt whether or not the proper course was to order a new trial. On reading his judgment as a whole I have, however, arrived at the conclusion that it is implicit therein that it was not the intention of the parties to exclude the stipulation. As we are of opinion that on the facts found by him he could not properly arrive at this conclusion, I think we are not compelled to put the parties to the expense of a further trial.

There was a good deal of discussion whether the description "unserved" constituted a warranty or a condition. I have, in what I have said so far, deliberately refrained from expressing a view thereon, but as a matter of law I think every item in a description which constitutes a substantial ingredient in the "identity" of the thing sold is a condition, although every such condition can be waived by the purchaser who thereon becomes entitled to treat it as a warranty and recover damages.

I think there was here an unqualified condition which, on its breach, the plaintiff was entitled to treat as a warranty and recover the damages claimed. One final word. The printed condition that the vendor will take no responsibility for errors of description of things or animals specifically offered for sale on inspection is reasonable for visible defects, but for qualities or attributes which are invisible it is not reasonable. It may well become a mere trap for the unwary. The point deserves consideration by the Auctioneers' Associations.

The appeal should, therefore, in my opinion be allowed with costs here and below, the latter on Scale B.

TUCKER, L.J.: I have had the advantage of reading my Lord's judgment before it was delivered, and I agree that the appeal succeeds for the reasons he has stated.

BUCKNILL, L.J. : I agree.

Appeal allowed with costs.

Solicitors : *Roche, Son & Neale*, agents for *Cecil Forward & Williams*, Axminster (for plaintiff) ; *Butt & Bowyer*, agents for *Rutter & Rutter*, Wincanton.

Approved and Applied. HARLING v. EDDY. [1951] 2 All E.R. 212.

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.]

WASSELL v. WEST CANNOCK COLLIERY COY., LTD.
[COURT OF APPEAL (Morton, Somervell and Asquith, L.JJ.), October 16, 1946.]

Emergency Legislation—Essential work—Wages—Head fireman—Bona fide rearrangement of duties by employer—Refusal to work as ordinary fireman—Essential Work (Coalmining Industry) Order, 1943 (S.R. & O., 1943, No. 505) art. 4 (1) (d).

The plaintiff was a head fireman employed by the defendants in their undertaking, a scheduled undertaking as defined in the Essential Work (Coalmining Industry) Order, 1943. A rearrangement of duties genuinely carried out by the defendants with a view to economising in labour having resulted in their no longer needing the services of a head fireman, they offered the plaintiff work as an ordinary fireman. He refused to work on the new basis and remained at home for a period in respect of which he sued the defendants for wages as a head fireman. The county court judge found that work in his normal occupation as a head fireman was not available for the plaintiff during the material period and that it was reasonable to ask him to do the work of an ordinary fireman.

HELD : that the plaintiff, through his refusal of the work offered to him, had failed to qualify for payment of wages as prescribed by art. 4 (1) (d) of the Order of 1943, and was not entitled to wages for the material period, his proper course having been to accept the work offered and thereafter to raise with the defendants the question of remuneration.

Quaere : whether, had he accepted the work of an ordinary fireman, the plaintiff would have remained entitled, under art. 4 (1) (d), to the wages of a head fireman.

[FOR THE ESSENTIAL WORK (COALMINING INDUSTRY) ORDER, 1943 (S.R. & O. 1943, No. 505) see BUTTERWORTH'S EMERGENCY LEGISLATION, EMPLOYMENT. [14].]

Cases referred to :

(1) *Adrema, Ltd. v. Jenkinson*, [1945] 2 All E.R. 29 ; [1945] K.B. 446 ; 114 L.J.K.B. 313 ; 173 L.T. 318 ; 109 J.P. 138 ; Digest Supp.

(2) *George v. Mitchell and King*, [1943] 1 All E.R. 233.

APPEAL from Walsall County Court.

In June, 1935, the plaintiff was employed as a fireman in the defendant company's undertaking, a scheduled undertaking under the Essential Work (Coalmining Industry) Order, 1943.* Having carried out the usual fireman's duties until Nov. 19, 1942, he was on that date appointed head fireman, in which capacity he performed many of the duties of an ordinary fireman, but

* By art. 1 of the Essential Work (Coalmining Industry) Order, 1943 : "... 'scheduled undertaking' means an undertaking that has been entered in the schedule of undertakings under this Order." By art. 4 (1) : "Subject as hereinafter provided, where a person carries on a scheduled undertaking the following provisions shall apply :—

(a) The person carrying on the undertaking shall not terminate (except for serious misconduct) the employment in the undertaking of any person employed therein, or without terminating such employment cause him to give his services in some other undertaking . . . except with the permission in writing of a national service officer ; (b) a person employed in the undertaking shall not leave his employment except with such permission as aforesaid . . . ; (d) Without prejudice to any terms and conditions of employment more favourable to persons employed in the undertaking that may be provided for by the Conditions of Employment and National Arbitration Order, 1940, . . . the person carrying on the undertaking shall in respect of every week pay to every person employed in the undertaking . . . a sum which is not less than the guaranteed wage for that week if that person is during his normal working hours : (i) capable of and available for work ; and (ii) willing to perform any services outside his usual occupation which in the circumstances he can reasonably be asked to perform during any period when work is not available for him in his usual occupation in the undertaking."

had two other firemen under his supervision. In other respects, also, the conditions of employment of a head fireman differed from those of an ordinary fireman, and, as found by the county court judge, the grade of head fireman was recognised as a grade in the defendants' undertaking.

A The defendants' manager having, with a view to economising man-power, made arrangements which would only necessitate, for the future, the employment of two ordinary firemen, he proposed that the plaintiff should be one of those firemen and thus no longer a head fireman. An offer to that effect was made to the plaintiff by the defendants on July 18, 1945, on his return from a holiday, but he refused and did not resume work for the defendants. On Sept. 25, 1945, they applied to a national service officer for permission to determine his employment as he had not presented himself for work since July 18. Permission was refused on Oct. 24. The plaintiff continued to remain at home. On Jan. 12, 1946, he claimed full wages as a head fireman from July 18, 1945, to Jan. 11, 1946, except for a period during which he had been ill.

B The county court judge found that work as a head fireman was not available for the plaintiff during the material time; that the defendants had reasonably asked him to do other work, and that he had refused; but that the plaintiff was "capable of and available for work" within the meaning of art. 4 (1) (d) of the Order of 1943 notwithstanding that he had refused to do the work offered; and he held him to be entitled to £148 14s. 6d., the amount of wages claimed.

C The defendants appealed.

Beney, K.C., and *R. H. Norris* for defendants.

Fox-Andrews, K.C., and *Norman Carr* for plaintiff.

D MORTON, L.J. [having stated the facts]: The county court judge found that the plaintiff would have done the work of an ordinary fireman if he had been offered the wages—nothing is said about the other terms—of a head fireman. On the other hand, there is not a shred of evidence that the plaintiff ever said to the defendants: "If you pay me the wages of a head fireman I am willing to work as a fireman." The defendants said: "You can work as a fireman and receive a fireman's wages," but they never said: "You can work as a fireman at a head fireman's wages." [HIS LORDSHIP read art. 4 (1) of the Order of 1943].

E It appears to me that the intention of art. 4 (1) (d) is to get as much work done as possible, that a workman may be put to work on something else if work is not available for him in his usual occupation, and that the minimum wage is to be paid if, but only if, the workman fulfils the conditions laid down by sub para. (d). The judge found that the work of a head fireman was not available, that the proposed reconstruction was *bona fide*, and that it was reasonable to expect the plaintiff to undertake the duties of an ordinary fireman. The judge

F then found that the plaintiff was capable of and available for work during the period for which he claimed his wages. He pointed out that the plaintiff's employment had never been determined and he held that the defendants were liable to pay him wages although he had not done any work during the period in question. In reference to a question by counsel for the defendants, the judge said: "I think it must follow that, if they offered him fireman's work at the

G normal figure of fireman's rate, that is a reasonable remuneration for that kind of work for a man employed to do that work."

Having regard to those findings, I turn back to art. 4 (1) (d), because it is plain that the plaintiff has based on it his claim that he is entitled to not less than the guaranteed wage as defined in the Order. First, was the plaintiff during his normal working hours capable of work? There is no doubt that he was, except during the period of illness for which he has not claimed. Was he available for work? I am prepared to assume in favour of the plaintiff, without deciding the point, that he was available for work in the circumstances which I have stated. Was he willing to perform any service outside his usual occupation which in the circumstances he could reasonably be asked to perform during the period when work was not available for him in his usual occupation? In my view, on the judge's findings of fact, that question must be answered in the negative. The judge has held that work was not available for the plaintiff in his usual occupation. He has held that the services outside his usual occupation which he was asked to perform, namely, the services of fireman, were services which

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he could reasonably be asked to perform. To my mind, it is plain that the plaintiff, in any ordinary meaning of the word "willing," was not "willing" to perform those services. In his own mind he may have resolved that, if and when he was offered a head fireman's wage, he would do the work of a fireman, but he never seems to have expressed that. He simply refused to do the work of a fireman. It seems to me to follow that he has not qualified for the amount which was awarded to him by the county court judge.

Counsel for the plaintiff have contended that the wage which ought to have been offered to the plaintiff was the full wage of a head fireman notwithstanding that he was being asked to do only fireman's work. That is a very difficult question, on which we have heard interesting argument, but I have not, myself, formed a concluded view on it. I am prepared to assume in favour of the plaintiff that counsel's contention is right, and that the employers were wrong in offering to the plaintiff only the ordinary fireman's wage. Even so, I think that the plaintiff fails to qualify for the remuneration which he claims. The emphasis in sub-para. (d) is on the services. Were the services which he was asked to perform services which in the circumstances he could reasonably be asked to perform? There was no work available for him as a head fireman, there was work available for him as a fireman, and the judge so held. He could reasonably be asked to perform those services, but he was not willing to perform them. If he thought that he was not being offered a proper wage, his proper course was to do the work and at once raise the question of the wages, if necessary testing the matter in the county court. Instead of that he took the step of refusing to do the work, with the result that, for some months, he did no work and his services were lost to the industry. I think, on the plain wording of sub-para. (d), that he did not qualify for the wages. The amount of his wages is regulated by the Order. If he had started to work as an ordinary fireman and the parties had failed to agree on the amount of wages payable on the true construction of the Order, the matter could have been settled by legal proceedings.

Two cases were cited, the first being a decision of the Divisional Court in *Adrema, Ltd. v. Jenkinson* (1). I do not think it necessary to refer to the facts of that case or the decision, as there has been no suggestion in the present case that the plaintiff's employment was terminated by what took place. We were also referred to observations of this court in *George v. Mitchell and King, Ltd.* (2). I do not think it necessary to refer to any of those observations because the facts there were different from the facts in the present case in the vital particular that there the work was available for the workman in his usual occupation whereas that was not so here. In my view, the judgment in favour of the plaintiff cannot stand, and the appeal will be allowed.

SOMERVELL, L.J.: I agree, but as we are differing from the county court judge I will add a few observations on the construction of the sub-paragraph of the Order on which this appeal depends.

The plaintiff claims wages from the defendants as his employers over a period during which he did no work for them. He puts forward that claim by virtue of the provisions of the Order of 1943. This case turns on the construction of art. 4 (1) (d) and in particular of sub-para. (d) (ii). One, perhaps, the main, purpose, of sub-para. (d) is to deal with cases where the employer is unable to offer work which would, on the applicable wage rates, enable the person employed to earn his ordinary wage. A very obvious example, which must have occurred many times in the war, is where a man's normal employment is to work on some material which, for a particular week or for a period, has not come forward from the suppliers, so that there is nothing for that workman to do at his ordinary job. As the Order of 1943 ties the workman to the employment, subject to serious misconduct or the consent of the national service officer, and as it is clear from the Order that it might be desirable to keep men in their existing employment although there was temporarily no work for them to do, it would have been unreasonable to keep a man so tied unless he were paid something in the nature of the average wage which he was able to earn when work at his ordinary job was available for him. This sub-paragraph in fact provides that, if he is there and willing to work, he is to receive the guaranteed wage as defined although the employer may be unable to give him work to do.

The sub-paragraph also provides (and this, of course, is the point on which the case turns) that, if the ordinary work is not available for the workman, he can be asked to do other work, and he must be ready to do that work if he is to qualify for the guaranteed wage. Arguments were addressed to us on the question which arises where a man has been asked to do work other than his ordinary work, namely, what remuneration is he to receive? It was submitted, on the one hand, by counsel for the defendants that, where alternative work, held to be reasonable within the meaning of the Order, is offered, it carries its normal wage, that is to say, the normal rate of the alternative work. That is a circumstance to be taken into account in deciding whether the workman can reasonably be asked to do that work. On the other hand, it was submitted by counsel for the plaintiff that, where a man is asked to do work other than his ordinary work, he is entitled, under the Order, to what I will call his old rates, applied on a calculation of the guaranteed minimum, if the normal rate for the new work is less than the sum so arrived at. I agree with MORTON, L.J., that that question is not an easy one, and I express no view about it, because, in my view, this appeal succeeds even assuming that counsel for the plaintiff is right in the submission which he made on that point.

The plaintiff was asked to perform work which he could, on the county court judge's finding, reasonably be asked to perform. On the other hand, on the assumption which I am making, the terms proposed by the employers were less favourable than the terms which the plaintiff would have been entitled to claim and therefore to receive under the Order. I entirely agree with what my brother MORTON has said with regard to the result of the county court judge's findings on the evidence of what took place between the plaintiff and the defendants at the material dates, namely, July 18, and after. If the plaintiff had taken the line that he was perfectly willing to do a fireman's work, but claimed that on doing that work he was entitled to a head fireman's rates and conditions, it seems to me at least probable that the employers would have told him to do the work, saying that of course they would pay him what he was entitled to under the Order, and that their respective lawyers should consult about it, with the result that the work would have been done. The plaintiff, however, it is clear from the evidence and from the judgment, did not take that line. In those circumstances he seems to me to have failed to satisfy the condition which he has to satisfy, namely, that he was willing to perform the services outside his usual occupation, which, in the circumstances as found by the county court judge, he was reasonably being asked to perform. For these reasons I think that the appeal succeeds.

ASQUITH, L.J. : I agree.

Appeal allowed.

Solicitors : Peacock & Goddard, agents for Haden & Stretton, Walsall (for the defendants); Sharpe, Pritchard & Co., agents for Underhill, Wilcock & Taylor, Wolverhampton, (for the plaintiff).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

R.C.C.

Applied. R. v. EAST KERRIER JJ.
352] 2 All E.R. 144.

R. v. BODMIN JUSTICES. *Ex parte* McEWEN.
[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Lewis, JJ.),
December 20, 1946.]

Crown Practice—Certiorari—When order granted—Justices interviewing witness in absence of accused and advisers.

Magistrates—Indictable offence triable summarily—Necessity for judicial exercise of jurisdiction—Order to pay costs—Criminal Justice Act, 1925 (c. 86), s. 24 (1).

The applicant, a soldier, during a disturbance in the barrack room, stabbed a fellow-soldier in the back with a bayonet, as a consequence of which the injured soldier was not expected to live, but did in fact recover. The applicant was charged before petty sessions with wounding with intent to do grievous bodily harm, but, at the request of both the prosecution and the defence, the justices allowed the charge to be reduced to one of unlawful wounding, and, assuming jurisdiction under the Criminal Justice Act,

1925, s. 24 (1), dealt with the case summarily. An officer of the applicant's unit gave some evidence as to character and said he could say a lot more but thought he had better not do so. The justices, having retired to consider their sentence, sent for the officer and interviewed him in their room in the absence of the applicant and his advisers. The applicant was sentenced to 6 months' imprisonment. On a motion for an order of *certiorari* :—

HELD : justice must not only be done, but must manifestly be seen to be done, and the interviewing by the justices of the officer in the absence of the applicant and his advisers could not be justified and the conviction must be quashed, the justices being ordered to pay the costs of the application for *certiorari*. A

Per cur : It was never intended that justices should deal, under the Criminal Justices Act, 1925, s. 24 (1), with cases of the nature of, and with the consequences which were described in, this case. Justices should deal with such matters judicially, and, though they must take into account what the prosecution and the defence say with regard to whether or not a case is a proper one for the charge to be reduced, they are not bound to assent to dealing with it summarily. B

[AS TO GROUNDS FOR CERTIORARI TO QUASH GENERALLY, see HALSBURY, Hailsham Edn., Vol. 9, pp. 880-889, paras. 1484-1493; and FOR CASES, see DIGEST, Vol. 16, pp. 417-431, Nos. 2763-2918; AS TO INDICTABLE OFFENCES TRIABLE SUMMARILY, see HALSBURY, Hailsham Edn., Vol. 21, pp. 582-586, paras. 1026-1029; and FOR CASES, see DIGEST, Vol. 33, p. 317, Nos. 330, 331.] C

Case referred to :

(1) *R. v. Essex JJ.*, *Ex p. Perkins*, [1927] 2 K.B. 475; 96 L.J.K.B. 530; 137 L.T. 455; 91 J.P. 94; Digest Supp.

MOTION for an order of *certiorari* to remove, for the purpose of quashing, an order made by the petty sessions for the borough of Bodmin on Oct. 9, 1946, the ground for the motion being that the justices had interviewed a witness in the absence of the accused and his advisers. The facts appear in the judgment of LORD GODDARD, C.J. D

C. Besley for the applicant.

H. J. Astell Burt for the justices.

H. E. Park for the prosecution. E

LORD GODDARD, C.J. : This is an application for an order of *certiorari* to bring up and quash a conviction of one John McEwen who, on Oct. 9, 1946, was charged before the petty sessions for the borough of Bodmin with wounding one Arthur Millington with intent to do grievous bodily harm, contrary to the Offences against the Person Act, 1861—an offence which I may state is punishable with penal servitude for life. Apparently, before the facts were gone into, for some reason or another both the prosecution and the defence asked the justices to deal with the case as one of unlawful wounding. F

The facts which emerged, of which the justices were informed when they consented to deal with this case, were these. The applicant was a soldier and this matter arose out of a disturbance in the barrack room at Bodmin Barracks, a depot of the Duke of Cornwall's Light Infantry. We are told that the applicant and another soldier returned from the town to barracks after lights out and entered the room in which Millington and others were sleeping. The lights were out. The applicant insisted on turning the lights on, and the men in the room, among whom was Millington, asked him to turn the lights off, otherwise there would be trouble. The applicant and his companion, both of whom had been drinking, began to quarrel with the others and particularly with Millington, who was kicked. Ultimately the applicant fetched his bayonet and returned to Millington. When he went for his bayonet most of the men ran from the room leaving Millington and another soldier who tried to take the bayonet from the applicant. During the ensuing struggle Millington received a stab in the back from the applicant with the bayonet. As a consequence of the injury, when he was admitted to the Royal Cornwall Infirmary, Truro, the doctors did not expect him to live, and an application was made to the justices of Truro for his evidence to be taken by deposition, pursuant to the Criminal Law (Amendment) Act, 1867, s. 6. Fortunately, however, he did recover, and, because of that fact, I suppose, the justices considered that it was a proper case to allow the charge G

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to be reduced to one of misdemeanour, unlawful wounding, and consented to deal with the case.

By s. 24 (1) of the Criminal Justice Act, 1925, under which they assumed jurisdiction :

A Where a person who is an adult is charged before a court of summary jurisdiction with an indictable offence, being one of the offences specified in sched. II to this Act the court, if it thinks it expedient so to do, having regard to any representation made in presence of the accused by or on behalf of the prosecutor, the character and antecedents of the accused, the nature of the offence, the absence of circumstances which would render the offence one of a grave or serious character and all the other circumstances of the case (including the adequacy of the punishment which a court of summary jurisdiction has power to inflict), and if the accused, when informed by the court of his right to be tried by a jury, consents to be dealt with summarily, may, subject to the provisions of this section, deal summarily with the offence . . .

B The offence of wounding with intent is not one of the offences specified in the schedule, but unlawful wounding is. The justices would have had no jurisdiction to proceed under that section if the charge had been made one of wounding with intent, so when they were asked by the prosecution and the defence to do so, they reduced the offence to one of unlawful wounding and then consented to deal with it summarily.

C Here is a case in which a man's life has been seriously imperilled and if he had died the applicant would have been charged with murder. It was never intended that justices should deal under that section with cases of this sort, where a man, whether under the influence of drink or not, takes a bayonet and stabs another in the back with the consequences which are disclosed here, and for justices to deal with it by treating it as nothing much more than common assault is a most extraordinary state of affairs. Justices should remember that they have to deal with matters of this sort judicially, and, although they must take into account what the prosecution and the defence say with regard to whether or not it is a proper case for the charge to be reduced, they are not bound, because the prosecution want to get the matter dealt with there and then without the necessity of going to the assizes (where this case undoubtedly should have been sent) to assent to dealing with it summarily. It is only due to the fact that this man recovered that the applicant was not charged with murder. That the justices should deal with such a case under these provisions is most unfortunate. That, however, is not a ground for *certiorari*. The justices having done this, this court cannot interfere with it. We can only express grave disapproval that the justices acted in this way.

E *Certiorari* can, however, be granted on another ground. An officer of the applicant's unit was present in court and was asked to give the man a character. He gave him a character—not a bad character—and added that there was a lot more that he could say but he would not say it. The character that he gave was :
F “The accused is a very good worker when he is not under the influence of drink. Since this stabbing affair we have not had any trouble with him. I could say a lot more, but I think I had better not.” The justices then retired to consider their sentence, and, during their retirement, they sent for the officer and interviewed him in their room. Whether the officer stayed in the room for one minute or
G whether he stayed there for five minutes does not matter. The justices were interviewing a person who had been in court in connection with the case and had given the justices information in connection with the case, and they were interviewing him in their room in the absence of the accused or his advisers. That is a matter which cannot possibly be justified. I am not suggesting for one moment that the justices had any sinister or improper motive in doing it. It may be that they sent for the officer in the interests of the accused. It may be
H that the information which the officer gave was in the interests of the accused. That does not matter. Time and again this court has said that justice must not only be done but must manifestly be seen to be done, and, if justices interview a witness in the absence of the accused, justice is not seen to be done, because the accused does not and cannot know what was said. The consequence of this unfortunate incident is that this conviction must be quashed. The applicant ought never to have been tried by the justices. He ought to have been sent to the assizes. He received a sentence of six months' imprisonment. This court must, in these circumstances, quash the conviction.

HUMPHREYS, J. : So far as I am concerned, the judgment which has just been delivered is the judgment of the court.

LEWIS, J. : I agree.

LORD GODDARD, C.J. : We should not give costs against justices merely because they came to a wrong decision, but in this case it is the conduct of the justices which is attacked. They are responsible. It was entirely their action which led to this application, which has succeeded. They were given notice of this application. In the case cited by counsel for the justices, *R. v. Essex JJ.*, *Ex p. Perkins* (1), there is no suggestion made against the justices. We shall give costs against the justices in this case. A

Conviction quashed.

Solicitors : *Robbins, Olivey & Lake*, agents for *Thrall, Llewellyn & Spooner, Truro* (for the applicant) ; *Barlow, Lyde & Gilbert*, agents for *Stephens & Scown, St. Austell* (for the justices and the prosecutors). B

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

THOMSON v. KNIGHTS

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Lewis, JJ.), December 17, 1946]

Criminal Law—Conviction—Uncertainty—Street traffic—Having charge of motor vehicle when under influence of drink or a drug—Road Traffic Act, 1930, (c. 43), s. 15 (1). D

The appellant was convicted by justices of being "unlawfully in charge of a motor vehicle . . . whilst under the influence of drink or a drug . . ." contrary to s. 15 (1) of the Road Traffic Act, 1930.

HELD : the conviction was not bad for uncertainty, since the sub-section, by the words quoted, created one offence, namely, being in charge of a motor vehicle while in a state of self-induced incapacity, whether that incapacity was due to drink or a drug, and not the two offences of being in charge of a vehicle (1) while under the influence of drink and (2) while under the influence of a drug. E

[AS TO UNCERTAINTY AND DUPLICITY IN CHARGES, see Halsbury, 2nd Edn., Vol. IX, p. 136, para. 178, 2 Supp., and as to DRIVING UNDER INFLUENCE OF DRINK OR DRUGS, see HALSBURY, 2nd Edn., Vol. 31, pp. 674, 675, paras. 993-995.] F

Cases referred to :

- (1) *R. v. Jones, ex p. Thomas*, [1921] 1 K.B. 632 ; 90 L.J.K.B. 543 ; 124 L.T. 668 ; 85 J.P. 112 ; 42 Digest 873, 217.
- (2) *R. v. Wells, etc., JJ., Ex p. Clifford*, (1904) 91 L.T. 98 ; 68 J.P. 392 ; 42 Digest 873, 216.
- (3) *Cotterill v. Lempriere*, (1890) 24 Q.B.D. 634 ; 62 L.T. 695 ; 54 J.P. 583 ; 42 Digest 728, 1504.
- (4) *R. v. Slater. Ex p. Bowler* (1903). 67 J.P. 299 ; 26 Digest 559, 2537. G

CASE STATED by the appeals committee of Essex Quarter Sessions.

The appellant who was discovered at night in his shirt sleeves sitting, apparently drunk and incapable, in the driving seat of a car which was broadside on across a road, was convicted by Romford justices of being unlawfully in charge of a motor vehicle when "under the influence of drink or a drug . . ." He appealed to quarter sessions on the ground that the conviction was bad for uncertainty. Quarter sessions upheld the conviction, but stated this Case for the opinion of the High Court. H

Curtis Bennett, K.C. and *G. L. Hardy* for the appellant.
Alban Gordon for the respondent.

LORD GODDARD, C.J. : This is a Case Stated by the appeals committee of Essex Quarter Sessions who upheld the conviction by a court of summary

jurisdiction sitting at Romford of the appellant of being "unlawfully in charge of a motor vehicle . . . whilst under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle, contrary to s. 15 of the Road Traffic Act, 1930."

A The sole point that was taken before the appeals committee and the sole point taken here is that, the conviction stating, as it does, that the appellant was driving "whilst under the influence of drink or a drug," is bad for uncertainty because, it is said, driving under the influence of drink is one offence and driving under the influence of a drug is another offence.

In my opinion, that is not sound. I think the section creates one offence. I paid great attention to the argument of counsel for the appellant and at first I was rather attracted by it, but I think counsel for the respondent provided the correct answer. In my opinion, the section creates three offences, and not six. These offences are: Driving a motor vehicle while under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle; or attempting to drive in those circumstances; or being in charge of a motor vehicle when under the influence of drink or a drug. I think that counsel for the respondent is right when he says that the words "under the influence of drink or a drug" are merely adjectival. The offence is driving or attempting to drive or being in charge of a vehicle when incapable of having proper control of the vehicle and that incapacity is caused by drink or a drug. C I do not think that Parliament meant to create one offence of being incapable by reason of a drug and another offence of being incapable by reason of drink. What it meant to provide for was that a man who drove, or attempted to drive, or was in charge of, a car when in a self-induced incapacity, whether it was due to drink or drugs, committed the offence. There is no question of an alternative offence or two offences. The appeal, in my view, fails and should be dismissed. D

HUMPHREYS, J.: I am of the same opinion. I would only observe that, in my view, the cases on this subject were admirably explained in the judgment of LORD COLERIDGE in *R. v. Jones, Ex parte Thomas* (1), where he dealt with *R. v. Wells, etc. JJ., Ex parte Clifford* (2), on which counsel for the appellant naturally relied, and also *Cotterill v. Lempriere* (3) and *R. v. Slater, Ex p. Bowler* (4). E He pointed out that in each of those cases there were two separate offences charged of which a person had been convicted in one conviction, which everybody knows is wrong and contrary to law. He pointed out that in the case with which he was then dealing—of a person charged under one of the sections of the Motor Car Act, 1903, with driving recklessly and at a speed dangerous to the public—having regard to the circumstances of the case the real offence was driving in a manner dangerous to the public by reason of one or other of F two things, and that a conviction in which the defendant was convicted of those supposed two offences was really a conviction for one single act. The same reasoning applies to the present case. I think the appellant was convicted, as my Lord observed during the argument, of the offence of being in charge of a motor car whilst intoxicated or under the influence of something which made him incapable of having proper control of the vehicle. I think it is one offence of which he was convicted, and not two.

G LEWIS, J.: I agree.

Appeal dismissed with costs.

Solicitors: *Alwyn Williams & Co.* (for the appellant); *Sharpe, Pritchard & Co.*, agents for *Arthur Morgan*, Chelmsford (for the respondent).

* [Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

REX v. LEAMINGTON SPA LICENSING JJ's, *Ex parte*
PINNINGTON

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Lewis, JJ.),
December 11, 1946.]

Intoxicating Liquors—Licensing—Ordinary removal of licence—Removal from county licensing division to borough within same county—Jurisdiction of borough justices to hear the application—Licensing (Consolidation) Act, 1910 (c. 24), s. 24 (3). A

The licensee of premises situated at N., in the county of W., applied to the justices for the borough of L., which was within the same county, for an order authorising the ordinary removal of his licence to premises within that borough. N. was in a county licensing district and L. was a borough having a separate commission of the peace, and was, accordingly, a licensing district within the Licensing (Consolidation) Act, 1910, s. 2. B

HELD : s. 24 (3) of the Act gave justices power to remove a licence from premises situated in one licensing district to premises in another licensing district, provided that both districts were within the same county, and, therefore, the justices in the present case had power to authorise the removal of the licence.

[AS TO REMOVAL OF LICENCE, ORDINARY OR SPECIAL, see HALSBURY, 2nd Edn., Vol. 19, pp. 29, 30, paras. 67-72; and FOR CASES, see DIGEST, Vol. 30, p. 36, Nos. 291-295.] C

MOTION for an order of *mandamus*.

The applicant made an application to the justices of the borough of Leamington Spa for their authorisation of an ordinary removal of a licence from licensed premises situated at Napton, Warwickshire to licensed premises situated within the borough. The justices dismissed the application on the ground that they lacked jurisdiction to hear it, and the applicant now applied for an order of *mandamus* directing them to hear and determine the matter. The facts appear fully in the judgment of LORD GODDARD, C.J. D

Beresford, K.C., and *Gerald Howard* supported the motion.
Flowers, K.C., and *Percy C. Lamb* showed cause.

LORD GODDARD, C.J. : The licensee of certain premises known as the Bull and Butcher at Napton, in the county of Warwick, applied to the justices of the borough of Royal Leamington Spa for an order for the removal of the licence from those premises to certain other premises known as the Joiners' Arms, within the borough. Leamington Spa is not a county borough, nor is it a borough having a separate court of quarter sessions, but it is a borough having a separate commission of the peace. The justices of the borough declined to entertain the application on the ground that they had no jurisdiction so to do, being of opinion that they had no power to grant an application for the removal of a licence situate in what I may call a county division of the geographical county into a borough within the same county. E

The question we have to determine is simply one of the construction of the Act. We could not consider the policy of the matter, unless there were some ambiguous phrase. Then we might have to consider, according to the well known principles of construction, what the purpose of the Act was or what was the particular mischief at which it was aimed, but no such point as that seems to me to arise in this case. The Act contains certain clear provisions and all that we have to do is to apply them. F

The Licensing (Consolidation) Act, 1910, s. 2 provides : G

For the purposes of this Act, a licensing district is a petty sessional division of a county, and a borough having a separate commission of the peace. H

One has, therefore, two kinds of licensing districts. By s. 24 (3) :

An ordinary removal of a justices' licence may be authorised to any premises within the licensing district in which the premises are situated from which it is desired to remove the licence, or to any premises within a licensing district within the same county, by the licensing justices of the district to which it is desired to remove the licence.

For some time I had some difficulty in seeing what was the grammatical construction of that sentence, which I think is somewhat obscure, but I think it

becomes clear if one removes the words "are situated" to later in the section so that it reads in this way : "An ordinary removal of a justices' licence may be authorised to any premises within the licensing district in which the premises from which it is desired to remove the licence are situated, or to any premises within a licensing district within the same county."

A The section, therefore, seems to me to deal with two things. You can either remove a licence from premises situate in a licensing district to other premises situate in the same licensing district, or you can remove a licence from premises situate in one licensing district to premises in another licensing district, provided that the two districts are within the same county. Leamington Spa is a licensing district and is in the same county as Napton, which is another licensing district, and it follows, I think, from the plain words of s. 24 (3), that an application can be made to the justices of Leamington Spa for an order of removal from Napton to their licensing district which is in the same county. It, therefore, seems to me
B clear that the justices had jurisdiction to hear this application.

Counsel appearing to show cause further contended that in s. 110, which is a definition section, there is a statement as to what the expression "county" is to include. It is to include

... any riding, part, or division of a county having a separate commission of the peace and a separate court of quarter sessions.

C That means that each riding of the county of York is a separate county, or that East Sussex and West Sussex are two separate counties. That does not throw any light on the question which we have to decide. You could not remove a licence from East Sussex to West Sussex, but you could remove it from one licensing district of East Sussex to another licensing district of East Sussex ; The section goes on :

D For the purposes of the provisions of this Act as to appeals from the refusal of licensing justices to grant a renewal, transfer, or special removal of a justices' licence, the area of the county shall be deemed to include any borough, or any part thereof, which is locally situated in the county, and for the purpose of the powers and duties of quarter sessions as compensation authority, the area of the county shall be deemed to include any borough, not being a county borough, which is locally situated in the county.

It will be observed that the words "ordinary removal" are not included. If one turns to s. 29, which deals with appeals, one finds that exactly the same
E provision has been made there in effect as is made in s. 110, because it is provided that, in the case of any borough which is situated within the county, the appeal shall lie to the county justices and not to the borough court of quarter sessions. If one may carry one's mind back to the time when this Act was being passed and to the discussions which took place, it may be remembered that one of the reasons, and I think the main reason, for that provision was that it was not thought desirable that a recorder, who had nothing to do with the county in the
F ordinary way, but was simply a judge of a borough court of quarter sessions, should have to decide licensing matters, and, therefore, it was decided that the appeal should go to the county quarter sessions, although the order appealed from arose within a borough. It may be that those words in s. 110 are tautologous and are not really necessary, because, the matter has been already dealt with in s. 29. Equally, the provision that the compensation authority in respect of premises
G situated in a borough shall be the county quarter sessions may also be redundant, because that has been already provided for in s. 2, but I can only give the words in s. 24 and in s. 2 (1) their plain and ordinary meaning. It seems to me to be clear, provided that the two licensing districts are situated in the same county, that an order for removal can be made from one to the other, notwithstanding the fact that one is borough and the other is county. For these reasons, I think that the order for *mandamus* must go.

H HUMPHREYS, J. : I am of the same opinion. The matter turns on the proper construction of s. 24 (3), and I agree with the construction put on that section by my Lord. This case does not come within the language of the first part of s. 24 (3), because the premises to which it is proposed to remove the licence are not within the same licensing district as the premises from which it is proposed to remove the licence, but I think that the case does come within the second part of that section because the premises to which it is proposed to remove the licence are within a licensing district within the same county. That, in my opinion, really concludes this matter.

I only desire to add that I am not as much impressed as my Lord is by the difficulty created by the words in s. 110, which deals with appeals. It is true that by s. 29 it is made quite clear that the appeal (which, be it said, does not apply to this case at all because there is no appeal in the case of an ordinary removal) from a refusal to grant a renewal, transfer, or a special removal, is :

... to the court of quarter sessions for the county in which the premises in respect of which the appeal is made are locally situated, and the appeal shall be to the court of quarter sessions for the county, although the premises are situated in a borough having a separate court of quarter sessions.

One might expect to find there some such words as "and for the purpose of this section a county shall include a borough having a separate court of quarter sessions." It is true that that is the notion of the Act throughout, but, when it came to s. 110, which is the definition section, it was, not unreasonably, thought necessary to define these matters. Inasmuch as the words which I have suggested might have been added at the end of s. 29 are not there, the draftsman had to deal with two separate matters—the question of appeals from a refusal of licensing justices to grant a renewal, transfer, or special removal, and also the jurisdiction of the compensation authority, and what he has done is to explain the meaning of the word "county" in relation to those two separate matters. They are different, because the first part of the section deals with a county including a county borough, and the second part of the section only includes in the county a borough which is a county borough. It seems to me that that was put there for a purpose. It may be that it was unnecessary. It may be that the court would have construed the Act in the same way without it, but I think that that is the explanation of why one finds that elaborate definition section. In my view, it is not clear that this *mandamus* should go. It is plain that we have nothing to do with the question to what court an appeal, which does not lie in this case, would lie, if it did lie, nor are we concerned with the question what is the body to which the question of compensation would go, although there is, in truth, no doubt about it. The matter depends on the language of s. 24, and I agree that the *mandamus* should go.

LEWIS, J. : I agree.

Order for mandamus.

Solicitors : Godden, Holme & Co. ; Gregory, Rawcliffe & Co., agents for Wright Hassall & Co., Leamington Spa.

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

LOEWENTHAL v. VANHOUTE AND ANOTHER.

[KING'S BENCH DIVISION (Denning, J.,), December 16, 1946.]

Landlord and Tenant—Notice to quit—Effect of subsequent notice to quit.

Where a notice to quit has been given, a subsequent notice to quit is of no effect unless it can be inferred from other circumstances that a new tenancy has been created after the expiry of the first notice. If there is no agreement, express or implied, for a new tenancy, the mere fact that the landlord's solicitor, to get possession, gives another notice to quit is not any reason for inferring any agreement for a new tenancy, and the first notice is not waived by the subsequent notice.

Doe d. Brierly v. Palmer (1) distinguished.

[AS TO EFFECT OF SECOND NOTICE TO QUIT, see HALSBURY, Hailsham Edn., pp. 143, 144, para. 154 ; and FOR CASES, see DIGEST, Vol. 31, p. 457, Nos. 6047-6050.]

Case referred to :

(1) *Doe d. Brierly v. Palmer* (1812), 16 East, 53 ; 104 E.R. 1009 ; 31 Digest 457, 6049.

ACTION for possession of a furnished flat.

On Sept. 14, 1946, the landlord gave a notice to quit expiring on Sept. 21, 1946. On Sept. 30, 1946, the tenants referred the question of the rent of the flat to a tribunal appointed under the Furnished Houses (Rent Control) Act, 1946, but the landlord claimed that the tenants had no protection under that Act since the tenancy had already been determined. The tenants, however, claimed that the tenancy was still existing because, on Oct. 4, 1946, the landlord's solicitors had sent a second notice to quit and the second notice (it was submitted) amounted to a waiver of the first.

H. G. Garland for the landlord.

J. R. O. Jones for the tenants.

DENNING, J. : In this case Berthe Loewenthal claims possession of a flat which she let furnished to the defendant tenants. The letting was a weekly letting as from Feb. 9, 1946. The rent was at first £3 13s. 6d. a week, but as the landlord put in extra furniture it was raised to £4 4s. a week. On Sept. 30, 1946, the tenants referred the matter of the amount of the rent to a tribunal under the Furnished Houses (Rent Control) Act, 1946, and it is plain from s. 5 of that Act that, if on Sept. 30, 1946, the tenancy was still subsisting, the tenants would have the benefit of the Act because a notice to quit which was given after that date would not be effective before the decision of the tribunal was given or within three months thereafter. So, if the landlord had to rely on a notice dated Oct. 4, 1946, he could not claim possession, but the landlord says he does not need to rely on a notice to quit of that date. The landlord says the notice to quit was given before and expired before the tenants applied to the tribunal, namely, on Sept. 14 to expire on Sept. 21, 1946. It was a perfectly good notice to quit, he says, and the tenancy, accordingly, expired on Sept. 21, 1946.

The point that is raised by counsel for the tenants is that that notice to quit was waived by a subsequent notice to quit, because on Oct. 1, 1946, the landlady having then consulted solicitors, the solicitors wrote to the tenants saying that they had been instructed that the tenants had ignored the notice of Sept. 14 and they were sending in due course a formal notice to quit and deliver up possession of the premises on Oct. 12. They followed that by sending a formal notice to quit in the terms indicated. Counsel for the tenants cited a passage from WOODFALL'S LANDLORD AND TENANT, 24th ed., p. 981, which says :

Generally speaking, giving a second notice to quit amounts to a waiver of a notice previously given . . .

In my judgment, that statement in the text book is not accurate. It is based on a decision of LORD ELLENBOROUGH in *Doe d. Brierly v. Palmer* (1), but when that case is examined it does not support the proposition. There is an observation by LORD ELLENBOROUGH in the course of the argument (16 East 53, at p. 56), which is the apparent basis for the proposition, but it is not in itself sufficient to carry it.

In my opinion, the law is well settled now that, when a forfeiture of a lease is incurred, the lease is voidable and not void, and in those circumstances the giving of a notice to quit may recognise the subsistence of the lease and may, therefore, waive the forfeiture, but in the case where a tenancy is determined by a notice to quit, the position is entirely different.

In this case the tenancy was determined on Sept. 21, 1946, the notice to quit having been given on Sept. 14. When a valid notice has been given, a new tenancy can be created only by an express or implied agreement. A subsequent notice to quit is of no effect unless other circumstances form the basis for inferring a new tenancy having been created after the expiry of the first notice. Applying that test in the present case, it is plain that there was no agreement, express or implied or to be inferred, for any new tenancy. The tenancy expired on Sept. 21. On Sept. 23, the tenants offered rent. It was refused. That showed plainly that the landlord was not going to create a new tenancy, and the mere fact that a solicitor, in order to get possession, gave another notice to quit, is not, in my judgment, any reason for inferring any agreement for a new tenancy.

I hold that the tenancy came to an end on Sept. 21, 1946. The tenancy having so come to an end, the tenants had no longer any right to be there, and when they went to the Furnished Rent Tribunal on Sept. 30, 1946, it was then too late, because the protection afforded by the Furnished Houses (Rent Control) Act, 1946, only applies to notices to quit after the contract has been referred to the tribunal. It does not have any effect on notices to quit given before the matter is referred to the tribunal. There, therefore, is no protection to the tenants under either the Rent Restrictions Acts or the Furnished Houses (Rent Control) Act, 1946, and there must be judgment for the landlord for possession.

Judgment for landlord for possession in 21 days and mesne profits up to the date of possession with costs.

Solicitors : *Telfer & Co.* (for the plaintiff) ; *H. G. Greenwood* (for the defendants)
[Reported by B. ASHKENAZI, Esq., Barrister-at-Law.]

COMPTOIR D'ACHAT ET DE VENTE DU BOERENBOND
BELGE S.A. v. LUIS DE RIDDER, LIMITADA. THE JULIA.
[KING'S BENCH DIVISION (Morris, J.), November 8, 11, 13, December 13, 1946.]

Sale of goods—Contract expressed to be on c.i.f. terms—Special clause for payment against delivery order—Payment on receipt of delivery order addressed to sellers' agents—Delivery rendered impossible owing to enemy occupation of place of delivery—Right of buyers to return of sum paid.

Contract—Impossibility of performance—Frustration—Sale of goods—Contract expressed to be on c.i.f. terms—Payment of price against receipt of delivery order addressed to sellers' agents—Delivery rendered impossible owing to enemy occupation of place of delivery—Right of buyers to return of sum paid.

By a contract dated Apr. 24, 1940, a Belgian company agreed to buy a quantity of rye to be delivered at Antwerp. The contract, which was expressed to be on c.i.f. terms, provided that payment was to be against bill of lading, or delivery order and policy, and/or certificate and/or letter of insurance at Antwerp. On Apr. 30, 1940, in accordance with the usual practice between the parties during a long period, the purchase price was paid by the buyers on receiving a delivery order addressed to the cargo agents of the sellers. This delivery order contained a statement that the bearer had been given a share in a certificate of insurance covering a certain quantity of rye ("War and S.R. and C.C. risks clause included"). Owing to the German invasion of Belgium, the ship carrying the rye did not proceed to Antwerp but was diverted while at sea to Lisbon, where the cargo was sold by the sellers for a price less than the sum which the buyers had paid. The sellers offered to account to the buyers for the proceeds received from the sale at Lisbon, but the buyers claimed the return of the amount paid by them on the ground that the consideration for the payment had wholly failed. They contended (a) that, since the sellers tendered merely a delivery order, the contract became an ex-ship contract, and until the actual delivery of the goods the sellers remained in control of them; (b) that the document against which the purchase price was paid was not good tender under the contract because it did not pass the property in the goods, and, therefore, there had been a total failure of consideration; (c) that the contract was frustrated owing to the German occupation of Antwerp:—

Held: (i) the contract was a c.i.f. contract.

(ii) there was no failure of consideration, because the buyers had received against their payment a document for which they had agreed to pay, the rights under the document being, in a business sense, the equivalent of the goods, and, although the property in the goods had not passed to the buyers, the risk had. (*Inglis v. Stock* (5) and *Sterns, Ltd. v. Vickers, Ltd.* (6) applied). Therefore, the buyers were not entitled to recover from the sellers the sum which they had paid.

[As to C.I.F. CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 29, pp. 210-225, paras. 280-299; and FOR CASES, see DIGEST, Vol. 39, pp. 575-581, Nos. 1801-1836.]

Cases referred to:

- (1) *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122; [1943] A.C. 32; 111 L.J.K.B. 433; 167 L.T. 101; Digest Supp.
- (2) *Re Denbigh Cowan & Co. & Atcherley (R.) & Co.* (1921), 90 L.J.K.B. 836; 125 L.T. 388; 39 Digest 580, 1834.
- (3) *Biddell Brothers v. Clemens (E.) Horst Co.*, [1911] 1 K.B. 934; *reversd.*, *sub nom.*, *E. Clemens Horst Co. v. Biddell Brothers*, [1912] A.C. 18; 81 L.J.K.B. 42; 105 L.T. 563; 17 Com. Cas. 55; 39 Digest 575, 1801.
- (4) *Tregelles v. Sewell* (1862), 7 H. & N. 574; 158 E.R. 600; *affd.* (1863), 7 H. & N. 584, Ex. Ch.; 39 Digest 495, 1119.
- (5) *Inglis v. Stock* (1885), 10 App. Cas. 263; 54 L.J.Q.B. 582; 52 L.T. 821; *affg.*, *S.C. sub nom.*, *Stock v. Inglis* (1884), 12 Q.B.D. 564; 39 Digest 530, 1433.
- (6) *Sterns, Ltd. v. Vickers, Ltd.*, [1923] 1 K.B. 78; 92 L.J.K.B. 331; 128 L.T. 402; 39 Digest 529, 1421.
- (7) *Produce Brokers New Co. (1924), Ltd. v. Wray, Sanderson & Co.*, (1931) 39 Lloyd L.R. 257.
- (8) *Smyth (Ross T.) & Co., Ltd. v. Bailey, Son & Co.*, [1940] 3 All E.R. 60; 164 L.T. 102; Digest Supp.

SPECIAL CASE stated by an umpire.

By a written contract dated Apr. 24, 1940, made in Antwerp, Luis de Ridder, Ltd. (acting by their Antwerp agents, Belgian Grain and Produce Co., Ltd.) agreed to sell to Comptoir d'Achat et de Vente du Boerenbond Belge S.A. about 500 tons of Plate rye for shipment by S.S. Julia :

... at the price of \$4.025 per 100 kilos c.i.f. Antwerp on the terms conditions and rules contained in Form No. 41 of the London Corn Trade Association . . . Any special condition applying hereto shall be treated as if written on such Form.

The contract further provided :

Payment to be made by nett cash on first presentation of and in exchange for first arriving copy/ies of bill/s of lading . . . and/or delivery order/s and policy/ies and/or certificates and/or letter/s of insurance at Antwerp . . .

In over 900 transactions between the parties during the 10 years before the date of the contract, the practice had been for the buyers to pay to the Belgian Grain Co. the amount named in the provisional invoice on receiving from them a delivery order addressed to F. van Bree S.A., cargo agents of the sellers, and on the arrival of the vessel carrying the shipment in question the buyers handed this delivery order to Carga S.A., their own cargo superintendents at Antwerp. Carga S.A. then presented the delivery order to F. van Bree S.A., who issued against it a release authorising the delivery to Carga S.A. of the goods. After Carga S.A. had received this release, their representatives and those of F. van Bree S.A. attended together on the steamer and drew samples of the shipment. The goods, however, could not be actually delivered until the captain's release had been obtained, and this was issued to F. van Bree S.A. and was never physically in the buyers' hands. On Apr. 30, 1940, the sellers presented to the buyers a delivery order for the rye and on the same day the buyers paid to the sellers the purchase price. The delivery order contained a statement that the bearer of the order had been given a share in a certificate of insurance covering a certain quantity of rye (" War and S.R. & C.C. risks clause included"), but the certificates themselves were delivered to F. van Bree S.A., and neither on this occasion nor in any other transaction between the parties did the certificate pass through the buyers' hands. Owing to the German invasion of Belgium, the Julia never arrived at Antwerp but was diverted to Lisbon, where she discharged her cargo and the rye was sold by the sellers at a price less than the sum which the buyers had paid. The sellers offered to account to the buyers for the proceeds received from the sale at Lisbon, but the buyers replied claiming that the contract had been rendered impossible of performance by reason of the occupation of Belgium and had been unilaterally broken by the sellers and that the buyers were entitled to reimbursement in full of the sums paid under it. This claim was repudiated by the sellers, and on Sept. 7, 1945, the buyers demanded arbitration under the contract.

The arbitrators being unable to agree on an award, the umpire appointed by them was requested to make his award in the form of a Special Case. The umpire found (a) that the property in the rye had not passed to the buyers ; (b) that the parties had intended to make a c.i.f. contract. By para. 16 of the award the umpire stated the question of law as follows :

The question of law for the decision of the court is whether upon the facts as found and upon a true construction of the contract the buyers are entitled to recover from the sellers the sum of £1,243 12s. 2d., together with interest thereon at the rate of 4 per cent. per annum from Apr. 30, 1940.

The umpire held that the written contract was on its face a c.i.f. contract to be performed by the sellers by the tender of documents in accordance with the terms thereof, and he rejected the buyers' contention that the sellers' election to tender a delivery order rendered the contract one under which they were under an obligation to deliver the actual goods at Antwerp. Para. 18 of the award was as follows :

Subject to the decision of the court, therefore, I answer the question of law stated in para. 16 hereof in the negative and I award and declare as follows : (a) The buyers . . . are not entitled to recover from the sellers . . . the sum of £1,243 12s. 2d. paid by the buyers on Apr. 30, 1940, nor any interest thereon . . .

H. U. Willink, K.C., and E. W. Roskill for the buyers.

Patrick Devlin, K.C., and J. V. Naisby for the sellers.

Dec. 13. MORRIS, J. : This is an award in the form of a Special Case under the Arbitration Act, 1934, s. 9 (1) (b), stated by the umpire appointed by the respective arbitrators for the parties after disputes had arisen under a written contract dated Apr. 24, 1940, for the purchase and sale of a quantity of Plate rye.

The claim of the buyers for the return of the sum of £1,243 12s. 2d., stated to be the equivalent of the dollars paid, is a claim for money had and received. It is for the return of money the consideration for the payment of which is alleged wholly to have failed. A claim so formulated prompts the two inquiries (a) for what consideration was the money paid, and (b) has such consideration wholly failed. I use the word "consideration" in the sense which is here applicable, bearing in mind what was said by VISCOUNT SIMON, L.C., in his speech in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd* (1). VISCOUNT SIMON, L.C., said ([1942] 2 All E.R. 122, at p. 129):

In English law, an enforceable contract may be formed by an exchange of a promise for a promise, or by the exchange of a promise for an act—I am excluding contracts under seal—and thus, in the law relating to the formation of contract, the promise to do a thing may often be the consideration; but, when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise.

The contract of Apr. 24, 1940, is one for the sale of goods. The stipulated price is stated: "price . . . c.i.f. Antwerp." The parties used a printed form of contract designed by the London Corn Trade Association for contracts intended to be on c.i.f. terms. The parties can hardly be heard to complain, therefore, if their contract were interpreted as a c.i.f. contract: compare the observations of SCRUTTON, L.J., in *Re Denbigh Cowan & Co. and Atcherley & Co.* (2). The contract as made, however, contains clauses either attached by slips or printed on the back, and all the words, phrases and clauses used and their inter-relation have to be considered in forming a conclusion as to the meaning and construction of the contract. The wording of the first of the attached clauses, in my view, gives to the sellers a right to choose between various courses. There may be either a bill of lading or a delivery order. There may be a policy of insurance tendered or there may be a certificate or letter of insurance. The buyers could not insist on having a bill of lading in preference to a delivery order; neither could they insist on having a policy of insurance instead of either a certificate or a letter of insurance, but they could refuse to accept documents other than those specified in the contract.

On behalf of the buyers, attention was directed to the nature of the delivery order that was in fact presented by the sellers to the buyers. Insistence was placed on the fact that the document presented was merely an authority addressed by one agent of the sellers to another. In my view, this is not a consideration that is decisive. The buyers did not decline to receive the so-called delivery order, and did not assert or suggest that a document more nearly corresponding to what would normally be regarded as a delivery order should be tendered to them. At the arbitration the buyers contended for, while the sellers disputed, the admissibility of evidence as to the previous course of business. That evidence showed both the course of business in the past and also what would have happened if the pressure of events had not prevented the S.S. *Julia* from reaching Antwerp. If, at the buyers' insistence, the evidence is considered, it shows ample reasons why the buyers did not refuse to take the delivery order which they received. In the dealings of the past there had been evolved methods and arrangements which were convenient and which had proved workable and they were acceptable to both sides. Similar considerations apply also to the position regarding insurance, even though no actual document was received by or on behalf of the buyers. It is too late, therefore, for the buyers to suggest that the documents tendered to them and received by them, against which they made payment, were not documents which they accepted as documents which the sellers in accordance with the contract might present to them. If the sellers had, pursuant to the option given to them by the contract, presented to the buyers a bill of lading and a policy or policies of insurance, and if payment had been made, it could not have been contended that thereafter the payment could have been recovered as money paid on a consideration

which had wholly failed unless the goods despatched were, after arrival, rejected as not being the goods contractually prescribed, but it is said that, inasmuch as the sellers in the exercise of their option acted as they did in this case, the contract in effect became an arrival or an ex-ship contract.

This submission bears resemblance to one of the arguments rejected by the Court of Appeal in *Re Denbigh Cowan and Atcherley* (2). That case, in my view, largely turned on the construction of the particular words of the contract then under review, and it was not a case in which the ship failed to arrive at its destination. In my view, that authority is in no way decisive of the present issue, though, in so far as guidance is given, it tends to support the submissions of the sellers rather than those of the buyers. BANKES, L.J., in giving judgment in that case, said (90 L.J.K.B. 836, at p. 839) :

I think the alternative in the clause is one giving the seller the option to substitute a delivery order for one of the documents which under a c.i.f. contract he is under an obligation to tender ; and that the document for which the delivery order may be substituted is one of the usual documents under a c.i.f. contract which he has to tender and which would give the buyer the right to possession of the goods. I would, therefore, read the clause in this way : " Payment cash against delivery of all the usual documents under a c.i.f. contract or delivery order in lieu of one of those documents necessary for giving possession of the goods ".

The question which throughout has to be borne in mind is whether the payment was made on a consideration which has wholly failed. It is to be observed that this is a different question from the question whether the time for making payment had under the contract arrived. There can be little doubt that such time did arrive, and that the buyers for good reasons took no point that the documents presented to them were not documents as specified in the contract. *Prima facie*, therefore, it would seem that the buyers received against payment that for which they stipulated, and that the consideration had not wholly failed. The matter requires, however, much deeper examination. A similar stage is reached and passed where payment is made against tender of a good and valid bill of lading and insurance policy, yet, if after arrival the goods are rejected as not being in accordance with the contract description, the payment made may be recovered. In such a case the payment made is, therefore, conditional. Even so, however, there is no condition imported that the ship shall safely arrive at the port of destination. To import any such condition would be to introduce a notion which would be out of tune with the conception of a contract on c.i.f. terms. Further, if any such condition were implied, it would seem to make meaningless or otiose the passing or tender of certificates of insurance or of some document or indorsement which, whatever its precise legal significance, would as a matter of business secure the result that the buyers would recover the value of the goods if they were lost in transit.

In *Biddell Brothers v. Clemens Horst Co.* (3), in his dissenting judgment in the Court of Appeal, KENNEDY, L.J., said ([1911] 1 K.B. 934, at p. 960) :

It is noticeable that in the course of the argument in *Tregelles v. Sewell* (4), MARTIN, B., observes, " The purchaser was to have a policy of insurance, which is usually considered as equivalent to the goods," and earlier in the same argument WILDE, B., asked, " If the meaning is ' to be delivered at Harburgh,' what necessity is there for insurance ? "

On the facts as found it would appear that the property in the rye did not pass to the buyers. The goods were not appropriated. This is, however, in my view, an immaterial consideration. What is of consequence is to consider whether the risk passed. In my view, it did. I see no difficulty in the conception of the passing of the risk even in the case of goods which are neither specific nor appropriated : compare *Inglis v. Stock* (5) and see also *Sterns, Ltd. v. Vickers, Ltd.* (6).

The contract was made on the terms, conditions and rules contained in Form 41 of the London Corn Trade Association as varied or supplemented by any term or clause in or attached to the contract. The terms included, therefore, the rye terms prescribing a guarantee as to condition on arrival. Another term provided that all average was to be for sellers' account. In my view, these and certain other particular terms were not intended by the parties to have, and did not have, the effect of deflecting the contract from its basis as one on c.i.f. terms.

Produce Brokers New Co. v. Wray Sanderson & Co., Ltd. (7) is a case de-

pending upon the construction of the particular words of a particular contract, and does not give guidance in the present case save so far as it illustrates how buyers may make a payment conditional. In his judgment ROCHE, J., said (39 *Lloyds*, L.R. 257, at p. 260) that it was a contract which was of a mixed character.

In my judgment, the buyers in this case, when they made payment, received what the sellers, while exercising certain limited options, were, by the terms of the contract, obliged to hand over. If they handed over a document purporting to be a delivery order, and containing an indorsement as to insurance, which, in fact, failed to satisfy contract requirements, then the buyers might have protested and refused acceptance. But if the buyers accept a document purporting to be a delivery order and in a form which had, in very many previous transactions, been mutually regarded as a delivery order, being a document of a kind which, when used in the manner found by experience to be mutually convenient, resulted in physical possession of the goods being secured, then, in my view, the position under the contract so far as consideration is concerned is the same as if a bill of lading had been handed over. In neither event does the physical delivery of the goods constitute the consideration.

In his judgment in *Tregelles v. Sewell* (4), MARTIN, B., said (7 H. & N. 574, at p. 582):

On consideration I think the true meaning of the contract is this, "When you, the defendant, have performed what you were bound to do, and put the goods on board a ship destined for Harburgh, and handed me the bill of lading and a policy of insurance, I will pay you £5 14s. 6d. per ton, less the freight." The defendant having done all he was bound to do, is entitled to keep the money he got.

The contrary view involves reading into the contract a term that the ship will arrive, or some similar term, but only reading in any such term if the sellers should exercise their option to present a delivery order rather than a bill of lading. But if the contract purports to be and sets out to be a c.i.f. contract, it would seem surprising if the mere exercise of an option to hand over a delivery order rather than a bill of lading should have the result that into the contract is to be read a condition which is repugnant to the whole nature of a c.i.f. contract. It is to be observed also that the handing over of the delivery order was necessarily an act which followed the shipment of the goods and the procuring of a contract of affreightment and the securing of proper insurance cover, so that the steps ordinarily to be taken before documents can be tendered in operating a normal c.i.f. contract had in the present case all been taken.

In my view, the buyers received against their payment a document for which they had agreed to pay, and there was no failure of consideration. This does not mean that the contract was a sale of documents and not of goods. It means that the rights under the document were taken to be, in a business sense, the equivalent of the goods. In *Ross T. Smyth & Co., Ltd. v. T. D. Bailey, Son & Co.* (8), LORD WRIGHT in his speech in the House of Lords said ([1940] 3 All E.R. 60, at pp. 67, 68):

The contract in question here is of a type familiar in commerce, and is described as a c.i.f. contract. The initials indicate that the price is to include cost, insurance and freight. It is a type of contract which is more widely and more frequently in use than any other contract used for purposes of sea-borne commerce. An enormous number of transactions, in value amounting to untold sums, are carried out every year under c.i.f. contracts. The essential characteristics of this contract have often been described. The seller has to ship or acquire after shipment the contract goods, as to which, if unascertained, he is generally required to give a notice of appropriation. On or after shipment he has to obtain proper bills of lading and proper policies of insurance. He fulfils his contract by transferring the bills of lading and the policies to the buyer. As a general rule, he does so only against payment of the price, less the freight, which the buyer has to pay. In the invoice which accompanies the tender of the documents on the "prompt"—that is, the date fixed for payment,—the freight is deducted, for this reason. In this course of business, the general property in the goods remains in the seller until he transfers the bills of lading. These rules, which are simple enough to state in general terms, are of the utmost importance in commercial transactions. I have dwelt upon them perhaps unnecessarily, because the judgment of the Court of Appeal might seem to throw doubt on one of their most essential aspects. The property which the seller retains while he or his agent, or the banker to whom he has pledged the documents, retains the bills of lading is the general property, and not a special property by way of security. In general, however, the importance of the retention of the property is not only to secure payment from the buyer but for purposes of

finance. The general course of international commerce involves the practice of raising money on the documents so as to bridge the period between shipment and the time of obtaining payment against documents. These credit facilities, which are of the first importance, would be completely unsettled if the incidence of the property were made a matter of doubt. By mercantile law, the bills of lading are the symbols of the goods. The general property in the goods must be in the seller if he is to be able to pledge them. The whole system of commercial credits depends on the seller's ability to give a charge on the goods and the policies of insurance.

A Later in his speech, LORD WRIGHT said (*ibid.* at pp. 69, 70) :

I have thought it important, however, to state the general rules in as simple terms as possible, and to construe the material sections of the Act. KENNEDY, L.J., in *Biddell Brothers v. Clemens E. Horst Co.* (3), in pointing out that, if the goods are lost during the ocean transit, the buyer must still implement his contract when the documents are tendered to him, said ([1911] 1 K.B. 934, at p. 959) : "The vendor tenders the bill of lading with the insurance policy and other shipping documents (if any) to the purchaser, to whom, from the moment of shipment the property has passed . . ."

B Such expressions must be read subject to all the qualifications which were fully present to the mind of that great commercial judge. He was not in that case concerned with the *jus disponendi*. In the very example which he gives, if the *jus disponendi* had been reserved, the property in the goods in the strict sense could never pass at all. It could pass, if at all, only when the documents were taken up against payment, and before that could happen, the goods had been lost. This illustrates one peculiarity of the

C c.i.f. contract, which is that the sale can be completed after the loss of the goods by the transfer of the shipping documents. That does not mean that a c.i.f. contract is a sale of documents, and not of goods. It contemplates the transfer of actual goods in the normal course, but, if the goods are lost, the insurance policy and bill of lading contract—that is, the rights under them—are taken to be, in a business sense, the equivalent of the goods.

D If the prior dealings between the parties are to be looked at, then the delivery order was undoubtedly a document of commercial value, and in many hundreds of previous transactions the practical worth of such a document, as bringing about the result that physical possession of the goods would, by the handling of the document, be secured, had been demonstrated. Whatever may have been the legal value of the delivery orders which the buyers were accustomed to accept, such delivery orders doubtless possessed commercial value.

E The buyers submitted that the sellers were under obligation, if they tendered a delivery order, to tender such a delivery order as would entitle the buyers to obtain the goods, that the buyers must not be prevented by any action of the sellers from obtaining the goods, and that the sellers must remain ready and willing to exercise rights against the ship or to give the buyers rights against the ship. They submitted that, if the contract became abortive either because of the action of the sellers or because of some frustrating event occurring at a time when nothing more had been done than the handing over of, *inter*

F *alia*, a delivery order, whether in ordinary form or not, in exchange for payment, then the consideration wholly failed. They further submitted that, if, while the sellers were in complete control of the goods, they negotiated with the ship and arranged that the ship should go to another port than that destined, then the consideration wholly failed, because in such event essential conditions remained unfulfilled. In so far as these submissions suggest that the sellers

G did not pass the kind of delivery order which they should have done, it is too late for the buyers to take the point. The buyers accepted the document as being of the nature for which the contract stipulated. In so far as the submissions involve that, whenever there is a delivery order handed over instead of a bill of lading, there is an implied condition that the ship will arrive, in my view, the submissions are erroneous for the reasons which I have stated. In so far as the submissions suggest that the sellers were guilty of some irregular

H conduct in regard to the bill of lading, it is to be observed that no such case was pleaded. In the points of claim it was alleged that it became impossible for the Julia to proceed to Antwerp.

I desire to say nothing that is not strictly necessary for a consideration of the issue which now arises, but it is pertinent to observe that the delivery order signed by the agents of the sellers is expressed to be for a quantity of rye *ex* bill of lading for 1,120,000 kilos rye in bulk. The sellers may have owed certain obligations to the buyers in regard to the holding and handling by them or their agents of the bill of lading which would make them liable for any wanton or

inexcusable dealings on their part resulting in detriment to the buyers. I need say no more than that the pleadings do not raise an inquiry into or complaint concerning what was done by the sellers after the occupation of Antwerp by the German armed forces. The claim made by the buyers was that the consideration for the payment made by them wholly failed. In my view, it did not.

I should state that, as a contention alternative to and separate from their main arguments, the sellers submitted that in any event the consideration did not wholly fail. They submitted that if, pursuant to contractual obligation, the sellers gave a delivery order, they were giving a document with which the buyers could deal before the time for taking physical delivery arrived. A delivery order was given, and so it was urged that the consideration had not wholly failed. I do not find it necessary to express a view in regard to this.

For the reasons which I have indicated, I am of the opinion that the question of law stated in para. 16 of the award should be answered in the negative. I uphold the award set out in para. 18. The buyers must pay the costs before me.

Award upheld.
Solicitors: *Richards, Butler & Co.* (for the appellants); *Thomas Cooper & Co.* (for the respondents).

[Reported by B. ASHKENAZI, Esq., Barrister-at-Law.]

HOLLORN v. MINISTER OF PENSIONS.

[KING'S BENCH DIVISION (Denning, J.), December 11, 1946.]

Royal Forces—Pension—Attributability—Anxiety state resulting from fear of overseas service.

The appellant, who enlisted in September, 1942, had a hysterical breakdown in Sept., 1943, which, in the opinion of a psychiatrist, was the result of fear of going on service abroad. There was no record of any previous nervous trouble in him or in his family. In Nov., 1943, as a result of his anxiety state, the appellant's employment was changed to that of storeman. In June, 1944, after another breakdown he was again examined by a psychiatrist and appeared before a medical board, and in August, 1944, he was discharged as unfit for any form of military service in consequence of psycho-neurosis. A collation of opinions by the Medical Services Division of the Ministry of Pensions made it clear that the seeds of psycho-neurosis were laid in early life and were due to a combination of hereditary and environmental factors, and that war strain, however severe, was not the sole cause of the neurosis, but that very severe strain could give rise to a temporary neurotic breakdown even in a stable, well-poised man:—

HELD: the strain of hard training followed by orders for foreign service might have been a precipitating cause of the appellant's neurosis, and as war service had not been proved not to be a cause of that neurosis, the compelling presumption in favour of the appellant was not rebutted, and the proper finding in point of law was that the neurosis was attributable to war service.

Minister of Pensions v. Chennell (1) applied.

[FOR THE PENSIONS APPEAL TRIBUNALS ACT, 1943, see HALSBURY'S STATUTES, Vol. 36, p. 480.]

Case referred to:

(1) *Minister of Pensions v. Chennell*, [1946] 2 All E.R. 719.

APPEAL by the claimant from a decision of a pensions appeal tribunal that psycho-neurosis, resulting from fear of being sent on service overseas, was not attributable to war service. The facts appear in the judgment.

G. H. Crispin for the appellant.

Stephen Chapman for the respondent.

DENNING, J.: This is a case stated by the tribunal in respect of a man who enlisted on Sept. 1, 1942, and was discharged on Aug. 14, 1944, as unfit for any form of military service in consequence of anxiety state, sometimes called psycho-neurosis. There is a compelling presumption in his favour.

In 1943, during the course of his service, he went sick and was seen in Sept. by a psychiatrist. The psychiatrist enquired closely into his history. He

found there was no record of any nervous trouble in him or his family beforehand. A drug called amytal was administered to him, and, in the opinion of the psychiatrist, under the influence of that drug, the cause of his breakdown was elicited from him. He confessed that his unit had orders for foreign service. From that the psychiatrist formed the opinion that this man had a hysterical breakdown as the result of fear of going abroad. That was in Sept., 1943. In Nov., as the result of the anxiety state, his employment was changed and he became a storeman, but it is to be noted that on June 5 and 6, 1944, he had to see the medical people again and was ordered to report for psychiatric examination. It was then recommended that he should appear before a medical board with a view to being discharged, and he was, in fact, discharged with an anxiety state in Aug., 1944. It may be that his breakdown in June, 1944, was also a manifestation of the fear of going overseas because it was about "D" day and men in this country did not know who or who would not be going overseas. He claims a pension now on the ground of his complaint of psycho-neurosis, the presumption, as I say, being in his favour.

Much assistance has been given to the tribunal and to the court by a collation of opinions on psycho-neurosis which has been made by the Medical Services Division of the Ministry of Pensions. It is plain from that summary that the seeds of psycho-neurosis are laid in early life due to a combination of hereditary and environmental factors and also that war strain, no matter how severe, is not the sole cause of it. That finding, of course, does not conclude the matter because, as I have already said in *Minister of Pensions v. Chennell* (1), to justify a finding of attributability in cases under this warrant it is not necessary that war service should be the sole cause or even that it should be the effective and predominant cause. It is sufficient that it should be a cause of the trouble. The opinion goes on to say that very severe strain can give rise to a temporary neurotic breakdown even in a stable, well-poised man, but in such a personality the neurosis state does not persist after discharge from the army. Even in such a man, war service may be a cause of neurosis and may persist, as I read this opinion, at the time of discharge from the army. But suppose the individual is not a stable, well-poised man. Suppose he is not so well balanced as some. It seems to follow that in such a man also severe strain could produce a neurosis, and how long it persisted after discharge would depend on the circumstances of the individual case. At all events, there is nothing in this opinion to negative the fact that some conditions of war service may be a cause of neurosis, although probably not the sole cause. In this case the strain of hard training followed by orders for foreign service may have been a precipitating cause of the neurosis. Then, when I have before me the finding of the psychiatrist who saw the man and administered the drug, who came to the conclusion that he was suffering Then, when I have before me the finding of the psychiatrist who saw the appellant and administered the drug, who came to the conclusion that he was suffering then from a hysterical breakdown as the result of being under orders for foreign service, and when I find that in Aug., 1944, soon after D-day, he was discharged on account of his neurosis, and especially when I find there is no history in him or his family beforehand, it seems to me quite plain that the compelling presumption in his favour is not rebutted. The proper finding in this case is that in point of law, inasmuch as war service is certainly not proved not to have been a cause, the neurosis is attributable to war service.

I say nothing about how long the disability lasts. That is an entirely different question and may be one for another tribunal. All I hold is, on the facts of this case, that at the time of the discharge the compelling presumption is not rebutted. The appeal is, therefore, allowed, and a finding of attributability will be recorded.

Appeal allowed.

Solicitors: *Culross & Co.* (for the appellant); *Treasury Solicitor* (for the respondent).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

BRACEGIRDLE v. OXLEY

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys, Lewis, Cassels and Denning, JJ.), December 18, 1946.]

Street and Aerial traffic—Motor vehicle—Dangerous driving—Excessive speed—“Not, in fact, dangerous to the public”—Road Traffic Act, 1930 (c. 43), s. 11 (1).

Magistrates—Perverse decision—Remittance by High Court of Case Stated with direction to convict.

The respondent, a lorry driver, was charged under the Road Traffic Act, 1930, s. 11 (1), with unlawfully driving a motor vehicle at a speed dangerous to the public having regard to all the circumstances of the case. The maximum speed allowed for the vehicle in question was 20 miles an hour, but it was travelling, heavily laden, at a speed of over 40 miles an hour along a main road which carried a heavy volume of traffic, and the driver overtook another vehicle without giving any signal. The justices, however, decided that, although the vehicle was being driven at a speed in excess of the legal speed limit, the speed was not in fact dangerous to the public who were on the road or might reasonably be expected to be on the road :—

HELD : the offence created by the Road Traffic Act, 1930, s. 11 (1) was driving at a speed which was dangerous, actually or potentially, having regard to all the circumstances of the case, and that offence had been proved.

Per curiam. If justices come to a decision to which no reasonable bench of magistrates could come, the High Court can interfere because the position is then the same as if the justices had come to a decision of fact which there was no evidence to support.

Kingman v. Seager (1) and *Durnell v. Scott* (2) followed.

Judgment of HUMPHREYS, J., in *Kingman v. Seager* (1) explained.

[AS TO DANGEROUS DRIVING, see HALSBURY, Hailsham Edn., Vol. 31, pp. 669, 670, para. 979; and FOR CASES, see DIGEST, Supp., Street and Aerial Traffic, Nos. 222a-222s.

AS TO MAXIMUM SPEED LIMITS, see HALSBURY, Hailsham Edn., Vol. 31, pp. 666, 667, paras. 974, 975.]

Cases referred to :

(1) *Kingman v. Seager*, [1938] 1 K.B. 397; 107 L.J.K.B. 97; 157 L.T. 535; 101 J.P. 543; Digest Supp.

(2) *Durnell v. Scott*, [1939] 1 All E.R. 183; Digest Supp.

CASE STATED by justices for the Bucklow division of the county of Chester. The respondent was charged on an information with dangerous driving, contrary to the Road Traffic Act, 1930, s. 11 (1). The justices found that the lorry he drove was being driven at a speed in excess of the legal speed limit on a main road which carried a heavy volume of traffic, but they dismissed the information on the ground that the speed was not in fact dangerous to the public who were on the road or might reasonably be expected to be on the road. The justices dismissed the information, and the appellant, a police superintendent appealed. Since a point of considerable importance was raised by the case, particularly in view of the decisions in *Kingman v. Seager* (1) and *Durnell v. Scott* (2), it was heard by a court of five judges. The facts appear in the judgment of LORD GODDARD, C.J.

S. R. Edgedale, and *J. G. K. Sheldon* for the appellant.

The respondent did not appear.

H. L. Parker as *amicus curiae*.

LORD GODDARD, C.J. : The respondent, Oxley was charged for that he, on Jan. 4, 1946, at Peovei, in the county of Chester, did on a certain public highway there situate, called Holmes Chapel Road, unlawfully drive a certain motor vehicle, to wit, a heavy motor lorry, at a speed dangerous to the public having regard to all the circumstances of the case. The justices dismissed the information, and the facts which they have found were these. The respondent drove a heavy motor lorry of an unladen weight of 6 tons 3 cwt. 1 quarter, carrying a load of 8 tons, so that it was substantially a vehicle of a total weight of between 14 and 15 tons. The maximum speed allowed for that class of vehicle

was 20 miles an hour. The vehicle was driven along the Holmes Chapel Road, Peover, for a distance of one mile and its speed varied between 40 and 45 miles an hour. It was driven on the correct side of the road and passed one slowly driven brewer's lorry which it overtook on a right-hand bend giving no signal of intention to pass. There was no other traffic on the road and no member of the public was actually placed in a position of danger. The justices find that the road is a first-class wide main road and carries a heavy volume of traffic from Liverpool and Manchester to the Potteries and London. There was one converging road, two bends, five farm entrances and one narrow bridge on the length of highway covered by the police test which was being carried out. The vehicle was overtaken and stopped, the respondent was informed of the speed at which he had been travelling, and he replied: "I was talking. I have no speedometer." The justices then say that they decided that, although the vehicle was being driven at a speed in excess of the legal speed limit, in view of the type of road and the situation of the test the speed was not in fact dangerous to the public who were on the road or to the public who might reasonably be expected to be on the road, and, in fact, that there was nothing which distinguished this case from any other ordinary case of exceeding the speed limit, and they dismissed the information. The question they put to the court was whether their decision was correct, it having been proved or admitted that the vehicle was driven at an exceptionally high rate, and whether they were bound to convict of driving at a speed dangerous to the public even though in the circumstances they did not think there was danger to the public who were on the road or might reasonably have been expected on the road.

It certainly seems a very startling decision, so startling that one is bound to ask oneself whether it was a decision to which any reasonable bench of justices could come. Here is a motor lorry of a very considerable weight, hurtling along the road at a pace which is found to be over 40 miles an hour, passing another vehicle without giving signals, only reducing very slightly in one case at a bend, negotiating a narrow bridge and so forth, and it is said that that is not a case of dangerous driving. It is remarkable that the justices in certain parts of Cheshire seem to hold rather strange views on the subject of dangerous driving and also seem to pay singularly little attention to the decisions of this court, for the two cases which caused those of us who sat to hear this case last July to decide that the present case should be heard before a full court were both cases which came from Cheshire. In both cases the justices had dismissed the informations, and in both cases this court remitted the informations, not for further hearing, but with a direction to convict. It is difficult, indeed, without going meticulously into small details, to see any broad distinction between the facts in the present case and the facts in those two previous cases.

It is, of course, said that we are bound by the findings of fact set out in the Case by the justices, and it is perfectly true that this court does not sit as a general court of appeal against justices' decisions in the same way as quarter sessions, for instance, sit as a court of appeal against the decisions of courts of summary jurisdiction. In this court we only sit to review the justices' decisions on points of law, being bound by the facts which they find, provided always that there is evidence on which the justices can come to the conclusions of fact at which they arrive. I should state that the court has had the advantage of argument from Mr. Parker, on the instructions of the Treasury Solicitor, who has intervened as *amicus curiae* to enable the court to have the benefit of a full argument on one side and the other, and Mr. Parker concedes that, if justices come to a decision to which no reasonable bench of justices, applying their minds to proper considerations and giving themselves proper directions, can come, then this court can interfere, because the position then is exactly the same as though the justices have come to a decision of fact which there was no evidence to support.

The first case to which it is necessary to refer is *Kingman v. Seager* (1). The present case comes from the Bucklow division of Cheshire where the justices sit at Knutford. *Kingman v. Seager* (1) was concerned with an appeal from a court of summary jurisdiction sitting at Middlewich in Cheshire. The facts in that case were, as I say, very similar to the facts in the present case. One can find certain small distinctions, for instance, they found in the Case there that the lorry was driven over a cross road at a speed of 40 miles an hour or

over. Though there was not, admittedly, a "cross road" in the case we are considering, there were converging roads, which makes very little difference. In the present case, too, there were farm entrances and so forth. I do not think there were found to be any farm entrances in *Kingman's* case (1). However, the court in that case had no difficulty in reversing the decision of the justices, who had found that there was no offence committed, and the court sent the case back with a direction to convict.

If one looks at the headnote alone in *Kingman's* case (1), it might be said that it can be distinguished on the ground that the justices there only considered the question whether persons were actually put into danger and not the question of potential danger by reason of the amount of traffic which might reasonably be expected to be on the road. The headnote—I am not saying that it is inaccurate—says ([1938] 1 K.B.D. 397):

The offence of dangerous driving under the Road Traffic Act, 1930, s. 11 (1), is complete if potential danger to traffic which might reasonably be expected to be on the road is proved, it being unnecessary to establish actual danger to any member of the public.

However, when one reads the judgment of the court carefully, it is obvious—and, indeed, DU PARCQ, J., said so in terms—that the court was sending the case back to the justices to convict because, in their opinion, the decision to which they had come was one to which no reasonable bench of justices could come. If the court had been dealing with the case merely on the ground that the justices had not considered whether there was potential danger, they would have remitted the case to them for further hearing. But the court did not do that. The court sent the case back with a direction to find that the offence was proved and that there was to be a conviction.

There are some expressions of opinion in the judgments in that case which, I think, go rather far, unless the facts and circumstances of the case are clearly borne in mind. Taken by themselves, these expressions of opinion might be taken as meaning that, wherever justices find excessive speed, they must find dangerous driving. I do not think that any member of the court meant to lay that down as universally applicable, for the reason that there are many cases, apart from any question of danger to the surface of the road, in which it would be perfectly safe to drive a heavy motor vehicle at almost any rate of speed. If you are crossing Dartmoor or a moor in Yorkshire, where there are no hedges on either side of the road and you can see for miles, and where perhaps, the only other vehicle within 20 miles is the police car that is chasing you in your lorry, of course there is no danger to the public, and it would be unreasonable then to say you are driving recklessly, or at a speed or in a manner which is dangerous to the public having regard to the amount of traffic, because there is not only no traffic but it would not be reasonable to expect any traffic thereabouts, since you are driving over a wide open space where you can see the roads are empty. Of course, if traffic does appear and you do not slow up, a different set of considerations may apply. I think it is obvious that what was meant in the judgments in *Kingman's* case (1), and particularly in the judgment of HUMPHREYS, J., was that when you take all the circumstances of the case into consideration, speed alone can be decisive. Supposing, for instance, you are driving on an arterial road, say the Great West Road going out of London or any of the main roads surrounding or in London, it is obvious that you can be driving there at a pace which in itself must be a danger to the public. It is clear in *Kingman v. Seager* (1) that the court, in remitting the case for conviction, were doing so because they thought that the finding of the justices was perverse, though that is not stated in terms.

Durnell v. Scott (2), came from the neighbouring petty sessional division of Sandbach. Whether the justices were the same I do not know. I imagine they were not as they were sitting in a different division, but there was evidently, I think one may say, very close liaison work between the justices of Middlewich and the justices of Sandbach, because the justices of Sandbach gave their decision in precisely the same words as the justices of Middlewich had given their decision in *Kingman v. Seager* (1) except that they were careful in *Durnell v. Scott* (2) to add to their decision, which was given after the judgment in *Kingman v. Seager* (1), the words:

... we did not think there was in fact danger to the public either on the road or which might reasonably have been expected on the road.

They put that in, I suppose, hoping thereby to distinguish the case from *Kingman v. Seager* (1), but the court sent the case back to them with a direction to convict, and again obviously it was because the court came to the conclusion that no reasonably-minded bench of justices could come to that decision.

A In the present case the justices of the Bucklow division have found that there was a lorry being driven down this main road at a speed approaching 50 miles an hour, giving no signals and charging at narrow bridges and so forth. They have not stated it in the Case, if it be the fact—and, therefore, I suppose it is not the fact—that this road is a place where one can see for miles. One knows something about this part of Cheshire, and it is not likely that you would find such a road there. At any rate, the justices of the Bucklow division have not stated that, but they have left the court with the fact that this is a main arterial B road which carries a large volume of traffic between the great manufacturing towns of the north, the Potteries, and London, and, in spite of these two previous decisions and of the fact that it had been shown that the addition of the words in regard to potential danger had not saved the justices' decision in *Durnell v. Scott* (2), for some reason or other the justices in the present case have proceeded to set out their decision in terms which are copied word for word from *Durnell v. Scott* (2). One feels obliged to say that these justices appear C to be acting in a somewhat contumacious manner.

Justices have to remember that their courts are all inferior to this court and they are under the jurisdiction of this court. If justices persist in disregarding decisions given previously by this court on a set of facts which cannot be distinguished from the facts which are before the justices in any particular case, then they are guilty of a grave dereliction of duty, because D it is their duty to obey the rulings of this court. If they do not obey the rulings of this court and persist in giving decisions which are contrary to the judgments of this court, they will find themselves in serious trouble. In this case the court takes exactly the same view as the court has done in the two previous cases. In the opinion of the court, it is impossible to say that a reasonably-minded bench of justices, having facts such as these before them, could come to a decision that no offence had been committed. This case will go back E to the justices with an intimation that the offences have been proved and a direction to convict.

HUMPHREYS, J. : I agree with the judgment given by my Lord, and I desire to say no more than this as to the action which the court has thought right to take. For a very great number of years, whenever justices have found facts from which only one conclusion can be drawn by reasonable persons F honestly applying their minds to the question before them, and have refused to draw that only conclusion, then this court has invariably upset the decision of the justices in the appropriate manner. I want to say one other word as to the judgment which I gave in *Kingman v. Seager* (1). Having read it again, I can quite appreciate that that judgment might be read as amounting to this, that the only question that need be considered in a prosecution for driving at a speed dangerous to the public is the speed itself. If it conveys that impression X to the reader, then, of course, it is wrong. I did not intend to say that, and I do not think myself I am reported as saying quite that. What I did say was ([1938] 1 K.B. 397, at p. 400) :

I understand the finding of the justices to mean that a speed cannot be " dangerous " unless some element of actual danger is proved.

I added :

I That is wrong. The danger to which the section refers is to be found in the speed itself.

I there had in mind the language of the Road Traffic Act, 1930, s. 11 (1), which I think may be read, so far as is necessary for the purpose of the present case and for the decision in *Kingman v. Seager* (1), as follows : " If any person drives a motor vehicle on a road ... at a speed ... which is dangerous to the public, having regard to all the circumstances " then he is guilty of an offence. What I wanted to convey was that the manner in which he was driving becomes

immaterial. He may be convicted because he is driving too fast and only because he is driving too fast, but, of course, there must be taken into consideration all the circumstances of the case, because a speed which is too fast on one road in certain circumstances may not be dangerous when driving on another road in other circumstances. I also had in mind the peculiar finding of the justices in that case. They said in their Case that they had taken into consideration the fact that the vehicle was in good condition, having only one week previously been returned by the makers after being reconditioned, and in stating their decision they used the words: "In view of the condition of the vehicle, the type of road, and the situation of the occurrence, the speed was not in fact dangerous to the public." What I intended to convey there was that the question of the condition of the vehicle was perfectly immaterial. All that had to be looked at was the speed, and I still hold the view that there may be speeds proved which are in themselves dangerous to the persons who use the high road. I do not think anyone can define what is, or is not, the speed that comes within that category, but that a person driving along any road in England at 100 miles an hour would be driving at a speed dangerous to the public would, I think, be admitted by everybody. The offence created by this section is driving at a speed which is dangerous actually or potentially, having regard to all the circumstances of the case.

LEWIS, J.: I cannot usefully add anything to the judgments that have been delivered, with which I wholly agree.

CASSELS, J.: I also agree with the judgments which have been delivered.

DENNING, J.: I agree. The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deduced by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road Traffic Act, 1930, s. 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the primary facts was not one that could reasonably be drawn from them.

Case remitted.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Geoffrey C. Scringgeour*, Clerk to Cheshire County Council, Chester (for the appellant); *Treasury Solicitor*.

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

BOLSOVER URBAN DISTRICT COUNCIL v. BOLSOVER COLLIERY CO., LTD.

[CHANCERY DIVISION (Roxburgh, J.), December 10, 11, 12, 20, 1946.]

Mines—Coal mine—Seams passing under sanitary works—Notice of intention to work—Particular seams not specified—Validity of notice—Waterworks Clauses Act, 1847, (c. 17), s. 22—Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883 (c. 37).

A colliery company owned mines under, or within 40 yards from, sanitary works owned and controlled by a local authority. By a notice given to the authority under the Waterworks Clauses Act, 1847, and the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883, the company stated that, "as owners, lessees and licensees entitled to work and get seams of coal under or within the prescribed distance of" the authority's sanitary works (described as being situated within three named parishes), they gave notice "that we are desirous of working the said

seams of coal and that it is our intention to work the same on the expiration of 30 days after the service upon you of this notice." In due course the company worked some of the seams. The local authority contended that the notice was bad (a) because the company had not specified which particular seams they desired to work, and (b) because the notice covered too large an area :—

HELD : it was not necessary for the company to particularise the seams of coal which it intended to work, and the notice did not cover too large an area, and, the notice was, therefore, valid.

Midland Ry., Co. v. Robinson (2) *applied*.

[AS TO NOTICE OF INTENTION TO WORK, see HALSBURY, Hailsham Edn., Vol. 22, pp. 645-647, paras. 1392, 1393; and FOR CASES, see DIGEST, Vol. 11, pp. 154-156, Nos. 360-368.]

Cases referred to :

- (1) *South Staffordshire Waterworks Co. v. Mason (R.) & Sons* (1886), 56 L.J.Q.B. 255; 57 L.T. 116; 11 Digest 153, 354.
- (2) *Midland Ry. Co. v. Robinson* (1887), 37 Ch.D. 386; *affirmed, sub nom. Midland Ry. Co., & Kettering, Thrapston & Huntingdon Ry. Co. v. Robinson* (1889), 15 App. Cas. 19; 59 L.J.Ch. 442; 62 L.T. 194; 54 J.P. 580; 11 Digest 150, 328.

ACTION by a public authority, owning and controlling certain sanitary works, for a declaration that a notice by a colliery company of intention to work seams of coal under or within 40 yards from their works was not a valid notice under the Waterworks Clauses Act, 1847, s. 22, and the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883, on the grounds (a) that the notice did not specify the particular seams of coal which the company desired to work, and (b) that the notice covered too large an area.

R. M. Montgomery, K.C., and *Lionel Edwards* for the plaintiffs.
D. L. Jenkins, K.C., and *L. M. Jopling* for the defendants.

Cur. adv. vult.

Dec. 20. ROXBURGH, J., read the following judgment: The plaintiffs, the urban district council of Bolsover, own and control a sewage system in the parish of Bolsover in the county of Derby, which consists of the Bolsover sewage works, the Carr Vale sewage works, and sewers which carry sewage from its various sources to the works. I need not describe in detail the component parts of this sewage system. It is enough to say that some parts are underground and some are not. Under these "sanitary works"—for they are such within the meaning of the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883, (hereinafter called "the Act of 1883")—or within 40 yards therefrom lie mines and minerals, owned, leased or occupied by the defendants, Bolsover Colliery Co., Ltd.

On Dec. 17, 1929, the defendants gave the plaintiffs a notice in the following terms :

Waterworks Clauses Act, 1847, and the Bolsover Colliery Workings. We hereby give you notice under and by virtue of the provisions of the Waterworks Clauses Act, 1847, ss. 22-27, that we intend on the expiration of 30 days from the service of this notice to work the coal of which we are the lessees in the seam known as the First Waterloo Seam at the Bolsover colliery lying in the area of protection comprising your works and appurtenances situate in the parishes of Bolsover and Scarscliffe in the county of Derby.

On Dec. 4, 1930, the defendants gave the plaintiffs another notice, in these terms :

Bolsover and Creswell Collieries. Under the provisions of the Waterworks Clauses Act, 1847, and the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883, we, Bolsover Colliery Co., Ltd., as owners, lessces and licensees entitled to work and get seams of coal under or within the prescribed distance of your works of sewerage, drainage, sewerage disposal, lighting and water supply, including all buildings, fixtures, pipes, fittings and apparatus connected with such work or works, all or any of the same lying and being situate within the parishes of Bolsover, Scarscliffe and Elmlton in the county of Derby, hereby give you notice that we are desirous of working the said seams of coal and that it is our intention to work the same on the expiration of 30 days after the service upon you of this notice.

On receipt of those notices, the plaintiffs did nothing. The defendants in

due course worked coal lying under or within 40 yards of the "sanitary works." The plaintiffs desire to claim that those workings have caused subsidence and damage to their "sanitary works," and, with a view to prosecuting such a claim, they issued a writ in this action on Mar. 4, 1946, seeking a declaration that the two notices which I have read were not valid notices on the true construction of the Act of 1883 and of s. 22 of the Waterworks Clauses Act, 1847. (hereinafter called "the Act of 1847").

The relevant statutory provisions are as follows. Section 19 of the Act of 1847 provides :

The undertakers shall from time to time, within 6 months from the time at which any pipes, conduits, or underground works shall have been laid down or formed by them, cause a survey and map to be made of the district within which any such pipes or underground works shall be laid, on a scale not less than one foot to a mile, and shall cause to be marked thereon the course and situation of all existing pipes or conduits for the collection, passage or distribution of water and underground works belonging to them, in order to show all such underground works within the said district, and shall, within 6 months from the making of any alterations or additions, cause the said map to be from time to time corrected, and such additions made thereto as may show the line and situation of all such pipes, conduits and underground works as may be laid down or formed by them from time to time after the passing of the special Act ; and such map and plan, or a copy thereof, with the date expressed thereon of the last time when the same shall have been so corrected as aforesaid, shall be kept in the office of the undertakers, and shall be open to the inspection of all persons interested in the same within the said district.

Section 20 provides :

The undertakers shall from time to time, within 3 months from the time at which any such map or plan, or any such correction thereof or addition thereto, shall have been made as aforesaid, deposit with the clerks of the peace in England or Ireland, and with the sheriff clerks in Scotland, of every county, and the town clerk of every burgh in Scotland, in which such district or any part thereof may be situate, and also with the parish clerks of the several parishes in England, and clerks of the union of the several parishes in Ireland, and the schoolmaster of the several parishes in Scotland, in which such underground works shall be situate, copies of the said map or plan, with all such particulars and all such corrections and additions as aforesaid, so far as relates to such counties, burghs, and parishes respectively.

Section 21 provides :

The said clerks of the peace, sheriff clerks, and town clerks, parish clerks, clerks of the union, and schoolmasters shall receive the said copies of the said map and plan respectively, and shall keep the same, and shall allow all persons interested to inspect the same and take copies or extracts of and from the same, in the like manner, and upon the like terms, and under the like penalty for default, as is provided in the case of maps and plans deposited under [the Parliamentary Documents Deposit Act, 1837].

Section 22 provides :

Except where otherwise provided for by agreement between the undertakers and other parties, if the owner, lessee, or occupier of any mines or minerals lying under the reservoirs or buildings belonging to the undertakers, or under any of their pipes or works which shall be under ground, and shall be described in the map or plan which shall be so kept and deposited as herein-before mentioned, or within the prescribed distance, if any, and if no distance be prescribed within 40 yards therefrom, be desirous of working the same, such owner, lessee or occupier shall give the undertakers notice in writing of his intention so to do, 30 days before the commencement of working ; and upon the receipt of such notice it shall be lawful for the undertakers to cause such mines to be inspected by any person appointed by them for the purpose, and if it appear to the undertakers that the working of such mines or minerals is likely to damage the said works, and if they be willing to make compensation for such mines to such owner, lessee, or occupier thereof, then he shall not work the same ; and if the undertakers and such owner do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation.

Section 23 provides :

If before the expiration of such 30 days the undertakers do not state their willingness to treat with such owner, lessee, or occupier for the payment of such compensation, it shall be lawful for him to work the said mines, and to drain the same, by means of engines or otherwise, as if this Act and the special Act had not been passed, so that no wilful damage be done to the said works and so that the said mines be not worked in an unusual manner .

Section 26 provides :

A For better ascertaining whether any such mines are being worked or have been worked so as to damage the said works, it shall be lawful for the undertakers, after giving 24 hours' notice in writing, to enter upon any lands through or near which the said works are situate, and wherein any such mines are being worked or are supposed so to be, and to enter into and return from any such mines or the works connected therewith, and for that purpose it shall be lawful for them to make use of any apparatus or machinery belonging to the owner, lessee, or occupier of such mines, and to use all necessary means for discovering the distance from the said works to the parts of such mines which are being worked or about to be worked.

Turning to the Act of 1883, s. 2 provides :

B In this Act, the expression "sanitary work" means any existing or future building or work constructed by or vested in or under the control of a local authority under the powers or for the purposes of so much of the principal Act or of any general or local Act or Provisional Order as relates to the construction or maintenance of any works of sewerage, drainage, sewage disposal, lighting, or water supply, and includes any fixtures, pipes, fittings, or apparatus connected with any such work, and belonging to or used by the local authority; the expression "support" includes vertical and lateral support: The expression "Sanitary Act" means the Act or Provisional Order under the authority of which a sanitary work has been or is constructed or is maintained, whether such Act or Order was passed and confirmed before or after the commencement of this Act: The expression "person" includes a body corporate.

C Section 3 provides :

D The provisions of the Waterworks Clauses Act, 1847, ss. 18-27 (both inclusive) with respect to mines, shall, in relation to any sanitary work of a local authority, be deemed to be incorporated with this Act and with the Sanitary Act under the authority of which such sanitary work has been or is constructed or is maintained, with the following modifications (that is to say): (1) For the purposes of such incorporation the said provisions of the Waterworks Clauses Act, 1847, shall be construed as if the expression "the undertakers" referred to the local authority, and as if the expression "the special Act" referred to such Sanitary Act and this Act, and as if expressions relating to pipes, conduits, or other works referred to the sanitary work: (2) The local authority, by or with any notice under the Waterworks Clauses Act, 1847, of willingness to treat for or make compensation, or of intention to prevent or interfere with the working of any mines, may specify and define the nature and extent of support which they require to be left, and any such notice may extend to minerals beyond the distance of 40 yards mentioned in the said Act or to such less distance as the local authority think fit: (3) As regards sanitary works existing at the passing of this Act the local authority shall cause the survey and map referred to in the Waterworks Clauses Act, 1847, s. 19, to be made within 12 months after the passing of this Act . . .

F The plaintiffs never caused a survey and map to be made on the scale prescribed by s. 19 of the Act of 1847, nor did they deposit any map or plan as required by s. 20 of that Act, and they concede that, as regards those portions of the "sanitary works" which are underground, they cannot succeed in this court in the face of the decision in *South Staffordshire Waterworks Co. v. R. Mason & Sons*, (1). But they contend that the obligations imposed by s. 19 and 20 of the Act of 1847 do not extend to those portions of the "sanitary works" which are not underground.

G This is a difficult question, but I shall assume, without deciding, that this contention is well founded, and that, in respect of such portions of their "sanitary works," the plaintiffs were entitled to a notice under s. 22 of the Act of 1847. On that assumption, I must consider the validity of the second notice. The plaintiffs abandoned their challenge to the first notice at the Bar.

H There is no doubt that the defendants were at the date of the notice desirous of working seams of coal under, or within the prescribed distance from, the "sanitary works," and, in fact, they have since done so in due course. The seams which they have so worked are the First Waterloo Seam, the Deep Hard Seam and the Black Shale Seam, but these seams are only three among many, and the main objection to the notice, and the only objection which clearly emerged before the evidence had been closed, was that it did not specify the particular seams of coal which the defendants were desirous of working. If on receipt of the notices the plaintiffs had availed themselves of their rights under the Act of 1847, they could readily have ascertained everything that they required to know to protect themselves, and their present predicament is due to their complete disregard of the notices, but the question is, not what

the plaintiffs could have done, but what the defendants were bound to do.

Looking at s. 22 of the Act of 1847 unaided by authority, I should be disposed to think that any owner, lessee, or occupier of any subjacent mines or minerals, who was desirous of working any such mines or minerals, discharged his obligation by merely giving notice of his intention to work the subjacent mines or minerals 30 days before the commencement of working, and that such a notice could only be impeached by showing that he had no *bona fide* intention of working at all, but, in fact, I am not unaided by authority. I refer to the decision of the Court of Appeal in *Midland Ry. Co. v. Robinson* (2). That case depended on the Railway Clauses Act, 1845, s. 78, which is not distinguishable from s. 22 of the Act of 1847 for the present purpose. The land there in question contained ironstone and limestone. The mineral owner gave notice that he was desirous of working the mines and minerals under the railway and adjoining thereto as set out in an annexed plan. Two objections were taken: (i) that the owner did not intend to work the minerals himself, but to let them; (ii) that the area shown on the annexed plan was too large. COTTON, L.J., said in his judgment (37 Ch.D. 386, at pp. 395-397):

It has been decided that the railway company is not bound to give their notice under s. 78 of their desire or intention to purchase within 30 days. They may give that at any time. They may postpone their intention of purchasing on the owner giving notice of his intention to work until the support which would be taken away by working becomes to them a practical question. That is very important, because, if they were bound within the 30 days once for all to make up their minds as to whether they would buy or not, questions would arise which, in my opinion, do not arise here. Also, as far as I can see, if they think it advisable (but I am far from saying it would be in this case), they may give notice to the landowner to buy one plot at one time and another plot at another time, that is to say, to buy the minerals in that portion which there is an immediate danger of his working, and they must afterwards, when he is coming near to work another portion, give another notice of their intention to buy that. As regards the possibility of giving notice at any time, that is settled; but then we come to a great deal that is unsettled. The question raised here was this: was there any intention or desire on the part of the defendant to work the mines within the meaning of this section and had he the right to express such a desire? That question turns upon this. It is said that no one but an owner, lessee, or occupier who is intending to work personally, that is to say, by his servants and those who are merely acting for him, could give such a notice, and that an owner of minerals who is not desirous of working as his own speculation, but desirous of having the mine worked by a lessee, cannot give such a notice. I think a great part of the argument in this case turns upon that, but, in my opinion, that contention of the railway company is wrong. What are the words here? "If the owner, lessee or occupier of any mines or minerals lying under the railway . . . or within 40 yards therefrom be desirous of working the same such owner, lessee, or occupier shall give to the company notice in writing of his intention so to do." There is nothing, in my opinion, there to restrict an owner from giving a notice unless he intends by his own servants and his own agents to work it. If he intends to do it in the way which is usually adopted by owners by letting it to lessees who will work, rendering him a royalty or rent, in my opinion he is a person who, being deprived of that right and deprived of that mode of employing his land, would be entitled to compensation under s. 6, and comes within the terms of this clause as an owner who is desirous of working. To hold the contrary would very largely prejudice owners of mines under or near a railway, because a man cannot make arrangements for letting a mine unless he is able to assure those who are offering to take that they can work it if they take a lease; but, if he does not know whether the railway company will exercise their right or whether they will allow it to be worked by him or his lessees, it is impossible for him to enter into any arrangement with persons who are willing to work and to lay out, as is very often necessary, a large sum of money in order to enable them to work profitably the minerals of which they are lessees. In my opinion that contention cannot prevail. Although I doubt whether if the notice means personally working, that is to say, by his servants, we could hold that the defendant was desirous of working, yet as he had a right to give the notice of his desire to work by means of lessees, in my opinion, on the evidence it is clearly established that he was desirous of doing so, and that there was a strong probability of his being able to let it, even at the time when he gave this notice. I quite agree that there must be not only an expression of desire, but an honest actual existence of the desire to work either by himself or his lessees to justify an owner in giving such a notice. If he gave the notice when it was obvious either that there were no minerals, or that he could not possibly intend [those words are very strong] either to let them or work them himself, that would be vexatious, and the court would not allow that to be acted upon. If it was acted upon it is very true the railway company might be put to some expense in arbitrations, unless they made an offer of rather more than nothing,

which is probably what the arbitrator would give if there were no minerals or no possibility of working them. In my opinion, therefore, if it appeared that the notice was a mere vexatious one, that would not be a notice of a desire to work within the meaning of this section.

Later, COTTON, L.J., said (*ibid.*, at p. 399) :

A Then it is said that this notice is a great deal too large. In this case the extent seems to be about a mile and a half. I give no opinion as to what would be the result if the owner of 20 miles of land through which the railway went gave a general notice of this sort. It may be that the court would come to the conclusion that there was not an honest actual intention of working those minerals. But in an ordinary case all difficulty is got rid of, in this way, that, where the railway company know the owner is intending to work any particular portion of that which is included in his notice, they can at once, although the 30 days may have elapsed, give him a counter-notice and say they are going to purchase the minerals in that portion.

LINDLEY, L.J., said (*ibid.*, at p. 402) :

B Then it is said that, if the notice is upheld, we should be putting a construction upon the Act which would expose railways to dangers never contemplated and that we should be enabling landowners to give general notices, which would be excessively embarrassing. I was struck with this contention, but, if examined, it will be found incorrect. Let me suppose this case : that a landowner, when the railway company gives him notice to take his land, or soon afterwards, gives a general roving notice to the railway company of his intention to work the minerals. What is the position of the railway company ? They may disregard the notice. If they think it is frivolous C they need not do anything. They have power of inspecting ; they have power of ascertaining what it is desirable to do for the protection of their own interests. If they come to the conclusion that the notice is seriously meant and that the landowner really does intend to work the minerals, and that there are minerals to work, they can give him a counter-notice, and if you look at the words "any part thereof" in ss. 78 and 79 it appears to me to be tolerably plain that the railway company can limit their counter-notice, if so disposed, to a portion only of the minerals referred to. Of D course, the consequence of that is that if they do limit their counter-notice, the landowner who has served a more general notice, can force them to give another notice if he is in a position really to work the minerals ; but the railway company can judge of their own interests about that.

LOPES, L.J., said (*ibid.*, at p. 405) :

E It was also suggested that the notice was too large, that the land in question extended for nearly 2 miles, and that the notice therefore was an embarrassing notice to the company. I do not myself see that difficulty, because in the first place I think that it is open to the company when they give their counter-notice to confine it to any such portions of the land in the extent of 2 miles as they think fit. Then if they desire, they might go to arbitration or to a jury to assess the value of the minerals, with respect to that particular area.

F That judgment was affirmed in the House of Lords. In his speech LORD HERSHELL said (15 App. Cas. 19, at p. 32) :

G It remains for me to consider the subsidiary contention of the appellants, that the respondent was not in the present case "desirous of working" the mines. The first objection raised is that he had no intention of working them himself, that is, by his own servants, but only by lessees or licensees. I agree with the court below that this objection cannot, upon the true construction of the section, be sustained. Then it was urged that there was no real desire to work, but only to compel the appellants to purchase the minerals. I quite concur with what COTTON, L.J., said, that "there must be not only an expression of desire, but an honest actual existence of the desire to work either by himself or his lessees, to justify an owner in giving such a notice. If he gave the notice when it was obvious that there were no minerals, or that he could not possibly intend either to let or work them himself, that would be vexatious, and the court would not allow that to be acted upon."

H That decision appears to me to show that an owner, who is acting in good faith, can give a valid notice before he has come to any arrangement with his proposed lessee for working, and before any shaft has been sunk, and such an owner could not be expected to particularise the seams of coal which the proposed lessee might wish to work. There is nothing in the Railway Clauses Act, 1845, s. 78, or in s. 22 of the Act of 1847, to suggest that the form of the notice ought to vary with the varying circumstances of persons giving notices, and nothing in those judgments to which I have referred indicate that the notice need contain anything beyond an expression of intention to work mines or minerals lying in the area in question. Accordingly, I hold that the notice is not invalid because it does not particularise the seams of coal.

Two further grounds of objection to the notice were put forward by counsel for the plaintiffs in his reply. He challenged it because it referred, not only to sewerage works, but also to lighting and water supply works, but he conceded that this challenge could only succeed if the plaintiffs did not own or control any lighting or water supply works in the parish of Bolsover and, as no evidence was adduced on this point, this challenge is without evidence to support it. Counsel for the plaintiffs also challenged the notice on the ground that the parish of Bolsover was an excessively large area. He had earlier disclaimed any intention to rely on the fact that the notice extended to two other parishes. Looking at the facts of the present case in the light of the passages from *Midland Ry. Co. v. Robinson* (2) which I have cited, I cannot hold that the notice covers an area too large. Accordingly, I dismiss the action.

Action dismissed with costs.

Solicitors : *Lewin, Gregory, Torr, Durnford & Co.* agents for *Jones & Middleton, Chesterfield* (for the plaintiffs) ; *Field, Roscoe & Co.*, agents for *Davies, Sanders & Co.*, Nottingham (for the defendants).

[*Reported by B. ASHKENAZI, ESQ., Barrister-at-Law.*]

EARP v. ROBERTS

[KING'S BENCH DIVISION (Lord Goddard, C.J., and Lewis, J.), December 13, 1946.]

Medicine—Advertisement—Advertisement referring to an article as a cure for tuberculosis—Advertisement, circular and letter together amounting to an advertisement—Pharmacy and Medicines Act, 1941 (c. 42), s. 8 (1).

The appellant advertised a certain article, "Tassa," in a periodical, stating that it contained "the only antiseptic both harmless and efficient in every form of disease," and that full information would be given on application. In answer to a letter asking for further information, the appellant wrote a letter stating that Tassa cured tuberculosis, and he inclosed a circular in regard to antiseptic treatment with Tassa. The appellant was charged under the Pharmacy and Medicines Act, 1941, s. 8 (1), with unlawfully taking part in the publication of an advertisement referring to an article in terms calculated to lead to the use of that article for the purpose of the treatment of human beings for tuberculosis :

HELD : the advertisement, the circular (which was in itself an advertisement) and the letter accompanying the circular together amounted to an "advertisement" within the meaning of the sub-section referring to Tassa in terms calculated to lead to its use as a cure for tuberculosis, and, therefore, the appellant was guilty of an offence against the sub-section.

CASE STATED by the Chertsey justices.

The appellant was charged under the Pharmacy and Medicines Act, 1941, s. 8 (1), with unlawfully taking part in the publication of an advertisement referring to an article in terms calculated to lead to the use of that article for the purpose of the treatment of human beings for tuberculosis. The justices held that an advertisement in a periodical, a circular and a letter accompanying the circular together amounted to an advertisement that the article in question was a cure for tuberculosis, and they convicted the appellant. The facts appear in the judgment of LORD GODDARD, C.J.

Robert Fortune for the appellant.

G. R. Blanco White, K.C., and *Cyril Morgan* for the respondent.

LORD GODDARD, C.J. : This is a Special Case stated by the justices for the petty sessional division of Chertsey. The appellant was summoned before them for unlawfully taking part in the publication of an advertisement referring to an article, to wit, "Tassa," in terms which were calculated to lead to the use of that article for the treatment of human beings for tuberculosis, contrary to the Pharmacy and Medicines Act, 1941, s. 8 (1), which provides :

Subject to the provisions of this Act, no person shall take any part in the publication of any advertisement referring to any article, or articles of any description, in terms which are calculated to lead to the use of that article or articles of that description for the purpose of the treatment of human beings for any of the following diseases, namely . . . tuberculosis.

An advertisement is not defined, but it is stated in s. 17 of the Act that it includes "... any notice, circular, label, wrapper or other document, and any announcement made orally or by any means of producing or transmitting light or sound."

The appellant inserted the following advertisement in a periodical known as "Health and Life":

A Tassa. Despite recent discoveries, Tassa still contains the only antiseptic both harmless and efficient in almost every form of disease which chemical science has yet produced. Restores and preserves health. Full information on application.

Then there are set out the prices, which are not inconsiderable. A letter was written to the appellant asking for further information, and in answer to that letter the appellant wrote a letter in which he said:

B Tassa is much superior to penicillin, for the latter is not, like Tassa, by any means harmless; nor is it of the least use for curing cancer or tuberculosis, both of which Tassa *does* cure.

With that letter he inclosed a circular in regard to antiseptic treatment with Tassa.

C The justices found, and, in my opinion, rightly found, that, taking those three documents together—the advertisement in which full information is proffered to anybody who likes to ask for it, the circular (which is in itself an advertisement), and the letter which accompanied it—they amounted to an advertisement that Tassa is a cure for tuberculosis. I think they came, not only to the right decision, but to the only possible decision. If it were not so, every inventor of a quack remedy could avoid the Act by publishing advertisements of the remedy in which it is stated that further information will be given on application, and then, when, in response to the advertisement, an application is made to him for information about his drug, medicine or whatever he may be selling, sending a circular with a letter saying: "This is a cure for tuberculosis," or some other disease which he is prohibited from offering to cure. I think the justices came to a right decision and the appeal is, therefore, dismissed.

D LEWIS, J.: I agree.

Appeal dismissed with costs.

E Solicitors: *Gale Thomas & Son* (for the appellant); *A. C. Castle*, solicitor to the Pharmaceutical Society of Great Britain (for the respondent).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

F A.-G. OF ONTARIO AND OTHERS v. A.-G. OF CANADA AND OTHERS—(A.-G. OF QUEBEC intervening)

[PRIVY COUNCIL (Lord Jowitt, L.C., Viscount Simon, Lord Macmillan, Lord Wright, Lord Greene, M.R., Lord Simonds and Lord Goddard, C.J.), October 23, 25, 28, 29, 31, November 1, 1946, January 13, 1947.]

G *Dominions—Legislative powers—Establishment of Supreme Court with exclusive and final appellate jurisdiction—Exclusion of appeals to Privy Council from dominion and provinces—British North America Act, 1867 (c. 66), ss. 91, 92, 101—Statute of Westminster, 1931 (c. 4).*

Privy Council—Appeals—Power of dominion legislature to exclude appeals from dominion and provincial courts—British North America Act, 1867 (c. 66), ss. 91, 92, 101—Statute of Westminster, 1931 (c. 4).

H The power vested in the Canadian parliament by s. 101 of the British North America Act, 1867, to establish a general Court of Appeal for Canada, was necessarily subject to the prerogative right of His Majesty the King, since that right was not expressly or by necessary intendment excluded, and this limitation was recognised by s. 54 of the Canadian Supreme Court Act, 1927. That, however, was a restriction or fetter on the legislative power of the dominion which has been removed by the Statute of Westminster, 1931, and it is now within the power of the dominion parliament to enact that the jurisdiction of its Supreme Court shall be ultimate. No other solution is consonant with the status of a self-governing dominion.

Given the power to abrogate imperial statutes, the authority conferred by s. 101 of the British North America Act, 1867, stands unqualified and absolute. Since the Statute of Westminster, 1931, the dominion parliament has power, not only to determine in what cases and under what conditions the appellate jurisdiction of the Supreme Court may be invoked, but also to deny appellate jurisdiction to any other court. Consequently, the dominion parliament is competent to exclude appeals to His Majesty in Council not only in criminal cases or civil cases falling within the subject-matter of s. 91 of the Act, but also in every other case which can be brought before any provincial court in Canada.

[EDITORIAL NOTE.] The decision in this case is of paramount constitutional importance since there is implicit in it a pronouncement that, since the passing of the Statute of Westminster in 1931, any of the dominions—Australia, New Zealand, South Africa, the Irish Free State, and Newfoundland (and India if and when she attains dominion status), as well as Canada—can provide for the establishment within the dominion of a court of appeal with “exclusive, ultimate, final, and conclusive” jurisdiction, unless some provision in the constitution of the dominion prohibits such a step being taken. If this course were followed by all the dominions, the function of the Judicial Committee of the Privy Council as the final court of appeal of the Empire would practically cease. With regard to the present matter, in *British Coal Corporation v. R.*, [1935] A.C. 500, it was held that the limitations imposed on the Canadian legislature by the Colonial Laws Validity Act, 1865, and also by the doctrine forbidding extra-territorial legislation, were abrogated by the Statute of Westminster, 1931, and that, accordingly, there now remained only such limitations as flowed from the British North America Act, 1867. It was, therefore, held to be competent for the Canadian legislature, under s. 91 of the Act, to pass an Act (Canadian Statute, 23 & 24 Geo. 5, c. 53) prohibiting appeals to the King in Council in criminal matters. While not disagreeing with the reasoning in that case, the Judicial Committee in the present case have expressed the view that it can also be supported on the wider ground that s. 101 of the Act, now that the limitations referred to no longer exist, directly authorises the establishment by the Canadian legislature of a court with final and exclusive jurisdiction both in civil and criminal matters. Their Lordships hold that it is within the power of the Canadian legislature to pass a Bill entirely abolishing appeals to the King in Council, both from the Supreme Court and from provincial courts. It should be noted that the Bill in question has not yet been passed, the debate on the second reading having been adjourned that the present adjudication on the legislative competence of the Canadian legislature might be obtained.

AS TO THE APPELLATE JURISDICTION OF HIS MAJESTY IN COUNCIL, see HALSBURY, Hailsham Edn., Vol. 9, pp. 221-237, paras. 425-454; and FOR CASES, see DIGEST, Vol. 17, pp. 476-503, Nos. 393-666.

FOR THE BRITISH NORTH AMERICA ACT, 1867, ss. 91, 92, 101 AND 129, see HALSBURY'S STATUTES, Vol. 5, pp. 364-367, 368, 372; and FOR THE STATUTE OF WESTMINSTER, 1931, see *ibid.*, Vol. 24, p. 125.]

Cases referred to:

- (1) *R. v. Bertrand* (1867), L.R. 1 P.C. 520; 4 Moo. P.C.C.N.S. 460; 16 L.T. 752; 31 J.P. 531; *sub nom. A.-G. of New South Wales v. Bertrand*, 35 L.J.P.C. 51; 17 Digest; 477, 402.
- (2) *Nadan v. R.*, [1926] A.C. 482; 95 L.J.P.C. 114; 134 L.T. 706; Digest Supp.
- (3) *British Coal Corp'n. v. R.*, [1935] A.C. 500; 104 L.J.P.C. 58; 153 L.T. 283; Digest Supp.
- (4) *A.-G. for Ontario v. A.-G. for Canada*, [1912] A.C. 571; 81 L.J.P.C. 210; 106 L.T. 916; 17 Digest 428, 96.
- (5) *Crown Grain Co., Ltd. v. Day*, [1908] A.C. 504; 78 L.J.P.C. 19; 99 L.T. 746; 17 Digest 441, 173.
- (6) *Croft v. Dunphy*, [1933] A.C. 156; 102 L.J.P.C. 6; 148 L.T. 62; Digest Supp.

APPEAL by special leave from a judgment of the Supreme Court of Canada, given on Jan. 19, 1940, and reported 1940 S.C.R. 49, on a question which was referred to the court under the Supreme Court Act, 1927, s. 55. The question referred to the court was whether a Bill, to amend that Act by the substitution of a section giving the Supreme Court exclusive ultimate appellate civil and criminal jurisdiction within and for Canada and abolishing appeals from any court in Canada to His Majesty in Council was *ultra vires* the parliament of Canada. The Supreme Court certified that the parliament of Canada was competent to enact the Bill in its entirety. From this judgment the Attorney-Generals of Ontario, British Columbia and New Brunswick appealed, the Attorney-General of Quebec intervening to support. The Attorney-Generals of Canada, Manitoba and Saskatchewan were respondents to the appeal.

E. R. Magone, K.C. (of the Canadian Bar) for A.-G. of Ontario, *Wilfrid Barton, K.C.* and *Frank Gahan* for A.-G. of British Columbia.

Frank Gahan for A.-G. of New Brunswick, *F. P. Varcoe, K.C.* (of the Canadian Bar) and *Charles Russell* for A.-G.s of Canada, Manitoba and Saskatchewan.

L. E. Beaulieu, K.C. (of the Canadian Bar) for A.-G. of Quebec.

The Board took time for consideration.

A Jan. 13. LORD JOWITT, L.C., read the following judgment of their Lordships.

This appeal is brought from the judgment of the Supreme Court of Canada given on Jan. 19, 1940, on a question which was referred to that court under the provisions of s. 55, the Supreme Court Act, R.S.C. 1927 (c. 35). From the recitals contained in the order of reference which was made by the Governor-General in Council on Apr. 21, 1939, it appears that, at the fourth session of the eighteenth Parliament of Canada, Bill 9, entitled "An Act to amend the Supreme Court Act" was introduced and received first reading in the House of Commons on Jan. 23, 1939, and that on Apr. 14 of the same year the debate on the motion for the second reading of the Bill was adjourned that steps might be taken to obtain a judicial determination of the legislative competence of the parliament of Canada to enact the provisions of the said Bill in whole or in part. The following question was accordingly referred to the Supreme Court of Canada for hearing and consideration:

C Is said Bill 9 entitled "An Act to amend the Supreme Court Act" or any of the provisions thereof and in what particular or particulars or to what extent *ultra vires* of the parliament of Canada?

The contents of the Bill, a short but pregnant one, must be stated in full. They are as follows:

D 1. Section 54 of the Supreme Court Act, c. 35 of the Revised Statutes of Canada, 1927, is repealed and the following substituted therefor:—

54. (1) The Supreme Court shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada; and the judgment of the court shall, in all cases, be final and conclusive.

E (2) Notwithstanding any royal prerogative or anything contained in any Act of the Parliament of the United Kingdom or any Act of the Parliament of Canada or any Act of the legislature of any province of Canada or any other statute or law, no appeal shall lie or be brought from any court now or hereafter established within Canada to any court of appeal, tribunal or authority by which, in the United Kingdom, appeals or petitions to His Majesty in Council may be ordered to be heard.

F (3) The Judicial Committee Act, 1833, chapter forty-one of the statutes of the United Kingdom of Great Britain and Ireland, 1833, and the Judicial Committee Act, 1844, chapter sixty-nine of the statutes of the United Kingdom of Great Britain and Ireland, 1844, and all orders, rules or regulations made under the said Acts are hereby repealed in so far as the same are part of the law of Canada.

2. Nothing in this Act shall affect any application for special leave to appeal or any appeal to His Majesty in Council made or pending at the date of the coming into force of this Act.

3. This Act shall come into force upon a date to be fixed by proclamation of the Governor in Council published in the Canada Gazette.

G On Jan. 19, 1940, the Supreme Court certified that the opinions in respect of the question referred to it were as follows:

By the court:—The parliament of Canada is competent to enact the Bill referred in its entirety. By CROCKET, J.: the Bill referred is wholly *ultra vires* of the parliament of Canada. By DAVIS, J.: The Bill referred, if enacted, would be within the authority of the Dominion parliament if amended to provide that nothing therein contained shall alter or affect the rights of any province in respect of any action or other civil proceedings commenced in any of the provincial courts and solely concerned with some subject-matter legislation in relation to which is within the exclusive legislative competence of the legislature of such province.

H From this judgment of the court the Attorney-Generals of Ontario, British Columbia and New Brunswick have by special leave brought this appeal which the Attorney-General of Quebec has intervened to support. The Attorney-Generals of Canada and of Manitoba and Saskatchewan are respondents to the appeal. The hearing of the appeal was postponed until the conclusion of the war. Their Lordships think it worth while to observe that H.M. Attorney-General in England took no part in the controversy, which has throughout been between the Dominion

of Canada and certain of the provinces, on the one hand, and others of the provinces, on the other hand. The single issue has been whether, as the appellants contend, the subject matter of Bill 9 falls within the exclusive powers committed to the provincial legislatures of the provinces of Canada under s. 92 of the British North America Act, 1867, or, as the respondents contend, is within the powers of the parliament of Canada under s. 101, or, alternatively, under s. 91, of that Act. An alternative argument was faintly addressed to their Lordships by counsel for the appellants that the Bill lay within the powers of neither provinces nor Dominion, but H.M. Attorney-General in England did not intervene to support this view and their Lordships see no valid reason for accepting it.

The sections of the British North America Act to which it is necessary to refer are ss. 91, 92, 101 and 129. Sections 91 and 92 fall within part VI of the Act which is entitled "Distribution of Legislative Powers" and by s. 91 it is enacted:

It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say:—

Then follow 29 enumerated classes covering a very wide field, of which for reasons which will later appear mention must be made of number 27:

The criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters.

Section 91 ends with the words:

And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

Section 92 is as follows:

In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say:—

Then follow 16 enumerated classes, in which the provincial aspect of the subject-matter is reiterated. It is upon the fourteenth class that the appellants rely:

The administration of justice in the province, including the constitution, maintenance, and organisation of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts.

They also call in aid the thirteenth class:

Property and civil rights in the province.

The sixteenth and last class is:

Generally, all matters of a merely local or private nature in the province.

Section 101 (which falls within part VII of the Act entitled "Judicature") is in these terms:

The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance and organisation of a General Court of Appeal for Canada, and for the establishment of any additional court for the better administration of the laws of Canada.

Before stating how this power has been exercised it will be convenient to refer to s. 129 of the Act and briefly to re-state the familiar facts in regard to appeals to His Majesty in Council. Section 129 of the Act provides:

Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia, or New Brunswick at the union, and all courts of civil and criminal jurisdiction, and all legal commissions, powers, and authorities, and all officers, judicial, administrative, and ministerial, existing therein at the union, shall continue in Ontario, Quebec, Nova Scotia and New Brunswick respectively, as if the union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the parliament of Great Britain, or of the parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the parliament of Canada, or by the legislature of the respective province, according to the authority of the parliament or of that legislature under this Act.

A The Act further made provision for the admission of other colonies or provinces into the union. The manner in which this power was exercised and the growth of Canada to a great dominion are matters of history which need not be narrated here. Suffice it to say that to the provinces originally brought within the union and to those afterwards admitted to it the relevant provisions of the British North America Act which have been cited equally apply, and for them all the question is the same, whether it is for them or for the dominion to legislate in regard to appeals to His Majesty in Council whether from their own provincial courts or from the Supreme Court of Canada set up under s. 101 of the Act.

B Their Lordships have, in the consideration of this case, been greatly assisted by the elaborate statements appearing in the factums and formal Cases of the parties and in the opinions of the learned judges of the Supreme Court in regard to the manner in which the appeal from the several provinces to His Majesty in Council has from time to time been regulated. It does not, however, appear to their Lordships to be necessary to consider these matters in detail nor to distinguish those cases in which appeal is said to lie as of right from those in which it is said to lie by leave under the prerogative. This has been for practical purposes a convenient mode of division, but fundamentally in both classes of case the appeal is founded on that prerogative which as long ago as 1867 in *R. v. Bertrand* (1) (L.R. 1 P.C. 520, at p. 530) was described as :

C . . . the inherent prerogative right, and, on all proper occasions, the duty, of the Queen in Council to exercise an appellate jurisdiction, with a view not only to ensure, so far as may be, the due administration of justice in the individual case, but also to preserve the due course of procedure generally.

D The exercise of this appellate jurisdiction is regulated generally by the Judicial Committee Acts, and in regard to each of the provinces of Canada either (as, for example, in the case of Manitoba) by Orders in Council or, (as in the case of Ontario and Quebec) by provincial statutes made under the authority or assumed authority (it matters not which) of the Constitutional Act of 1791, or (as in the case of British Columbia) by an imperial statute, and the only difference between the two classes of case is that an appeal may be said to lie as of right when an appellant brings his appeal under the provisions of the relevant Order in Council or statute, and, when he cannot do so, but can only appeal by special leave of the Sovereign on the advice of the Judicial Committee itself, then the appeal is sometimes said to be under the prerogative, a description which, if it is intended to be exclusive, is inaccurate.

F It is convenient shortly to re-state what immediately after the Act, and, indeed, at all times until the passing of the Statute of Westminster (to which reference will shortly be made), was the constitutional bar to legislation whether by dominion or province in regard to appeals to His Majesty in Council. In the first place, it must be remembered that by the Colonial Laws Validity Act, 1865, any colonial law which was repugnant to the provisions of an Act of the United Kingdom extending to the colony either by express words or necessary intendment was void and inoperative to the extent of such repugnancy. It followed that neither dominion nor province could then validly legislate so as to abolish a right of appeal to the Sovereign in Council which was provided by imperial Acts. In the second place, the doctrine which imposed a territorial limitation on the powers of colonial legislatures might be regarded as a fetter on the legislative competence of dominion or province to deal with the so-called "prerogative" right of appeal. In the third place, the express terms of the exception in s. 129 of the British North America Act, to which reference has been made, precluded any alteration of imperial Acts.

G It is now necessary to return to s. 101 of the Act. Acting under its authority, H the parliament of Canada, in the year 1875, passed the Supreme Court of Canada Act, which has from time to time been amended and, as amended, is now R.S.C. 1927, c. 35. Under that Act a Supreme Court of Appeal was established which, under s. 35, was to have, hold, and exercise an appellate civil and criminal jurisdiction within and throughout Canada. It prescribed the limits within, and the terms on, which an appeal might be brought from the courts of the provinces, and by s. 54 provided that the judgment of the court should in all cases be final and exclusive and that no appeal should be brought from any judgment or order of the court to any court of appeal established by the parliament

of Great Britain and Ireland by which appeals or petitions to His Majesty in Council might be ordered to be heard, saving any right which His Majesty might be graciously pleased to exercise by virtue of his royal prerogative. It is this s. 54 which the Bill now challenged seeks to amend, and two things may be noticed about the section as originally enacted. In the first place, it is silent, as is the whole Act, about appeals from the provincial courts to His Majesty in Council. In the second place, so far as appeals from the Supreme Court are concerned, it expressly saves the prerogative while denying any appeal as of right. A

Such being the position before 1931, in that year was passed the Statute of Westminster, an Act of the imperial Parliament, which has as its sub-title "An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930." The recitals in the preamble of this Act, after referring to the reports of the conferences, affirm that it is proper to set out that, as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the succession to the throne or the royal style and titles should thenceforth require the assent as well of the parliaments of all the dominions as of the parliament of the United Kingdom, and that it is in accord with the established constitutional position that no law hereafter made by the parliament of the United Kingdom shall extend to any of the said dominions as part of the law of that dominion otherwise than at the request and with the consent of that dominion. By s. 2 (1) it is provided that the Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of the Act by the parliament of a dominion (which by definition includes the Dominion of Canada), and by s. 2 (2) that no law and no provision of any law made after the commencement of the Act by the parliament of a dominion shall be void or inoperative on the ground that it is repugnant to the law of England or to the provisions of any existing or future Act of Parliament of the United Kingdom or to any Order, rule, or regulation made under any such Act, and the powers of the parliament of a dominion shall include the power to repeal or amend any such Act, Order, rule, or regulation in so far as the same is part of the laws of the dominion. By s. 3 it is declared and enacted that the parliament of a dominion has full power to make laws having extra-territorial operation. (It may be noticed that this power is not given to the legislature of a province). By s. 4 it is provided that no Act of Parliament of the United Kingdom passed after the commencement of the Act shall extend, or be deemed to extend, to a dominion as part of the law of that dominion unless it is expressly declared in that Act that that dominion has requested and consented to the enactment thereof. It remains only to refer to s. 7, which deals with Canada only. By that section it is provided (by sub-s. (1)) that nothing in the Act shall be deemed to apply to the repeal, amendment, or alteration of the British North America Acts, 1867 to 1930, or any Order, rule, or regulation made thereunder; (by sub-s. (2)) that the provisions of s. 2 of the Act shall extend to laws made by any of the provinces of Canada and to the powers of the legislatures of such provinces; and (by sub-s. (3)) that the powers conferred by the Act on the parliament of Canada or on the legislatures of the provinces shall be restricted to the enactment of laws in relation to matters within the competence of the parliament of Canada or of any of the legislatures of the provinces respectively. B C D E F G

It is in the light of this Act of transcendent constitutional importance that the question must now be considered whether it is competent for the parliament of Canada to enact, not only that the Supreme Court of the dominion shall have appellate civil and criminal jurisdiction within and for Canada, but also that that jurisdiction shall be "exclusive" and "ultimate." This question must be considered under two heads—first, in regard to appeals from the Supreme Court itself, and, secondly, in regard to appeals direct from the provincial courts to His Majesty in Council. H

First, then, as to appeals from the Supreme Court itself. Here the question is whether under sub-s. (1) of the substituted s. 54 the jurisdiction can validly be made "ultimate," by which, as the subsequent new subsections make clear, is intended the abolition of appeal from the Supreme Court to His Majesty in Council. On this question their Lordships can entertain no doubt. The power

vested in the dominion parliament by s. 101 of the British North America Act to establish a general Court of Appeal for Canada was necessarily subject to the prerogative right of His Majesty, since that right was not expressly or by necessary intendment excluded, and this limitation was recognised in the first words of s. 54 of the Supreme Court Act. But that was a restriction or fetter on the legislative power of the dominion which could be removed and has been removed by an Act of the imperial Parliament, and, since it has been removed, it must be within the power of the dominion parliament to enact that the jurisdiction of its Supreme Court shall be ultimate. No other solution is consonant with the status of a self-governing dominion.

Secondly, as to appeals direct from provincial courts to His Majesty in Council. It is in regard to these appeals that the validity of the Bill has been more strenuously challenged, and their Lordships have felt the familiar difficulty of determining which of two alternative meanings is to be given to an instrument, the authors of which did not contemplate the possibility of either meaning. For how could it be supposed in 1867, only two years after the passing of the Colonial Laws Validity Act, that the competence of either the dominion or the provincial legislatures to pass laws directly repugnant to Acts of Parliament of the United Kingdom and to the common law relating to the prerogative could be the subject of judicial determination? Yet this is the question which must now be decided. In its solution their Lordships have the advantage of two recent pronouncements of the Board, *Nadan v. R.* (2) and the *British Coal Corporation* case (3), the first before, the second after, the passing of the Statute of Westminster, and it will be convenient to see what these cases decided.

In *Nadan's* case (2) the question was as to the validity of s. 1025 of the Criminal Code of Canada if and so far as it purported to prevent the King in Council from giving effective leave to appeal against an order of a Canadian court in a criminal case. Criminal law, including the procedure in criminal matters, was, it will be remembered, one of the subjects to which under s. 91 of the British North America Act the exclusive authority of the parliament of Canada extended. It was argued that the legislative power so conferred was complete and included power to limit the royal prerogative to entertain an appeal. The Board after a review of the prerogative and of the manner in which the Judicial Committee had been in effect established as a court of appellate jurisdiction rejected the argument, holding that, however widely the powers conferred by s. 91 were construed, they were confined to action to be taken in the dominion and did not authorise the dominion parliament to annul the prerogative right of the King in Council to grant special leave to appeal, and further holding that s. 1025 of the Criminal Code, if and so far as it was intended to have that effect, was repugnant to the Judicial Committee Acts and, therefore, void and inoperative by virtue of the Colonial Laws Validity Act, 1865.

In 1935 there came before the Board the *British Coal Corporation* case (3) in which the same question was raised, but with the vital difference that in the meantime the Statute of Westminster had been passed. The section of the Criminal Code then in force [s. 10 (4) as amended by R.S.C. 23 & 24 Geo. 5, c. 53, s. 17] purported in unambiguous terms to abolish the appeal to His Majesty in Council;

Notwithstanding any royal prerogative or anything contained in the Interpretation Act or in the Supreme Court Act no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any courts of appeal or authority in which in the United Kingdom appeals or petitions to His Majesty may be heard. The validity of this provision was challenged by certain persons who sought leave to appeal in a criminal case from a judgment of the Court of King's Bench (Appeal Side) of the province of Quebec. But it was challenged in vain. The Board, after once more expounding the nature of appeals to His Majesty in Council, explained the decision in *Nadan's* case (2) thus ([1935] A.C. 500, at p. 516):

Their Lordships are of opinion that the judgment was based on two grounds only: (1) that s. 1025 was repugnant to the Privy Council Acts of 1833 and 1844 and was therefore void under the Colonial Laws Validity Act, 1865; (2) that it could only be effective if construed as having an extra-territorial operation, whereas according to the law as it was in 1926 a dominion statute could not have extra-territorial operation. These two difficulties as the law then stood could only be overcome by an imperial statute. . . Such, their Lordships think, is the meaning of the decision in *Nadan's* case (2) . . .

The Board proceeded to consider the question whether the difficulties had been overcome. Recalling (*ibid.*, at p. 517) the words used by LORD LOREBURN, L.C., in delivering the judgment of the Judicial Committee in *A.G. for Ontario v. A.G. for Canada* (4) ([1912] A.C. 571 at p. 581):

Now, there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self government was withheld from Canada.

(words that their Lordships reiterate in regard to the present appeal), the Board concluded that both difficulties had been removed by the Statute of Westminster. It was said ([1935] A.C. 500, at p. 520):

There now remain only such limitations as flow from the Act itself, the operation of which as effecting the competence of dominion legislation was saved by s. 7 of the statute, a section which excludes from the competence of the dominion and provincial parliaments any power of "repeal, amendment or alteration" of the Act.

It has been properly urged on behalf of the appellants that at the conclusion of their judgment (*ibid.* at p. 523) the Board observed that they were dealing only with the legal position in Canada in regard to that type of appeal in criminal matters and that it was there neither necessary nor desirable to touch on the position as regards civil cases. It was this consideration that led DAVIS, J., in the present case to give the qualified opinion already cited in regard to the validity of the referred Bill. This opinion rightly recognises that, whether or not the reasoning of the Board in the *British Coal Corporation* case (3) extends beyond the subject-matter of legislation which was by s. 91 of the British North America Act confided to the dominion parliament, at any rate, it cannot be limited to one only of the 29 classes of subject-matter enumerated in that section, and that, just as an appeal to His Majesty in Council may by dominion legislation be abrogated in respect of "the criminal law . . . including the procedure in criminal matters," so it may be abrogated in respect of, e.g., class 21 'Bankruptcy and insolvency' or class 22 'Patents of invention and discovery.'

But the conclusion reached by DAVIS, J., involves a distinction which their Lordships would not willingly adopt. For if, as he holds, the subject-matter provides the test whether the right of appeal may be abrogated by dominion legislation so that it may not be abrogated in respect of classes of subjects assigned exclusively to the provinces under s. 92, a strange result would follow. It must be remembered that in the provincial courts the subject-matter of litigation may arise as well under dominion as under provincial legislation. The judicial and legislative spheres are not coterminous, provincial courts determining all questions except those for which a special court is set up under s. 101, whether the rights of the parties spring from the common law or from dominion or provincial statutes. Thus, if the right of the dominion parliament to prohibit appeals to His Majesty in Council from a provincial court depended on the subject-matter in suit, the result would be that from the same court an appeal might lie in one suit to the Supreme Court of Canada only, but in another to that court or to His Majesty in Council, nor is it impossible that in the same suit two or more questions might be raised in respect of which different rights of appeal would arise. This result is yet more remarkable when it is remembered how wide is the scope of those classes of subjects which, falling within s. 91 of the Act, can on this hypothesis be excluded from appeal to His Majesty in Council. Only the residue of civil cases, in which the rights of the parties were determinable by reference to other than dominion legislation, would remain the subject of such appeal.

Therefore, while their Lordships give full weight to the observation with which the judgment in the *British Coal Corporation* case (3) concluded, and do not doubt that that case rightly decided that the dominion parliament was competent to exclude appeals in criminal cases for the reasons therein appearing, they must observe that that decision can be supported on wider grounds which cover not only criminal cases and not only civil cases falling within the subject-matter of s. 91 but also every other case which can be brought before any provincial court in Canada.

In coming to this conclusion their Lordships do not think it useful to embark on a nice discrimination between the legislative powers contained in ss. 91 and 92 respectively of the Act. Nor, as it appears to them, is it necessary to determine

whether the words of head 14 of s. 92, "The administration of justice in the province," would, if they were disembarassed of any context, be apt to embrace legislation in regard to appeals to His Majesty in Council. There appear to be cogent reasons for thinking that they would not, but their Lordships do not make this the ground of their decision, for it is elsewhere, it is in s. 101 of the Act, that the solution lies.

In his judgment in the matter under appeal DUFF, C.J., used these words (1940 S.C.R. 49, at pp. 64, 65):

A Assuming even that s. 92 gives some authority to the legislatures [of the provinces] in respect of appeals to the Privy Council, that cannot detract from the power of Parliament under s. 101. Whatever is granted by the words of the section, read and applied as *prima facie* intended to endow parliament with power to effect high political objects concerning the self-government of the dominion (s. 3 of the British North America Act) in the matter of judicature, is to be held and exercised as a plenary power in that behalf with all ancillary powers necessary to enable parliament to attain its objects fully and competely. So read it imports authority to establish a court having supreme and final appellate jurisdiction in Canada.

B The vital words in the passage cited, with which their Lordships are in full agreement, are the words in the last line "and final," but, in the opinion of their Lordships, the same considerations lead to the conclusion that the court so established must have, not only "final" or "ultimate," but also exclusive, appellate jurisdiction. They would emphasise that s. 101 confers a legislative power on the dominion parliament which by its terms overrides any power conferred by s. 92 on the provinces or preserved by s. 129. "Notwithstanding anything in this Act" are words in s. 101 which cannot be ignored. They vest in the dominion a plenary authority to legislate in regard to appellate jurisdiction, which is qualified only by that which lies outside the Act, namely, the sovereign power of the Imperial Parliament. This was fully recognised in *Crown Grain Coy. v. Day* (5).

D What then is the power of the dominion parliament since the Statute of Westminster has come into operation? It is useful to examine what the position would be if now for the first time the dominion legislature thought fit to exercise its power under s. 101. Nor is this a fanciful or inept mode of examination, for the power is to provide "from time to time" for a general court of appeal. To their Lordships it appears reasonably plain that, since, in the words used by LORD ROBERTSON in delivering the opinion of the Board in the *Crown Grain Coy.* cases (5) ([1908] A.C. 504, at p. 507)—the subject in conflict belongs primarily to the subject-matter committed to the dominion parliament, namely, the establishment of the Court of Appeal for Canada—to that parliament also must belong the power not only to determine in what cases and under what conditions the appellate jurisdiction of that court may be invoked, but also to deny appellate jurisdiction to any other court. That natural attribute of sovereign power was, no doubt, qualified by an external constitutional limitation, namely, the existence of imperial statutes, but, given the power to abrogate such statutes, the authority conferred by s. 101 stands unqualified and absolute.

F It is possible to regard this matter from a somewhat wider point of view, as, indeed, it is regarded in the judgment of DUFF, C.J. Giving full weight to the circumstances of the union and to the determination shown by the provinces as late as the imperial conferences which led to the Statute of Westminster that their rights should be unimpaired, nevertheless, it appears to their Lordships that it is not consistent with the political conception which is embodied in the British Commonwealth of Nations that one member of that Commonwealth should be precluded from setting up, if it so desires, a supreme court of appeal having a jurisdiction both ultimate and exclusive of any other member. The regulation of appeals is, to use the words of LORD SANKEY in the *Coal Corporation* case (3), a "prime element in Canadian sovereignty," which would be impaired if, at the will of its citizens, recourse could be had to a tribunal in the constitution of which it had no voice. It is, as their Lordships think, irrelevant that the question is one that might have seemed unreal at the date of the British North America Act. To such an organic statute the flexible interpretation must be given that changing circumstances require, and it would be alien to the spirit with which the preamble to the Statute of Westminster is instinct, to concede anything less than the widest amplitude of power to the dominion legislature under s. 101 of the British North America Act.

In this connection some argument was addressed to their Lordships on the importance of uniformity of legal decision, which, it was urged, could not be secured if appeal lay indifferently to the Supreme Court of Canada or to His Majesty in Council. For a decision of the Supreme Court would, at least, be final, though its jurisdiction would not on this hypothesis be exclusive. Against this it was contended that the British North America Act contained, in s. 94, a provision whereby the postulated uniformity of law could be obtained. In their Lordships' opinion this section provides an imperfect remedy for a state of affairs in which an important dominion Act might be finally interpreted in one way by the supreme court for a province which did not admit appeals to His Majesty in Council, and in another way by the Judicial Committee for a province which did admit such appeals, neither tribunal admitting the authority of the other. But it is the possibility of such a conflict, creating a different law for different provinces out of the same Dominion Act, which points the way to a truer interpretation of the British North America Act in the light of the Statute of Westminster. It is, in fact, a prime element in the self-government of the dominion that it should be able to secure through its own courts of justice that the law should be one and the same for all its citizens. This result is attainable only if s. 101 now authorises the establishment of a court with final and exclusive appellate jurisdiction. The words used by LORD MACMILLAN in delivering the opinion of the Board in *Croft v. Dunphy* (6) on a question that arose in regard to one of the specific subjects enumerated in s. 91 are equally applicable in the consideration of s. 101. He said ([1933] A.C. 156, at p. 163):

... their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully Sovereign State.

It is right to conclude with some observations on s. 7 of the Statute of Westminster on which counsel for the appellants strongly relied. Subsection (1) of s. 7 is in general terms, and it was urged that to interpret the statute 'as vesting in the dominion parliament a power which it did not before possess was in effect to repeal or amend, or, at least, to alter, the British North America Act, but their Lordships cannot accept this reasoning. Necessarily the effect of the statute is to amend and alter the Act in so far as from the operation of the statute there arises a new power in the legislatures both of the dominion and the provinces. The question is in which legislature the power is vested in regard to this particular subject-matter. That is a question of construction on which their Lordships have stated their opinion. Subsection (2) does not call for further comment here. In regard to sub-s. (3), the same observations appear to apply as to sub-s. (1). If on the true construction of the British North America Act the conclusion had been that the power to legislate for the abrogation of appeals to His Majesty in Council was vested under s. 92 in a provincial legislature, that would have been an end of the matter. It is just because their Lordships have come to a different conclusion that sub-s. (3) does not assist the appellants.

Their Lordships are of opinion that this appeal fails and that it ought to be declared that Bill 9 of the Fourth Session of the Eighteenth Parliament of Canada entitled "An Act to amend the Supreme Court Act" is wholly *intra vires* of the parliament of Canada, and they will humbly advise His Majesty accordingly.

Solicitors: *Blake and Redden* (for the Attorney-General of Ontario); *Gard, Lyell & Co.* (for the Attorney-Generals of British Columbia and New Brunswick); *Charles Russell & Co.* (for the Attorney-Generals of Canada, Manitoba and Saskatchewan); *Lawrence Jones & Co.* (for the Attorney-General of Quebec).

[Reported by C. R. L. PHILLIPS, ESQ., Barrister-at-Law.]

R. v. COLLINS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Humphreys and Lewis, JJ.), January 14, 1947.]

Criminal Law—Sentence—Outstanding charge—Taking into consideration—Conviction of receiving stolen property—Outstanding charge under Road Traffic Acts.

A Offences against the Road Traffic Acts for which disqualification for driving or the indorsement of the offender's licence is imposed (e.g., driving a motor vehicle while under the influence of drink), are not proper cases to be taken into consideration by the court when passing sentence for another class of offence (e.g., offences of dishonesty, such as receiving stolen goods).

B *Aliter*, if a prisoner is charged on indictment with an offence under the Road Traffic Acts for which he is liable to be disqualified or to have his licence endorsed and there is a second charge under the Acts outstanding against him.

[**EDITORIAL NOTE.** The reason for this decision may not, perhaps, be apparent at first sight. The courts today regard as of the greatest importance, as being enacted for the safety of the public and being only incidentally punitive, the provisions in the Road Traffic Acts that, on conviction of certain offences, the offender may be disqualified for holding a licence for a substantial time or may have his licence endorsed.

C This power of disqualification and endorsement can only be exercised by the court where an offender has been convicted of one of the specified motoring offences created by the Acts. If an outstanding charge of such an offence is taken into consideration in sentencing an offender who has been convicted of an offence of, say, dishonesty or violence, there is no conviction under the Road Traffic Acts and the court cannot discharge the duty which is on it to protect the public against a dangerous, careless, or incompetent driver.

D AS TO OUTSTANDING CHARGES BEING TAKEN INTO CONSIDERATION, see HALSBURY, Hailsham Edn., Vol. 9, p. 258, para. 365; and FOR CASES, see DIGEST, Vol. 14, pp. 472, 473, Nos. 5070—5091.

AS TO DRIVING UNDER INFLUENCE OF DRINK, see HALSBURY, Hailsham Edn., Vol. 31, p. 674, paras. 993, 994.]

Case referred to:

(1) *Whittall v. Kirby*, [1946] 2 All E.R. 552; 175 L.T. 449; 111 J.P. 1.

E APPLICATION for leave to appeal against a conviction before the Recorder of London at the Central Criminal Court.

The applicant was found guilty on two charges of receiving stolen property. After he was convicted the recorder was informed that there was a warrant out against him for driving a motor car whilst under the influence of drink. At the applicant's request, the recorder took that fact into consideration in passing sentence.

F The applicant did not appear.

The Crown did not appear.

G LORD GODDARD, C.J. [delivering the judgment of the court]: The applicant was convicted before the recorder at the Central Criminal Court on two charges of receiving a stolen motor car and a stolen suitcase and its contents and was sentenced to 3 years' penal servitude. In respect of both charges the case was about as clearly proved as any case could be. There is, however, one matter which has arisen on which it is desirable to say something of which I hope notice will be taken. After the applicant was convicted, the police informed the recorder that there was a warrant out against him for driving a motor car while under the influence of drink. No doubt, it was proper for the police to give the recorder that information, but the recorder then asked the applicant if he desired that charge to be taken into consideration. He said he did, and the recorder agreed to take it into consideration. In the opinion of this court, offences against the Road Traffic Acts, which on conviction might involve disqualification for driving or the indorsement of the licence, are not proper cases to be taken into account when sentencing a prisoner for a different class of offence. No doubt, if a man is charged on indictment with an offence under the Road Traffic Acts for which he is liable to be disqualified, and there is a second charge against him for the same class of offence, the court might take that into account. But the reason why, in the opinion of this court, these offences ought not to be taken into

consideration when a man is charged with another class of offence is that, unless there is a conviction of driving under the influence of drink or, for instance, driving a car when uninsured, there is no power to disqualify the prisoner from holding a licence, and parliament has ordained that unless special circumstances exist, which is a matter with which the Divisional Court dealt at some length a short time ago [in *Whittall v. Kirby* (1)], the prisoner must be disqualified and, in certain other cases, the licence must be endorsed. In this particular case, I daresay no harm was done because the applicant received a sentence of 3 years' penal servitude. None the less, if the case had been inquired into, the court might have considered that a period of disqualification for 5 or 10 years might be appropriate or, if it had turned out that the applicant had been convicted two or three times before, the court might have imposed a disqualification for life. Or again, if a sentence of six months' hard labour was passed in a particular case for some other offence, it would be most unsatisfactory to take into consideration a case of driving under the influence of drink, because the period of disqualification must be for a year. So this court lays it down that, for the future, offences under the Road Traffic Acts for which disqualification or the indorsement of the licence is imposed, are not proper cases to be taken into account when passing sentence for dishonesty or some other matter.

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

affirmed. H.L. [1948] 1 All E.R. 616.

HOLT v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Greene, M.R., Cohen and Asquith, L.JJ.), November 11, 12, 13, 14, 15, December 19, 1946.]

Revenue—Excess profits tax—Disposal of company's stock at under market value—Disposal for benefit of person holding controlling interest in the company—Purchase of shares from sole shareholder—Liability to tax of vendor of shares—Finance Act, 1943 (c. 28), s. 24 (1) (2) (4).

By s. 24 of the Finance Act, 1943: "(1) Where any of the stock in trade of a company is disposed of otherwise than for at least its full market value and is so disposed of either to, or directly or indirectly for the benefit or by the procurement of, any persons who directly or indirectly hold, or are in a position to obtain, a controlling interest in the company, and any of that stock is disposed of by any person at a profit but in circumstances in which, apart from this section, the full tax (as hereinafter defined) is not payable or, in the opinion of the Commissioners [of Inland Revenue], is unlikely to be recovered, the commissioners may direct—(a) that such sum as may be specified in the direction, being the sum which, in the opinion of the commissioners, is equal to the full tax, shall be chargeable by way of excess profits tax; and (b) that that sum shall be a joint and several liability of such persons as may be specified in the direction, being the company and the persons who, in the opinion of the commissioners, obtained (but for this section) financial benefits as a result of the transactions aforesaid and any other transactions which, in the opinion of the commissioners, were effected in connection with or in association with any of the said transactions. . . (2) In this section, the expression 'the full tax' means the excess profits tax which, if the stock, instead of being disposed of otherwise than for at least its full market value, had, at the time when it was so disposed of, been sold by the company on its own behalf in the ordinary course of trade for its full market value, would have become payable by or in respect of that company for the chargeable accounting period during which the stock was so disposed of, no account being taken of any relief for deficiencies of profits."

H. was the beneficial owner of the whole of the share capital in W.H., Ltd., distillers and whisky merchants. In 1942 H. agreed to sell all his shares, and, on Mar. 5, 1942, he transferred them to nominees of S. for £1,399,775, or £38 7s. 0d. a share. On the same date the company, now controlled by S. through his nominees, sold 509,441 gallons of whisky to the G.B. Co. for £82,880 16s. 7d., the "full market value" being £2,255,547. The G.B. Co., which was controlled by S. and purchased the whisky on his

behalf, resold it at a considerable profit. In 1943 the Commissioners of Inland Revenue made a direction in which, after computing the market value of the whisky and declaring their opinion that the full tax was not payable or was unlikely to be recovered, they assessed the sum which should be chargeable by way of excess profits tax and apportioned it as to £1,107,775 to H., being the difference between the price at which he sold his shares and the price at which they were valued, namely, £8 a share or £292,000 in all. On appeal by H., the special commissioners affirmed the direction.

HELD, (i) stock of W.H., Ltd. had been disposed of for less than its full market value for the benefit of S., who held a controlling interest in the company, and was later disposed of by S. and other persons at a profit, and, therefore, the matter fell within s. 24 (1) and the commissioners were authorised to make a direction under s. 24 (1) (a) that a sum equal to the full tax should be chargeable by way of excess profits tax.

(ii) the sale of the shares by H. to S. was an essential step in the carrying out of this main transaction and the shares could only have been acquired by S. for the purpose of that transaction, and, therefore, H. was a person who had obtained financial benefits as a result of a transaction which had been effected in connection with or in association with the main transaction.

(iii) it was unnecessary for the Crown to prove (a) knowledge by H. at the time of the transfer of the shares of the scheme then entertained by S., or (b) some connection or association between the transactions in the mind of S., such as the payment of an extravagant price for the shares in the expectation of realising a large profit, or (c) that the shares had been necessarily paid for out of money realised from the main transaction, or (d) the aggregate profit realised by all the persons concerned.

(iv) as a result, H. was chargeable to tax under s. 24 (1), but under s. 24 (1), proviso (ii), and s. 24 (4) (b), his liability was limited to the extent by which the consideration which he had obtained for the shares was greater than it might have been expected to be if the stock had been sold by W.H., Ltd., immediately before the transfer in such circumstances that the full tax became payable by the company, and that excess was the sum directed by the commissioners.

(v) the words "in the ordinary course of trade" in s. 24 (2) indicate a sale for the best price obtainable on any available market, and they cannot be construed to exclude a particular market because a company has not previously dealt in that market.

[EDITORIAL NOTE.] There is here a sharp divergence of opinion between the English Court of Appeal and the First Division of the Court of Session. The matters in issue now await the final determination of the House of Lords whose opinion, it is understood, is being sought both by the Crown in the Scottish cases and by the taxpayer in the present proceedings.

AS TO EXCESS PROFITS TAX, see HALSBURY, Supp. 1946, Vol. 28, para. 1041A *et seq.*

Cases referred to:

- (1) *Howard de Walden (Lord) v. I.R.C.*, [1942] 1 All E.R. 287; [1942] 1 K.B. 389; 111 L.J.K.B. 273; 25 Tax Cas. 121; Digest Supp.
- (2) *Gollin v. I.R.C.*, [1943] 1 All E.R. 346; 168 L.T. 274; 25 Tax Cas. 161; *sub. nom. Inland Revenue Comrs. v. Gollin*, 112 L.J.K.B. 343; Digest Supp.
- (3) *Ross and Coulter and Others v. Inland Revenue*, 1946 S.C. 134;

APPEAL by Commissioners of Inland Revenue against a decision of ATKINSON, J., on the hearing by him of a Case Stated by the special commissioners of income tax. The facts appear in the judgment of LORD GREENE, M.R.

The Solicitor-General (Sir Frank Soskice, K.C.), D. L. Jenkins, K.C., and R. P. Hills for the commissioners.

Sir Cyril Radcliffe, K.C., and F. Heyworth Talbot for the taxpayer.

Cur. adv. vult.

December 19. LORD GREENE, M.R., read the following judgment: This appeal raises important questions as to the meaning of s. 24 of the Finance Act, 1943, a section which has retrospective effect and is directed against certain types of transactions resulting in the avoidance of excess profits tax.

The taxpayer, Mr. Stanley S. Holt, was the beneficial owner of the whole of the issued share capital of W. H. Holt & Sons (Chorlton-cum-Hardy) Ltd. (hereinafter called "the company") consisting of 36,500 ordinary shares of £1 each. The company carried on business as distillers and whisky merchants. It owned a distillery in Scotland and its stocks of whisky amounted to about 560,000 gallons, which were carried in the balance sheet at a sum of £75,146.

By a contract contained in two letters dated Feb. 18, 1942, the taxpayer agreed to sell his shares in the company for £1,399,775, or £38 7s. 0d. a share, to a Mr. Barclay, who was acting for an undisclosed principal. By this contract the taxpayer also agreed to appoint such directors as Mr. Barclay might nominate and to procure the resignation of the existing board. Mr. Barclay was, in fact, acting on behalf of a Mr. J. D. Stewart. Some doubt appears to have arisen whether this was the real name of Mr. Barclay's principal, or an assumed name, or even an invented name, to cover the identity of a group of co-adventurers. This question appears to be for present purposes immaterial. The shares were transferred on Mar. 5, 1942, to two nominees of Mr. Stewart who were appointed directors of the company in place of the existing directors, who resigned on the same day. On the same Mar. 5 the company sold 509,441 gallons of whisky, being the greater part of its stock, to a company called Glasgow Bonding Co., Ltd. for £82,880 16s. 7d., a price which was far less than the full market value of the whisky as found by the special commissioners. The Glasgow company was controlled by Mr. Stewart and it purchased this whisky on his behalf. It is not necessary for the purpose of this judgment to explain the complicated transactions by means of which this stock of whisky found its way on to the market or to state the names and interests of the various persons who participated in the profits of the deal. The greater part of the 509,441 gallons, namely 420,483, was sold for a gross sum of £2,005,795 3s. 0d. of which the net sum of £1,999,463 was found by the special commissioners to have been the full market value for the purposes of the section. A further quantity of 46,893 gallons was also sold for its full market value amounting (net) to £186,175. The remainder of the 509,441 gallons was acquired in the first instance by various persons at prices less than the full market value. How these persons dealt with the parcels so acquired by them does not for the most part appear. The full market value of the whole of the 509,441 gallons (including the sums of £1,999,463 and £186,175 above mentioned) was found to have been £2,255,547. The taxpayer contends that this finding was based on a misinterpretation of the provisions of the section relating to full market value and that on the true construction of those provisions the figure should have been £705,222.

From this brief summary of the relevant facts it will be seen that the whisky in question was found to have been sold by the company to Mr. Stewart for a sum far less than its full market value. Mr. Stewart was enabled to bring about this purchase so beneficial to himself by reason of his control of the company, and that control he had obtained by means of the shares which he had purchased from the taxpayer. The question whether or not the taxpayer knew of the scheme thus put into execution by Mr. Stewart and those associated with him under which the greater part of the company's whisky stock came to be sold in such a way as not to render the company liable to excess profits tax (a liability which would have absorbed practically the whole of the profit realised on the sale) was not fully explored before the special commissioners for the reason that in the Crown's contention such knowledge was immaterial. Whether the taxpayer knew or did not know, the fact remains that the sale of his shares to Mr. Stewart was an essential step in carrying the scheme into effect, and he received the sum of £1,399,775 for his shares which, as I have already stated, was at the rate of £38 7s. 0d. a share. The commissioners found that, if the whisky had been sold by the company on its own behalf in the ordinary course of trade for its full market value, the price which the taxpayer might have expected to obtain for his shares would have been only £8 a share of £292,000 in all. The explanation for this low figure is, of course, that excess profits tax would have absorbed the greater part of the profit that would have been realised by the company. The excess profits tax which would have been so payable by the company was found by the special commissioners to be £2,146,389. Of this sum £1,107,775, being the difference between the purchase price of the shares and their value at £8 a share, was appor-

tioned to the taxpayer as his share of the liability to excess profits tax which the section imposes on those who obtain financial benefit from transactions of this kind. This apportionment was based on the view that, on the true construction of the section, the financial benefit received by the taxpayer was £1,107,775. The taxpayer contends that the special commissioners have misconstrued the section and that, if it is correctly construed, there was no evidence before the commissioners on which they could find that the taxpayer had received any financial benefit at all. We are not concerned with the other persons implicated on whom tax was charged under the decision of the special commissioners and I shall not complicate this judgment by referring to them.

Section 24 belongs to a class of legislation which, in recent years, has become increasingly common. For convenience, I may refer to it as legislation directed against "tax-evasion." In many branches of the law relating to taxation it has been found that the tax can be avoided by means of ingenious schemes, and many pages of the statute book have been devoted to attempts to defeat them. I need only mention as examples the legislation relating to what is conveniently called "company sur-tax," the legislation relating to certain kinds of "settlements," the legislation relating to transfer of assets resulting in payment of income to persons abroad, and legislation directed against avoidance of excess profits tax itself. It is a common feature of legislation of this class that amendments and extensions of increasing stringency are found to be necessary in order to defeat the many varieties of technique in tax evasion which occur in practice. If I may quote words of my own in a tax-evasion case (*Howard de Walden v. C.I.R.* (1) ([1942] 1 All E.R. 287, at p. 289) :

For years a battle of manoeuvre has been waged between the legislature and those who are minded to throw the burden of taxation off their own shoulders on to those of their fellow-subjects. In that battle the legislature has often been worsted by the skill, determination and resourcefulness of its opponents.

In the case of excess profits tax an earlier attempt to deal with evasion of the tax was made in s. 35 of the Finance Act, 1941. This was followed in 1943 by the much more sweeping section with which we are now concerned. The section, like many tax-evasion enactments, is constructed in a highly artificial manner in order to bring within the framework of the existing legislation a transaction which in its very nature falls outside it. The tax which the legislature is concerned to recover is the tax which a company would have incurred if it had acted in a way in which it did not act in fact. The liability for the tax is then charged on those individuals (in addition to the company itself) whose activities brought about the evasion of tax which has taken place. The tax is still called excess profits tax although, as charged on the individuals concerned, it is not charged on their individual profits. The reason is that the object of the section is to recover for the revenue the tax that it has lost, not to impose a tax on profits made by individuals. The making of a profit (or financial benefit, as it is called) by an individual is, it is true, a condition precedent to any liability on his part, but the extent of his profit is not the measure of his liability save in the special case of transferors of shares under proviso (ii) to sub-s. (1) and (4), and save in any other case to the extent that the commissioners in the exercise of their discretion may appropriate to him a part only of the full tax commensurate with the profit that he has made.

This very broad sketch of the object aimed at by the section is sufficient to bring out its artificial character and I shall have more to say on the subject as I proceed. One word of warning may be added at the outset. The language used by the legislature invites the criticism that its natural interpretation will in various assumed states of fact lead to hardship, and on this an argument is based that words must be implied which will cut down that natural interpretation. The argument is a familiar one and is, in my experience, commonly used on behalf of the taxpayer in tax-evasion cases. It clearly appealed to the Court of Session in the cases to which reference will be made later. On the other hand, the Crown can and does point to the startling failure to achieve the full results obviously aimed at by the legislature if its language is construed in the narrow sense contended for by the taxpayer. In the present case, Sir Cyril Radcliffe, on behalf of the taxpayer, very fairly agreed that these arguments really cancel one another out, and he based his case—properly, in my opinion—on what he submitted was the natural meaning of the language itself. As will be seen, the

legislature has provided such machinery as it considered to be fair and reasonable with a view to avoiding or mitigating cases of hardship.

Section 24 is given retrospective effect by subs. (8), presumably because it was intended to cover transactions known or suspected to have already taken place. That sub-section provides that the enactments relating to excess profits tax shall be deemed always to have had effect as amended and extended by the section. The Act received the Royal Assent on July 22, 1943, more than a year after the happening of the events which gave rise to the present claim by the Crown. The section is a long and complicated one. Its object is to obtain from the persons (including the company) and in the circumstances mentioned therein what is described as the "full tax" which a company would have had to pay if its stock had been sold in "the ordinary course of trade for its full market value" instead of being disposed of for less than its full market value. It will be seen at once that this method of charging the excess profits tax which the company (in assumed circumstances) would have had to pay on persons other than the company is a highly artificial one and presents difficult problems, both of policy and of draftsmanship, particularly in the matter of determining the range of persons to be charged and the conditions necessary to impose liability on them.

The necessary requirements for setting the section in motion is to be found in the opening paragraph of subs. (1). I can summarise its operation, since it is not disputed that in the present case this requirement was satisfied. Stock of the company must be disposed of at less than its market value for the benefit of persons controlling the company and subsequently disposed of by "any person" at a profit but in circumstances in which the full tax is not payable or, in the opinion of the Commissioners of Inland Revenue, is unlikely to be recovered. In the present case (a) stock of the company was disposed of (b) for less than its market value (c) for the benefit of Mr. Stewart, who, by virtue of the share purchase, controlled the company (d) and was subsequently disposed of by Mr. Stewart and other persons at a profit (e) the full tax not being payable or, in the opinion of the commissioners, being unlikely to be recovered.

When the conditions stated in this part of the sub-section exist, the machinery provided for achieving the objects of the section consists of a "direction" which the Commissioners of Inland Revenue are empowered to make. The first step (a) is to direct that the "full tax" is to be "chargeable by way of excess profits tax." This presents no particular difficulty. The next step (b) has as its object to define the range of persons on whom and the conditions in which the liability created—in the air, so to speak—by para. (a) is to fall. The direction is to be that the sum made chargeable under para. (a) shall be a joint and several liability of the persons specified in the direction. The persons who are so to be made jointly and severally liable are the company (which in the circumstances envisaged in the first part of the sub-section may have made no profit at all and cannot in any event have made a profit equal to the full tax) and "the persons who, in the opinion of the commissioners, obtained (but for this section) financial benefits as a result of the transactions aforesaid" (namely, the sale and subsequent disposal of the stock mentioned in the first part of the sub-section) "and any other transactions which, in the opinion of the commissioners, were effected in connection with or in association with any of the said transactions."

This is in many ways a remarkable provision. The first thing worth noticing about it is that the liability to be imposed on the specified persons is in no way measured or limited by the financial benefits which they may have obtained. Any person who has sold even a small part of the stock in question at a profit to himself may find himself made liable for the full tax, which may amount (as in the present case) to a very large sum indeed. But the legislature has provided what it, no doubt, considered to be in practice reasonable safeguards against hardships which would inevitably result from so stringent an enactment. These safeguards may be summarised as follows:—(a) The commissioners are given, by proviso (i), a wide discretion under which they may apportion the amount of the full tax and it would, no doubt, be permissible under this direction to effect such an apportionment as might bring the liability to tax of a given person into some sort of line with his financial benefits. (b) There is in proviso (ii) a special protection to transferors of shares who (as in the case of the present taxpayer) did not obtain their shares under any such transaction as is referred to in the sub-section and were not, apart from the transfer, concerned in any such

transaction. Under this proviso there *must* be apportioned to such a transferor of shares no greater part of the full tax than is equal to "the amount by which he is under subs. (4) . . . deemed to have . . . financially benefited." (c) Sub-section (3) provides in effect that where persons, by virtue of a direction, became jointly and severally liable as between themselves and the Crown, their liabilities *inter se* are to be proportionate to their respective financial benefits. (d) Sub-section (5) gives special protection to barristers, solicitors, accountants and certain transactions by dealers (this sub-section will be examined more closely later in this judgment). Finally, (e) [subs. 7] there is a right of appeal to the special commissioners, who are empowered to vary, confirm or cancel the direction. It is common ground that this right of appeal is quite general in character and under it the special commissioners are entitled to override both the opinion and the discretion of the Commissioners of Inland Revenue.

The discretion given to the Commissioners of Inland Revenue may, I think, be described as an unusual method of imposing liability on the subject. It is not, however, unprecedented and in cases where the nature of the subject-matter calls for wide language in order to prevent evasion, it may be regarded as a useful device for minimising the risk of hardship in individual cases. An example of such a discretion is to be found in s. 34 of the Finance Act, 1927, which deals with certain cases of sur-tax. There the special commissioners are to charge the taxpayer to sur-tax or adjust his liability to sur-tax so as to give such relief as may be just, having regard to all the circumstances. In *Gollin v. C.I.R.* (2) in a judgment with which the other members of the court agreed, I said of the section ([1943] 1 All E.R. 346, at p. 349):

... that language appears to me to give to the special commissioners the widest possible discretion to do what appears to them as just-minded men to be just in the circumstances of the case . . . The whole matter is left at large, and they would be entitled to take into consideration anything which to them appeared to be relevant to the question of justice.

Sub-section (2) defines the expression "full tax" and, as its interpretation is in controversy, I will deal with it later in this judgment. Sub-section (4) also deals with controversial matter relating to financial benefits which transferors of shares are to be deemed to have received.

Acting under this section [s. 24] the Commissioners of Inland Revenue on Dec. 17, 1943, made a direction under which they set out the transactions to which they had given consideration, *viz.* the sale by the taxpayer of his shares in the company, the sale of the whisky to Mr. Stewart, and a number of subsequent sales by or on behalf of Mr. Stewart. They computed the market value of the whisky at £2,356,472, and, after declaring their opinion that the full tax was not payable or was unlikely to be recovered, they assessed and charged the full tax at £2,320,170. They then proceeded to apportion the tax, as to £1,107,775 to the taxpayer and as to £1,212,395 to 45 persons and companies as a joint and several liability. It is not necessary for me to say anything about the fate of the various appeals from this direction which was modified in certain respects and in relation to certain of the named persons by the special commissioners. We are only concerned with the present taxpayer, against whom the special commissioners affirmed the direction.

Between the hearing by the special commissioners on Feb. 15, 1944, and following days and the hearing of the appeal by the taxpayer to the King's Bench Division on a Case Stated, judgment was delivered in a number of Scottish cases—*Ross & Coulter and others v. Inland Revenue* (3)—in which transactions of the same general nature came up for consideration. One of the principal questions which the Court of Session had to decide was thus stated by the Lord President (LORD NORMAND) (1946 S.C. 134, at p. 156):

The most important question, and the most general question which we shall have to decide, is whether shareholders, who parted with their shares without any awareness of a scheme, actual or prospective, to realise the stocks so as to escape liability for the tax, are caught in the meshes of the section.

This question had, in effect, been answered in the affirmative by the special commissioners in Scotland, but the Court of Session reversed their decision. In the present case this issue of awareness was not pursued to any definite conclusion before the special commissioners since the Crown was there maintaining, as it maintains before us, that such awareness is not in the least necessary.

As an alternative to this submission, the Solicitor-General before us wished to extract from the case a finding that the taxpayer was aware of the existence of a scheme, and in the further alternative he argued that the matter should be sent back to the special commissioners for further investigation. Having regard to the view which we have formed, it was not necessary for us to deal with these alternative submissions, which were not fully argued before us.

In the King's Bench Division ATKINSON, J. followed the decision of the Court of Session on this point of awareness, and he expressed his agreement with that decision without giving any reasons of his own. An examination of the judgments in the Court of Session makes it clear that the arguments both of the Crown and of the taxpayer before that court were different in important respects from those presented to us by the respective parties to this appeal. In particular, Sir Cyril Radcliffe, on behalf of the taxpayer, did not endeavour to support what, without disrespect, I may call the extreme view taken by the Court of Session. He conceded that there were cases in which an ignorant vendor of shares could nevertheless be made liable under the section, but he argued that these cases were restricted within certain defined limits, none of which, he said, applied to the present case, but before I come to the main issue in the case, *viz.* whether or not the taxpayer can be made liable at all, it will be convenient to dispose of an argument which related to the quantum of his liability, assuming that he is liable at all.

This question arises under subs. (2) of the section and was dealt with by the special commissioners by an interim decision. The Commissioners of Inland Revenue had found the full market value of the stock sold to be £2,356,472, a sum reduced by the special commissioners to £2,255,547. These valuations were based on the prices obtainable in the broker's market, where the highest prices for whisky were obtainable. It was argued on behalf of the taxpayer that the valuation ought to have been on the basis of what the company would have been able to obtain for the stock if it had disposed of it in accordance with what had been its usual practice, which was not to sell in the broker's market. The figure of what would have been obtained if this practice had been followed was stated in evidence to be £705,222. The answer to the question depends on the true construction of subs. (2) of s. 24, which reads as follows:

In this section, the expression "the full tax" means the excess profits tax which, if the stock, instead of being disposed of otherwise than for at least its full market value, had, at the time when it was so disposed of, been sold by the company on its own behalf in the ordinary course of trade for its full market value, would have become payable by or in respect of that company for the chargeable accounting period during which the stock was so disposed of, no account being taken of any relief for deficiencies of profits.

In my opinion, the Commissioners of Inland Revenue and the special commissioners came to a correct decision. As the special commissioners point out, the words used are "in the ordinary course of trade," and not "in the ordinary course of its trade." The reference to sale in the ordinary course of trade for full market value appears to me to indicate, according to the ordinary meaning of language, a sale for the best price obtainable on any available market, and I cannot construe it as excluding a particular market merely because the company had not previously dealt in it. The notional sale by the company referred to in the sub-section would not have been the sort of sale which the company in its ordinary methods of trading would, according to the evidence, have adopted, *viz.*, a sale of 509,441 gallons at an assumed point of time. The notional sale is to be a sale "at the time when it was so disposed of," *i.e.* in the present case, the sale to Mr. Stewart. A sale of that character would in its nature have been something outside the ordinary business practice of the company. The figure of £2,146,389 taken by the special commissioners as the full tax is based on their valuation of the stock, and, apart from the point which I have just discussed no question is raised with regard to it. On the question of "full market value," the same argument as that now put forward by the taxpayer was submitted to and rejected by the Court of Session in the cases to which I have referred.

I now come to the main question in the case, which is whether in the circumstances the taxpayer can be charged with any tax at all. I must set out verbatim the relevant passages in the section. The first is para. (b) of subs. (1), under which the direction of the Commissioners of Inland Revenue imposes the joint

and several liability for the full tax which is made chargeable under para. (a). It runs :

... that sum shall be a joint and several liability of such persons as may be specified in the direction, being the company and the persons who, in the opinion of the commissioners, obtained (but for this section) financial benefits as a result of the transactions aforesaid and any other transactions which, in the opinion of the commissioners, were effected in connection with or in association with any of the said transactions.

- A I note in passing that the phrases "the transactions aforesaid" and "the said transactions" obviously refer to the transactions mentioned in the first part of the sub-section, *viz.*, the sale of the company's stock for less than its full value and its subsequent disposal at a profit. I may, for convenience, call these transactions "the main transactions." The "other transactions" (which I may call "the associated transactions") are not in any way limited or defined save that they must, in the opinion of the commissioners, have been "effected in connection with or in association with" any of the main transactions. Any person, therefore, who, in the opinion of the commissioners, obtained "financial benefits" from the main transactions or an associated transaction is a proper subject of the joint and several liability to be imposed by a direction. It is not disputed that a sale of shares by a person in the position of the taxpayer may be an associated transaction provided that a link of the necessary description between that sale and the main transaction is shown to have existed. The Crown's case is that, as the sale by the taxpayer was an essential step in the carrying out of the main transaction in the present case and the shares can only have been acquired by Mr. Stewart for that purpose, it follows, on the ordinary meaning of the language used, that the commissioners could properly hold that the sale was "effected in connection with or in association with" the main transaction ; that, contrary to the view taken by the Court of Session, nothing of the nature of *mens rea* is required to be proved against the transferor of shares ; and that no special link such as is suggested on behalf of the taxpayer need exist before the necessary "connection" or "association" can be established. On behalf of the taxpayer it was argued that there can be no such "connection" or "association" unless a link of one or other of the following descriptions can be shown to have existed, *viz.*, (1) knowledge of the scheme on the part of the transferor of the shares—this was the only link which, in the opinion of the Court of Session, could establish liability ; (2) some connection or association in the mind of the purchaser, such as the payment of an extravagant price in the expectation of realising a large profit ; (3) payment of the purchase price out of the money realised on the stock, coupled with proof that it could not have been provided otherwise. These arguments, together with another argument as to the meaning of "financial benefits" in para. (a), I will discuss when I have completed my citation of the section.

- F The next relevant passage is proviso (ii) to subs. (1), which is in the following words :

where any person has (apart from this section) obtained financial benefits as aforesaid but only by reason of the transfer by him of shares which he did not obtain under any such transaction as aforesaid and he has not, apart from that transfer, been concerned in any such transaction as aforesaid, the direction shall apportion the said sum so that there is apportioned to him no greater part thereof than is equal to the amount by which he is, under sub-s. (4) of this section, deemed to have (apart from this section) financially benefited.

- G In the application of this proviso to the facts of the present case, it may be pointed out (1) that the taxpayer did not obtain his shares under the main or an associated transaction, (2) that, apart from the transfer of his shares, he was not found to have been concerned in the main or any associated transaction.
- H It follows, therefore, that, if he obtained financial benefits by reason of the transfer of his shares, he is entitled to have his liability limited by a suitable apportionment to the amount "by which he is, under subs. (4) . . . deemed to have . . . financially benefited." Sub-section (4) (so far as relevant) is as follows :

(4) Where any such transaction as aforesaid consists of the transfer of any shares, the persons transferring the shares shall be deemed to have (apart from this section) financially benefited . . . (b) if they did not obtain the shares under any such transaction as aforesaid, to the extent by which the consideration which they obtained for the

shares is greater than it might have been expected to be if the stock had been sold by the company immediately before the transfer in such circumstances that the full tax became payable by or in respect of the company.

The maximum liability that could be imposed on the taxpayer (assuming him to be liable at all) was, therefore, the difference between the sum of £292,000 (£8 a share) and £1,399,775 (£38 7s. 0d. a share), *viz.* £1,107,775, the sum for which he has, in fact, been made chargeable under the direction as affirmed by the special commissioners.

This para. (b) has particular reference to the argument already mentioned as to the meaning of "financial benefits" in subs. (1) (b), which I will now endeavour to explain, so far as I am able to understand it. It was said that before any person could be brought within the ambit of the charge at all, he must be shown to have received "financial benefits"; that subs. (4) (b) does no more than quantify the financial benefits of a vendor of shares who has been shown *abundante* to have received financial benefit in fact; and that in the present case there was no finding that the taxpayer had received any financial benefit in fact and that the price for which he sold the shares may have been no more than their real market value as an investment. This argument I am quite unable to accept. Paragraph (b) of subs. (4) appears to me to do more than quantify a benefit already proved to have been obtained in fact. Under the sub-section a transferor of shares in the position of the taxpayer is to be "deemed to have financially benefited" to the extent mentioned in para. (b). This, to my mind, clearly fixes him with financial benefit to that extent by the mere force of the statute and it is sufficient to make him a proper subject of charge once he is shown to have received for his shares a consideration greater than he would have received if the company had sold the stock in such circumstances that the full tax became payable. The argument involves the proposition that in the case of the transferor of shares two different kinds of financial benefit must be considered by the commissioners, *viz.*, (1) financial benefit in fact, (2) that financial benefit artificially quantified under subs. (4) (b). Moreover, it would mean that once a quite small financial benefit was shown to have been obtained in fact, the whole of the heavy liability mentioned in subs. (4) (b) would fall on the vendor, while, if no such financial benefit was obtained, he would escape altogether.

There are other indications which confirm me in my view. At the end of proviso (ii) to subs. (1) there is a reference to

... the amount by which he is, under sub-s. (4) of this section, deemed to have (apart from this section) financially benefited.

This language appears to me to be more consistent with the view that subs. (4) both prescribes the existence of the benefit and defines what its quantum is to be. Moreover, subs. (4) (b) enacts categorically that a transferor of shares shall be deemed to have financially benefited to the extent stated. This is not, as it appears to me, the natural way in which to express a mere quantification of a benefit already proved to exist. I should have expected to find some such wording as that "the benefit obtained by a transferor of shares who is shown to have financially benefited shall be deemed to," etc., or, perhaps, the insertion of the words "no more and no less."

There are other considerations which appear to me to be worth mentioning. Sub-section (4) deals with two classes of transferors of shares. Paragraph (b) deals with what may be called "original transferors," para. (a) deals with transferors who acquired their shares under an associated transaction. They may, perhaps, be called "mesne transferors." Each class is to be "deemed to have (apart from this section) financially benefited." The bracketed words "apart from this section" are significant. They or their equivalent appear in several places in the section in connection with the phrase "financial benefits" and are used to indicate that the "financial benefits" referred to are gross benefits without taking into account the diminution in benefit which will be caused by the imposition of tax. Sub-section (4), therefore, is dealing with a subject-matter, namely, "financial benefit," which the legislature by the bracketed words tells us is going to be diminished by the imposition of tax. What then is the "financial benefit" which a transferor of shares is to be deemed to have (apart from the section) received? The fact that it is an "associated" transaction implies, of course, the existence of the "main" transaction, and the "financial benefit" which is referred to in the sub-section is, in my opinion, the financial benefit

obtained as a "result" of the "associated" transaction in question itself, viz., the transfer of shares. The opening words of subs. (4) on this reading, when written out at length, will run as follows: "where a transaction which, in the opinion of the commissioners, was effected in connection with or in association with any of the 'main' transactions consists of the transfer of any shares, the persons transferring the shares shall be deemed to have (apart from this section) financially benefited as a result of that connected or associated transaction as follows. . . ." The sub-section then proceeds to draw a datum line which is necessarily different in each case. In the case of the "mesne transferors," para. (a), it is the price which they paid for their shares, and any excess over this price obtained on a subsequent transfer is to be regarded as financial benefit whatever the ultimate result to the transferor may be. In the case of original transferors, para. (b), a different datum line had, of course, to be adopted. This datum line is fixed by the legislature at a value to be attributed to the shares as at the date of the transfer in accordance with the formula laid down in the paragraph. Any excess over and above this datum line is to be regarded as the financial benefit derived from the "associated" transaction of transfer.

I cannot leave this topic without referring to certain opinions expressed on it in the Court of Session in *Ross and Coulter v. Inland Revenue* (3). The Lord President appears to have linked up this question with his view that "innocent" shareholders are not within the mischief of the section. He says (1946 S.C. 134, at p. 166):

... a transferor of shares who was aware that such a scheme was afoot, and can therefore be presumed to have extracted from the promoter, as part of the price of his shares, a part of the promoter's prospective profits, is a party to a transaction effected in connection with or in association with the scheme, and will be deemed under sub-s. (4) (b) to have obtained financial benefits as a result of the transfer and the scheme . . .

He does not appear to think that the fact of financial benefit is to be established *aliunde* save to the extent that knowledge of the scheme will be sufficient to establish the fact that the transferor with knowledge must be "presumed" to have extracted from the promoter of the scheme "part of the promoter's prospective profits." The Lord President's construction of subs. (4) would thus appear to be as follows: "Where any such transaction as aforesaid consists

of the transfer of any shares by persons having knowledge of a scheme, the persons transferring the shares shall be deemed to have obtained a financial benefit in that their knowledge of the scheme must be presumed to have enabled them to extract from the promoter part of his prospective profits and the amount of that financial benefit shall be deemed to be," etc. With the utmost deference, I do not know any principle of construction which would justify so drastic a treatment of simple language. LORD MONCRIFF's view (*ibid.* pp. 174 *et seq.*) is agreed with by

LORD RUSSELL (*ibid.* at p. 194). I will not quote this passage, which is a long one. It appears to me to assume that an actual financial benefit must be proved *aliunde* because there is a "paramount need of finding such an actual financial benefit" which the enactment "insists shall be found as the necessary usher and antecedent to any liability for tax." This, with respect, seems to me to be assuming the very point which requires to be decided, viz., in the special case of transferors, does the enactment so insist? If it be assumed that it does, it, of course, follows that sub-s. (4) (b) is nothing but a quantifying provision. As will have been seen, my own approach is a different one.

I have already summarised the taxpayer's argument as to the nature of the link between the transfer of shares and the main transaction and I will now state as succinctly as I can my conclusions on it. On the point decided by the Court of Session, namely, that knowledge of a scheme must be proved against a transferor of shares before he can be made liable, I find myself constrained to take a different view. Nowhere in the section are there to be found any express words to the effect that a transferor of shares or any other person is only to be charged with tax if he knew of the existence of a scheme. If such knowledge was to be necessary, nothing would have been easier than to say so in the statute itself. The learned Lords of Session appear to me, if I may say so with all respect, to have been too much influenced by considerations of possible hardship to persons innocent of any knowledge of the scheme, and they did not, I think, appreciate that on the construction that they adopted the scope of the section

would be unduly limited. After all, the object of taxing Acts is to obtain money for the revenue from persons who are considered by the legislature to have acquired property or made profits which the legislature thinks ought to render them liable to tax. Whether or not the fortunate person who acquires the property or obtains the profits does so with knowledge of how or why they come to him appears to be an irrelevant consideration in legislation of this kind. The Court of Session appears to have thought that a *mens rea* is necessary and they seem to have regarded the transactions aimed at by the section as in some sense guilty transactions. It is, perhaps, worth noting that in the legal sense there was nothing guilty in a transaction which at the time that it was effected was perfectly lawful, whatever one may think of the social morality of those who took part in it. The importation of the idea of guilty knowledge cannot, I think, be justified either by the language of the section or by its general object and character.

The section may, it is true, in many cases operate as a penal section and is, undoubtedly, intended in that respect to act as a deterrent, but it applies not only to future but also to past transactions in respect of which no question of deterrence can possibly arise. What the legislature is minded to do is, as I have already said, to recover the tax which it conceives itself to have lost. If a transfer of shares has been effected in connection with or in association with the main transaction, that transfer necessarily forms a link in the chain which has resulted in the revenue losing tax, whether the transferor of the shares knew of it or not. From the point of view of the revenue, it seems to me to be the most natural thing in the world that a transferor of shares should be made to disgorge what the legislature regards as being his financial benefit, whether he knew or did not know of the scheme. Why should he not? I can see no injustice about it. If only transferors with knowledge are to be hit, it is only to such "guilty" transferors that the limitation of liability in proviso (ii) will apply, and I ask myself: "Why should the legislature thus go out of its way to favour guilty transferors above other participants in the transaction?" I can see no answer to this question. It would seem more natural to have left such transferors to share the joint and several liability imposed on other persons, since it would have been their deliberate act which had enabled the scheme to be put into operation. The crucial words are those towards the end of para. (b) of subs. (1), *viz.*, "transactions which, in the opinion of the commissioners, were effected in connection with or in association with any of the said transactions." Speaking for myself and reading these words in what appear to me to be their natural meaning, I can find no reason for interpreting them as requiring any such subjective or financial links as were suggested to be necessary by Sir Cyril Radcliffe. They appear to me to mean exactly what they say and no more, namely, that a transaction may be treated as what I have called an associated transaction if the commissioners find (on proper evidence, of course) that it was "effected in connection with or in association with" any of the main transactions, and this refers to a connection or association in fact and not to some subjective link existing in the minds of the transferors or transferees or both or to some financial link between the profit obtained by the promoters and the payment of the purchase price of the shares. In the present case there can be no doubt to my mind that the sale by the taxpayer of his shares to Mr. Stewart was connected or associated in fact with the purchase by Mr. Stewart of the company's whisky. The sale of the shares was an essential preliminary to the acquisition of control of the company by Mr. Stewart, just as the acquisition of control was an essential preliminary to the purchase of the whisky by Mr. Stewart at an undervalue and its subsequent disposal at a profit. How can this relationship of one transaction to another be better described than by the words "connected" and "associated"? I do not know. The commissioners are made the judges of what is connected or associated. If the fact-finding duty imposed on them by the legislature is intended to be limited to certain narrow categories of connection or association, I should have expected the legislature to say so rather than leave it to the courts to discover. I can see no justification for writing in to the language words which are not there.

The reasons which I have given, if correct, are sufficient to dispose of the argument submitted to us on behalf of the taxpayer. I may add a few words in relation to the second and third suggested "links." The suggestion that the necessary connection or association would be found if the purchaser of the shares had given an extravagant price for the shares in the hope of realising a profit

seems to me to be artificial in the extreme. What is an "extravagant" price? Would the present taxpayer have incurred liability if he had sold his shares for £10? The argument, in my opinion, only needs to be stated to be rejected. The same observation applies to the suggestion that inability on the part of the purchaser of the shares to pay for them otherwise than out of the profits realised or expected to be realised by the resale of the whisky "is a possible pre-condition of liability." This would mean that, if the purchaser was a very rich man who

- A could pay for the shares out of his own resources without having recourse to the profits realised or expected to be realised, the transferor would escape liability.
- I must now turn to subs. (5), which provides that a barrister, solicitor, or accountant is not to be treated as having received financial benefits by reason only that he received in the ordinary course of his profession remuneration in respect of ordinary professional services rendered in connection with any such transaction at not more than the customary rate. There is a similar provision
- B in favour of bankers who only receive the customary rate of interest. These provisions clearly apply to the persons referred to, whether they know or do not know of the nature of the transaction. If their connection with the transaction goes beyond the rendering of such services or if they receive remuneration above the usual rate, the protection given by the sub-section will not operate. I see nothing unreasonable or oppressive in this which seems to me to be entirely in accordance with the policy of the legislature as expressed in the comprehensive
- C language which it has employed. I certainly do not find myself compelled or even inclined to construe these provisions as having been inserted *ex majore cautela*. Moreover, another case is given exemption by the sub-section, which admittedly cannot be construed as having been inserted *ex majore cautela*. It is the case of a merchant who deals in stock of the kind in question, buys some of the stock of the company at its full market value, and subsequently disposes of it at a profit.
- D Such a case would have occurred if, for example, a whisky merchant had bought some of the company's whisky from Mr. Stewart at the full market price, kept it for a while, and then resold it at a profit, the price of whisky having gone up in the meanwhile. Such a merchant might or might not know the circumstances in which and the purpose for which Mr. Stewart had bought the whisky, but in either case the sub-section relieves him of liability, thus setting a limit to the sequence through which the transaction can be pursued. There are two ways of
- E dealing with such a clause as this. One is to interpret the main provisions of the section in a narrow sense, perhaps by reading into it qualifications and limitations which are not to be found in express words, and then to interpret the clause as having been inserted *ex majore cautela*. The other is to treat the clause as part of the whole context in which the main provisions of the section are to be construed and as helping to decide whether those provisions are to be construed in a broad or a narrow sense. If the answer is in a broad sense, the clause then becomes
- F a real exception inserted to exclude the cases mentioned from the operation of the main provisions. The Court of Session chose the former alternative and that is what was contended for by counsel for the taxpayer here. Personally, with all respect, I prefer the latter alternative. I have already given my reasons for thinking that the main provisions of the section are intended to cast the net very wide indeed, in the first instance, with certain ways of escape provided. Sub-
- G section (5) provides an additional way of escape limited to the particular cases mentioned, which were naturally considered to fall outside the policy of the legislature and, therefore, required to be expressly exempted. The sub-section appears to me to confirm my view that the technique of draftsmanship adopted was not in drafting the main provisions to restrict their scope, but to draw them in wide terms, leaving special cases to be exempted by special words. The doctrine of *ex majore cautela* implies that the natural meaning of the language used by
- H the legislature in the main provisions is sufficient in itself to exclude the exempted cases. Here, as it appears to me, the doctrine can only be made applicable by writing in to that language qualifications which are not there. Once this is done, it is, of course, necessary to treat the exemptions as having been inserted *ex majore cautela*. If, however, contrary to my view, the sub-section is to be treated as having been inserted *ex majore cautela*, I adhere to my opinion already expressed as to the interpretation of the other provisions of the section.

The last argument put forward on behalf of the taxpayer can be dealt with quite shortly. I have referred earlier in this judgment to the discretion given to the

commissioners. In proviso (ii) to subs. (1) they are directed to apportion the full tax so that there is apportioned to a vendor of shares

... no greater part thereof than is equal to the amount by which he is, under sub-s. (4) ... deemed to have ... financially benefited.

It is argued that the words "no greater part" mean that the Commissioners of Inland Revenue have a discretion under which they may apportion a part less than the stated limit. Whether or not this is a correct interpretation, it is not necessary to consider. I will assume that it is. It is then said that the special commissioners cannot have realised that they were given such a discretion, since there is nothing in the Case to suggest that they ever considered the matter. On the contrary, it is said, their language shows that they did not regard themselves as having any such discretion, since they find that the taxpayer's financial benefit was £1,107,775 and say that this sum "must" be apportioned to him. The word "must" as here used cannot, in my opinion, bear the weight which it is sought to place on it. The special commissioners were hearing an appeal from a direction by the Commissioners of Inland Revenue who had apportioned the sum named to the taxpayer, and we are told that the nature of the discretion contended for was clearly put before them in argument. In effect, the special commissioners are saying no more than that the appeal "must" be dismissed. The word "must" is commonly used by judges in (for example) such a phrase as "this action must be dismissed," or "an injunction must be granted," and the special commissioners, in my opinion, were here using it in that sense. It may be observed that, if the special commissioners had apportioned a smaller sum to the taxpayer, the difference would have had to be apportioned to the other persons concerned, or some of them, and it is not surprising that both the Commissioners of Inland Revenue and the special commissioners took the course that they did.

Sir Cyril Radcliffe also relied on the fact that the special commissioners had not found what the aggregate profit realised by all the persons concerned was. This is, no doubt, true, but he argued that without such a finding the special commissioners were not in a position to exercise their discretion in the matter of apportionment. I cannot agree with this construction. It must surely have been realised that it would often be impossible to discover all the profits that had been made from a given set of transactions. Moreover, I cannot see how the absence of full information as to the profits realised by others can affect the discretionary power to apportion to the transferor of shares any proportion of the tax up to the permissible maximum. The profits made by others seem to me to have no bearing on the question what ought to be apportioned to the taxpayer. Whatever profits the others may have made, the taxpayer's profit is ascertained, and there can be nothing unfair in apportioning to him a proportion of the tax commensurate with his profit whatever the profit made by other persons may have been. The commissioners, in my opinion, were entitled to act on the material that was before them.

As I am taking a view contrary to those expressed by the Lords of Session, in *Ross and Coulter v. Inland Revenue* (3), I would have liked, out of respect to them, to examine their judgments in detail. I hope that I shall not be thought disrespectful if I do not do so. This judgment has already occupied a great deal of time and my reasons for differing will, I think, already be clear. There is, however, one point on which I should add a few words, namely, the meaning of the words "concerned in" in proviso (ii) to subs. (1). The Lord President says (1946 S.C. 134, at p. 163):

In my opinion, "concern in" a transaction signifies an active interest in it and in this context an active financial interest... In my opinion, what is relevant is not bare knowledge or awareness but knowledge or awareness enabling the shareholder to bargain for a better price than he could have bargained for without it. But, if knowledge is proved, it becomes reasonable to presume that it would be used, and used with effect, in negotiating the price for the transfer of the shares: It is those who are in this position of advantage who are "concerned in" the transactions.

I am afraid that I cannot agree with this method of interpreting the phrase "concerned in." Proviso (ii) itself speaks of a transfer of shares by itself without qualification as being one way of being "concerned in" the main transaction, since it speaks of a transferor of shares who "has not, apart from that transfer, been concerned in any such transaction," and I can find no justification in the context for limiting the quite general word "concerned" to persons who have an

active financial interest due to the fact that their knowledge of the scheme puts them in an advantageous bargaining position. The appeal is allowed with costs here and below.

COHEN, L.J. : I agree so entirely with the conclusion reached by my Lord and with the reasons he has given therefor that I do not desire to add anything of my own.

LORD GREEN, M.R. : I am authorised by ASQUITH, L.J. to say that he has read the judgment which I have just delivered and agrees with it.

Appeal allowed with costs.

Solicitors : *The Solicitor of Inland Revenue* (for the Commissioners of Inland Revenue) ; *F. O. S. Leak, Burgess, Battersby & Co.* (for the taxpayer).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

B

LLOYD-DAVIES v. LLOYD-DAVIES

[COURT OF APPEAL (Lord Greene, M.R., Morton and Somervell, JJ.)
December 19, 1946.]

Divorce—Decree absolute—Appeal pending—Discretion of trial judge—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), ss. 31 (1) (e), 183 (1), 184 (1).

C

The right of a respondent to appeal from a decree *nisi* of divorce is an absolute right. A divorce judge, when an application is made to him to make a decree absolute, must inform himself whether or not there is an appeal pending against the decree *nisi*. If there is an appeal pending, he has no discretion or right to pronounce a decree absolute, because by doing so he would be destroying the respondent's right of appeal. Whether or not an appeal is vexatious is a matter for the Court of Appeal, and not one which the trial judge should consider.

D

[**EDITORIAL NOTE.** It is possible that when, owing to the need to expedite relief in divorce suits, the normal period for making absolute a decree *nisi* was reduced from six months to six weeks, the fact was overlooked that difficulties might arise owing to the time within which an appeal against a decree *nisi* must be entered being the same as the latter period. The position, however, is not likely to lead, as might appear at first sight, to injustice to a would-be appellant. Owing to the practice of the Divorce Registry, the department which receives applications for decrees *nisi* to be made absolute is aware of any appeals against decrees *nisi* which are set down. This, coupled with the fact that an application to make absolute a decree *nisi* is not entertained until the period of six weeks has actually elapsed, should ensure that no respondent should suffer any interference with his right of appeal. Where, as in the present case, the petitioner applies for the decree absolute to be expedited, notice of that application is given to any respondent who has entered an appearance, and there would then be an opportunity for the respondent or his advisers to inform the court dealing with the application to expedite if an appeal is proposed.

E

F

[AS TO APPEALS FROM DECREES NISI AND ABSOLUTE, see HALSBURY, Halsham Edn., Vol. 10, p. 775, para. 1226 ; and FOR CASES, see DIGEST, Vol. 27, pp. 487-489, Nos. 5195-5213].

G

APPLICATION by the husband, who had served notice of appeal against a decree *nisi*, for a stay of an order of WALLINGTON, J., that the cause should be listed among the causes in which decrees absolute were being made on a certain day.

The husband appeared in person.

William Latey for the wife.

H

LORD GREENE, M.R. : This application raises what appears to be a novel point in divorce procedure. The reason why it has not come up for discussion before is, no doubt, that until recently a period of at least six months had normally to elapse between the decree *nisi* and the decree absolute. Now the period is reduced to six weeks, and the consequence is that, whereas in most cases in the old days an appeal would have been heard and determined before the six months had elapsed, nowadays it is equally certain that, save in exceptional circumstances, an appeal will not be heard before the six weeks have elapsed. The question is : What is the effect of serving a notice of appeal on the power of the Divorce Court to make absolute the decree *nisi* against which the appeal is brought.

In the present case the wife obtained a decree *nisi* on Nov. 8, 1946. She was anxious to re-marry before the six weeks elapsed, and applied to the trial judge, WALLINGTON, J., to have the decree *nisi* made absolute before the six weeks elapsed. WALLINGTON, J., heard the parties in chambers and was informed that the husband had served a notice of appeal against the decree *nisi*. The judge, we are told, took the view that the appeal was vexatious and that its existence ought not to prevent him from making the decree absolute as asked. He did not make it absolute there and then because that was not the appropriate occasion, but he gave instructions that the cause should be listed among the causes in which decrees absolute were being made on a particular day. The effect of that would be that it would have appeared in the list among a number of other causes to be made absolute, and it would be made absolute unless the judge for some reason refused to make it absolute. The husband came before us and complained of that procedure, and he applied for a stay of the decree absolute. I do not think that is technically the right way to describe the relief he asked for, but that cannot be allowed to affect us. Having heard the nature of his application, we thought it right to direct him to give notice to the other side, and we have had the advantage of hearing counsel who has appeared for the wife before us.

The position it will be observed, is rather curious. First, save in cases which by statute or rule admit of no appeal, the right of a litigant to appeal against a judgment which is adverse to him is given by statute and cannot be taken away. We, therefore, have before us, an appeal which is perfectly competent in pursuance of the husband's statutory right, and whether or not that appeal is vexatious, whether or not there is any merit or foundation for it, is a matter for this court and not for the trial judge to decide. The litigant has the right to come to this court and nobody has the right to stop him coming here. It is impossible for us on an interlocutory application of this sort to consider whether or not the appeal has any merits because we can only decide what merit there is in an appeal when we have heard it, and the husband has the right to require us to hear his appeal. The wife, on the other hand, has a statutory right to have her decree *nisi* made absolute, subject to the qualification that a divorce judge has a discretion to postpone the making of the decree absolute to a time subsequent to the expiration of the statutory period of six months or six weeks. Those are the rights of the two parties. It is obvious that there might be a conflict between those two rights. If the decree is made absolute while an appeal is pending, the effect must necessarily be to render the appeal completely abortive. The making of the decree absolute would nullify the appeal and deprive the appellant of the right which is statutorily in him to have his appeal heard and determined by this court.

I am confirmed in that view by the fact that counsel agrees that that in fact is so, but I base my view on the language of the statute itself. Under the Judicature (Consolidation) Act, 1925, s. 183 (1) :

Every decree for a divorce . . . shall, in the first instance, be a decree *nisi* not to be made absolute until after the expiration of six months from the pronouncing thereof, unless the court by general or special Order from time to time fixes a shorter time.

and of course by the recent Order, which is a general Order, the court has fixed for the decree absolute six weeks. Then s. 184 (1) provides :

As soon as any decree for divorce is made absolute, either of the parties to the marriage may, if there is no right of appeal against the decree absolute, marry again as if the prior marriage had been dissolved by death, or, if there is such a right of appeal, may so marry again, if no appeal is presented against the decree, as soon as the time for appealing has expired, or, if an appeal is so presented, as soon as the appeal has been dismissed.

That sub-section says nothing about pending appeals from decrees *nisi*. The only appeal mentioned is an appeal against the decree absolute, and it says in terms that the parties may marry again if there is no right of appeal against the decree absolute. The statute lays down the circumstances in which there is a right of appeal against a decree absolute. That is to be found in s. 31 (1) (e), which provides :

No appeal shall lie . . . from an order absolute for the dissolution or nullity of marriage in favour of any party who, having had time and opportunity to appeal from the decree *nisi* on which the order was founded, has not appealed from that decree.

It follows, therefore, that, if a decree absolute is made, the husband will not be in a position to appeal against it under s. 184 (1) because he is not a person who had no opportunity to appeal against the decree *nisi*. On the contrary, he has actually appealed from the decree *nisi*, and therefore, his right of appeal against the decree absolute would never arise. The effect of that section seems to me to be that, directly a decree absolute were made, first, the appeal against the decree *nisi* would become abortive because the parties would be at liberty to marry again under s. 184, and, secondly, there would be no chance of appealing against the decree absolute because the husband could not satisfy the provisions of s. 31 (1) (e). That appears to lead to the result that, on the one hand, the husband has got a statutory right to appeal, and, on the other hand, the terms of the legislative provisions regarding divorce, construed literally and by themselves, put it within the power of the Divorce Court to destroy that statutory right to appeal.

- A The provisions of the two sections have got to be reconciled, and the only way of reconciling them is this. The right of appeal is absolute and is not to be in any way interfered with, and the divorce judge when an application is made to him to make a decree absolute must inform himself (he would naturally be informed) whether or not there is a pending appeal. If there is a pending appeal, in my judgment, he has no discretion or right to pronounce a decree absolute, because by doing so he would be destroying the right to appeal to this court.
- C Whenever there is an appeal to this court the judge has no option. He must not take any step which would make the appeal ineffective, and the making of the decree absolute would make the appeal ineffective. I am confirmed in that view by this fact. We are told that within the memory of the officials at the Divorce Registry it has never been the practice to put a cause in the list to have the decree made absolute in a case where there is a pending appeal. The cause is simply kept out of the list, and I think that this practice must have originated from a recognition of what I have been saying, that the judge ought not to make a decree absolute when there is known to be an appeal pending.
- D It was suggested that the proper course for an appellant to take who knew or thought that he would not get his appeal heard and determined before the expiration of the period before the decree was due to be made absolute was to apply to the judge or to this court under R.S.C. Ord. 58, r. 16. That rule says :

- E An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the court appealed from, or any judge thereof, or the Court of Appeal, may order. . .

It is suggested that R.S.C. Ord. 58, r. 16, was incorporated under the Divorce Rules, r. 81. Rule 81 is as follows :

- F Subject to the provisions of these rules and of any statute, the Rules of the Supreme Court shall, notwithstanding the provisions of Ord. 68 thereof, apply with the necessary modifications to the practice and procedure in any matrimonial cause or matter to which these rules relate.

- Order 58, r. 16, is, in my judgment, quite inept to deal with the particular problem that we are discussing, having regard to the fact that the right of appeal is an absolute right and to the fact that it is peculiar to divorce that once the decree absolute is made and there is no right of appeal against it the parties are at liberty to re-marry. The axe has fallen and nothing can be done to undo what has been done.
- G

- Taking the whole thing together, in my judgment, the divorce judge, even if technically he has a discretion to make the decree absolute, is not entitled to exercise that discretion in a case where to his knowledge there is a pending appeal. *A fortiori* he is not entitled to say : " I am going to make this decree absolute because I do not think there is anything in the appeal." That appears to me to be the inevitable result of the legislation relating to this question. It must not be thought from what I have said that I do not appreciate the hardship on the wife who wishes to re-marry and go abroad, but we are here to administer the law as laid down by Parliament, and we cannot make exceptions because of hardships. It is suggested that something might be done to see that the husband does not delay in the prosecution of his appeal. The opportunities for delay in the case of an appeal are nothing like what they are in the case of an action, because when an appeal has found its way into our list, it can only be stood out of the list for some good cause. Nevertheless there are ways in
- H

which the appeal could be delayed, though not for any indefinite period, and counsel would be quite within his rights to come to this court and ask for directions in the event of his considering that the husband had been to blame for any delay. He could come and ask for a date to be fixed, and from what we have heard of the case I think it extremely likely that we should accede to an application to expedite the hearing of this appeal. I do not think we are entitled at this stage to impose conditions on the husband. His right of appeal is an absolute right of appeal, and we have no right to refuse him relief or to impose, as a condition of giving him that relief, some condition or obligation on him. On the other hand, the court is concerned to see that undue hardship is not caused to the other side, and counsel may take it that his application to expedite the appeal will receive our serious consideration. A

The result is that we must make an order that the cause is not to appear in the list for making the decree absolute pending the determination of the appeal.

MORTON, L.J.: I agree. I think that the conclusion which my Lord has stated is the inevitable result of the existing legislation. Counsel has suggested that this appeal is wholly vexatious and that it is an attempt on the part of the husband, out of spite, to prevent his wife marrying the man whom she desires to marry and who is proceeding overseas at an early date. It is impossible for us to determine today whether that is so or is not so. If that is the fact, the husband's behaviour is extremely contemptible, but we cannot pre-judge that issue. He has an absolute statutory right of appeal, and at this moment we do not know whether it is well founded or not. I agree with the order of the court. B C

SOMERVELL, L.J.: I agree.

Order accordingly.

Solicitors: *Ludlow & Co.* (for the wife).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.] D

CHANDLER v. STREVETT

[COURT OF APPEAL (Scott, Bucknill and Somervell, L.JJ.), November 21, December 10, 1946.] E

Landlord and Tenant—Rent restriction—Recovery of possession—Premises required by landlord for own occupation—Hardship—How far question of fact—Matters for consideration—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3 (1) sched. I. (h).

By s. 3 of and sched. I (h) to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, the court has power to make an order for the recovery of possession of a dwelling-house within the Rent Restriction Acts without proof of suitable alternative accommodation if the house is reasonably required by the landlord for occupation as a residence for himself, "Provided that an order . . . shall not be made . . . if the court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order . . . than by refusing to grant it." F G

Semble. per SCOTT, L.J.: The question where lies the balance of hardship is not one of fact on which there is no appeal to the Court of Appeal under s. 105 of the County Courts Act, 1934. The county court judge's finding of the facts on the evidence is final, but his inferences regarding the incidence of hardship is open to review. H

Per BUCKNILL, L.J.: The question what is reasonable in all the circumstances must be a difficult, and, at times, almost insoluble, problem on which different minds may arrive at different conclusions. In certain circumstances an order for possession might be reasonable although it imposed greater hardship on the tenant than on the landlord. The question whether a house is reasonably required by the landlord for occupation as a residence for himself is one entirely of fact for the county court judge.

Matters to be considered on the issues of hardship and reasonable requirement by the landlord discussed.

[EDITORIAL NOTE. In his judgment BUCKNILL, L.J., states that the burden of proving greater hardship under the proviso is on the tenant. The authority for that proposition is *Robinson v. Donovan* [1946] 2 All E.R. 731, and the cases there cited.

AS TO POSSESSION OF PREMISES REQUIRED BY LANDLORD FOR OWN OCCUPATION, see HALSBURY, Hailsham Edn., Vol. 20, p. 332, para. 396; and FOR CASES, see A DIGEST, Vol. 31, pp. 580, 581, Nos. 7283—7297.]

APPEAL by the tenant from an order of JUDGE ARCHER, K.C., at Brighton and Lewes County Court, granting to the landlord possession of a house under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1), and sched. I, para (h). The facts appear in the judgment of BUCKNILL, L.J.

H. Glyn-Jones, K.C., and B. E. Dutton Briant for the appellant.

Aitken Watson, K.C., and Anthony Harmsworth for the respondent.

Cur. adv. vult.

Dec. 10. The following judgments were read.

SCOTT L.J.: The tenant appeals from an order for possession obtained against him by his landlord under para. (h) of sched. I to the Rent Restrictions Act, 1933. There were two issues below:

(1) on the defence that the landlord had agreed to sell the house to the tenant, with a counter-claim, added at the hearing, for specific performance; and (2) on the balance of hardship. On the first issue I am satisfied that the judge was right in holding that the correspondence disclosed no acceptance by the tenant of the landlord's offer to sell before receipt by him of a letter from the landlord withdrawing the offer.

The hardship issue raises, in an interesting, and, I think, inescapable, form, the question how far that problem should be regarded by this court as a question of fact on which there is no appeal under s. 105 of the County Courts Act, 1934. Each case must, of course, depend on its own facts, but there are two aspects which frequently call for consideration and certainly do so in the present case. The first is that it is to the balance of hardship that the judge is directed to turn his mind, and that means that he has to add up the items of hardship

proved in evidence on each side of the statutory profit and loss account or balance sheet (for either metaphor will serve) and then see on which party the greater hardship falls. The second is that the judge is called on to operate the process by putting a hardship value on the various items on each side. That involves making very human estimates of comparative values on which widely divergent views may be taken by any two human minds. Did Parliament intend to leave that

very difficult task in its entirety and finally to the county court judge to the exclusion of the Court of Appeal and even of the House of Lords, and, if not, where did it draw the line? If in any given case there is evidence for the landlord of one particular burden to be suffered or of one particular loss of benefit to be borne, while on the tenant's side there are several of each, or one that to the Court of Appeal seems vastly more serious than the hardships on the landlord's side, is the decision of the county court judge to the diametrically opposite effect

conclusive on the Court of Appeal and the House of Lords? Is it the law that such a problem of human happiness and misery, or comfort and inconvenience, are just mere questions of fact with which the Court of Appeal cannot interfere at all, or, on the other hand, do these problems lie in the debatable land of fact and law, matters of inference and opinion on which the Court of Appeal and House of Lords may give guidance? Another aspect of the problem is seen in the difference between the two judicial functions, on the one hand, of finding specific facts on contentious and contradictory evidence, and, on the other, of drawing the right inferences from the specific facts when so judicially established.

In the present case there are certain "facts" indisputably proved—facts regarding which there was no evidence to the contrary. In addition, there are certain inferences which I should draw and the judge apparently, and, I think, really, refused to draw. The result is that, if it is open to me, I utterly disagree with his general conclusion that the hardship which would have been caused to the landlord if he had not got his order for possession would outweigh the hardship in fact caused to the tenant by the order.

I will tabulate some of what I will call "the items" on each side of the profit and loss account which were clearly proved: (1) The landlord has another house, namely, the one he is living in; the tenant has tried hard to get one in the district where his business compels him to live and cannot. (2) The tenant's desire and need for his present house are both obviously very real; the landlord's desire for the house was obviously not for his own occupation but in order to sell it with vacant possession, as is shown by a series of his letters and his general conduct. (3) The tenant's failure to finance his purchase of the house from the landlord was to some extent due to his being still tied to the army; had he been free and back at his business he would probably have got his second mortgage. On the other hand, the landlord was continually, and, perhaps, dishonestly, trying to bluff the tenant into believing that he was still bound by his tenancy agreement to give up possession. The landlord never once referred to the Rent Restrictions Acts, and it is impossible to imagine that he did not know all about them. I regard his letters as in that sense dishonest.

In the result, I can see no reasonable justification for the judge's conclusion on the hardship issue and am satisfied that he must have arrived at it by erroneous inferences from the facts and correspondence. I, therefore, regard his conclusion as unjust and think that the appeal should be allowed with costs here and below.

BUCKNILL, L.J.: This appeal raises the difficult question whether there was any evidence on which the judge could come to the conclusion from which the appeal has been made.

The appellant was the tenant of a house, No. 56 Goldstone Crescent, Hove. The respondent was the landlord. The landlord brought an action in the county court for recovery of possession of the house on the ground that he required it for his own use and occupation. The tenant, by his defence, claimed the protection of the Rent Acts. At the hearing on July 27, 1946, the judge made an order for possession in favour of the landlord, to take place on Dec. 25, 1946.

The points argued before the court on this appeal were whether there was evidence before the judge on which he could properly come to the conclusion (1) that it was reasonable to make the order, (2) that the dwelling house was reasonably required by the landlord for occupation as a residence, (3) and most important, whether on the evidence the judge ought to have been satisfied that, having regard to all the circumstances of the case, including the question whether other accommodation was available for the landlord or the tenant, greater hardship would be caused by granting the order for possession than by refusing it. [HIS LORDSHIP reviewed the evidence on the first point and continued]: Section 3 (1) of the Rent Act, 1933, enacts that no order or judgment for the recovery of possession of any dwelling house shall be made "unless the court considers it reasonable to make such an order." Was there evidence on which the court could come to this conclusion? The question of what is reasonable in all the circumstances must be a difficult and, at times, almost insoluble, problem on which different minds may arrive at different conclusions. It seems to me, for instance, that in certain circumstances an order for possession might be reasonable although it in fact imposed greater hardship on the tenant than on the landlord. Taking all these things into consideration, I do not see how this court can say that there was no evidence on which the court could decide that it was reasonable to make the order giving possession to the landlord.

The next question was whether the house was reasonably required by the landlord for occupation as a residence for himself (which includes his wife) and his daughter, in accordance with para. (h) of sched. I to the Act of 1933. That he so required the house was clearly proved. The question is whether his requirement was reasonable in all the circumstances. It seems to me that the same kind of test must be applied here as in the first question, although in this case the reasonableness hinges more on the actual requirements of the landlord. For instance, one would consider the nature and place of his business (if any), the size of his family, his actual residence or lack of one at the time of asking for the order. Questions of health and cost of living and innumerable other possible factors may have to be taken into account. The question is one entirely of fact for the judge, and I do not see how this court can say that there was no evidence to support his conclusion that the landlord reasonably required the house for occupation as a residence.

The third question for this court to decide is whether the court ought to have been "satisfied that having regard to all the circumstances of the case, including the question whether other accommodation was available for the landlord or the tenant, greater hardship would be caused by granting the order ... than by refusing to grant it." These are the actual words at the conclusion of para. (h) of sched. I. They are as wide as they can be. The judge is to consider the problem of other accommodation, but he has to consider all the circumstances of the case, and then, if he is satisfied that an order for possession will cause greater hardship to the tenant than the landlord, he must not make it. The burden of proving greater hardship under this proviso is on the tenant. Unless the judge is satisfied of that then he must make the order, provided the other conditions of reasonableness and occupation as a residence by the landlord have been complied with. In this case ought the judge to have been satisfied in this way? If the question turned solely on the hardship of being without a residence, I think clearly the condition would have been satisfied because the tenant had no alternative accommodation and the landlord had. But that is not the only thing to be considered. Was there any other material factor in this particular case? The only two grounds were, (1) the wife's ill health and (2) the tendency of the landlord and his son-in-law to be on bad terms with one another. As regards the wife's health, I can see no effective reason for thinking that her health would be better at Hove than at Kingston. There was no evidence about the daughter's preference for Hove or Kingston as a residence. The continuance of her care of her mother is an important factor in the problem. As regards the second reason, I think the bad feeling between the landlord and his son-in-law is not likely to be cured merely by a change of residence.

In my view, therefore, in this case the only effective question to consider on this matter of hardship was the question of accommodation. On that question it seems to me that the evidence was all one way. The landlord had a residence; the tenant, his wife and five children, if evicted, had none. I think, therefore, that the judge was wrong in law in that he did not pay due regard to the proviso in para. (h), and that the appeal should be allowed.

SOMERVELL, L.J., [read by SCOTT, L.J.] : This is an appeal by the tenant from an order made by the county court judge ordering the tenant to give up possession of 56, Goldstone Crescent, Hove, of which the plaintiff is the landlord.

The first point argued by counsel for the tenant was that in 1944 a binding agreement was entered into by the parties under which the landlord undertook to sell the premises to the tenant. This agreement is said to be contained in letters. The county court judge decided that they did not constitute a binding agreement. I think he was clearly right and this point, therefore, fails.

The second point was that there was no evidence on which the judge could make the order or that the judge was wrong in law in making an order for possession. The Acts give the county court judge a very wide discretion, and emphasis has been laid many times (as it was by counsel for the landlord) on the principles on which this court will or will not interfere with a decision of the kind in question here.

In the first place, it is clear to me that counsel for the tenant can rely only on the facts found or undisputed. [HIS LORDSHIP reviewed the evidence and continued:] It has been suggested that the landlord did not really want the house as a residence for himself. There is force in this suggestion, but for the purpose of my judgment I will assume that the landlord, if he gets an order, will move into the house with, as he stated, his wife, daughter and son-in-law.

There was no evidence that there was other accommodation available for the tenant and his family. The evidence was that the tenant and his wife had made considerable efforts to find other accommodation without any success. The landlord had alternative accommodation in the flat in which he and those with whom he intended to move were living. There was no evidence about the size of the flat. There was no suggestion that the two couples could not continue to live there. The rent was higher than the rent which the landlord was receiving from the tenant. It was on the first floor and the landlord said that if he got No. 56 he would make arrangements so that his wife could live wholly on the ground floor.

The landlord's claim was made under para. (h) of sched. I to the Act of 1933. The case is a borderline one, but I have come to the conclusion that, applying that provision and the general principle of the Acts to the admitted facts, the county court judge came to a conclusion that was wrong in law. It is emphasising the obvious to point out that the Acts were passed, and have been continued and extended, to meet the hardships which would have arisen but for them, whether by increase of rent or ejectment, from the absence of alternative accommodation. In cases brought under s. 3 (1) (b) of the Act of 1933 the court has to be satisfied that suitable alternative accommodation is available. This is not so under para. (h) of sched. I, but, under that paragraph, in having regard to all the circumstances of the case the court is expressly enjoined, in deciding on the issue of greater hardship, to have regard to the question whether other accommodation is available for the tenant or the landlord. These words and the general principles of the Acts make it clear, to my mind, that alternative accommodation, though not a condition under para. (h), is normally the most important of the circumstances to which regard must be had. Admittedly, the landlord with his son-in-law had a financial motive for requiring the house, and also the motive based on his wife's health. There was no medical evidence as to the latter and she was able to go out fairly regularly to lunch outside the flat, but I accept the statements about her health and they seem to me sufficient to establish that the landlord reasonably required the house. I find it, however, impossible to hold that the county court judge correctly applied the law on the issue of greater hardship. On the evidence, the landlord and those with him had a flat in which they could continue to live whereas the tenant and his large family of children had nowhere to go. There seems to me, therefore, to be only one possible answer on the issue of greater hardship, and that is one in favour of the tenant. I agree that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Walmsley & Stansbury*, agents for *J. E. Dell & Loader*, Brighton (for the appellant); *Blakeney & Co.*, agents for *Cyril Wheeler*, Brighton (for the respondent).

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.]

Affirmed. H.L. [1948] 1 All E.R. 948.

CONGREVE v. INLAND REVENUE COMMISSIONERS

[COURT OF APPEAL (Scott, Tucker and Cohen, L.JJ.), November 6, 7, 8, December 9, 1946.]

Income Tax—Sur-tax—Avoidance of tax—Transfer of assets to company abroad—Transfer of assets to company in United Kingdom subsequently moved abroad—By whom transfer to be made—"Associated operation"—What income deemed income of transferor—Finance Act, 1936 (c. 34), s. 18 (1).

A wife, who, with her husband, was ordinarily resident in the United Kingdom but domiciled abroad, held controlling interests in an English trading company and in investment companies, formed for the purpose of evading liability to tax, in England and abroad. A series of transfers between these companies, entered into in order that the wife might escape the incidence of income tax and sur-tax, resulted in the transfer of income to persons abroad. Throughout these transactions the wife's father was acting with the authority of his daughter, who signed such documents as he advised her to sign. In pursuance of the Finance Act, 1936, s. 18, as amended, assessments to tax were made on the wife and on the husband in right of his wife.

HELD, (i) a transfer was within the mischief of s. 18 (1), although it was not a transfer by the individual whom it was sought to charge with tax or by his agent. Even if the preamble to s. 18 connoted activity by the individual concerned, the condition of activity would be fulfilled if the execution of the transfer were procured by the individual concerned even though it was not actually executed by him or his agent.

(ii) an individual ordinarily resident in the United Kingdom could be charged with tax on the income of a company resident or domiciled outside the United Kingdom although that company was not so resident or domiciled at the date of the relevant transfer or operation, for the material date so

far as residence was concerned was the date at which the income became payable and not the date of the transfer or associated operation.

Semble: The removal abroad of the control of the company was an "associated operation" in relation to the assets transferred, since the effect of the removal was to alter the incidence of taxation under case IV in relation to the income of the assets transferred.

(iii) in any event, the liability of the taxpayers under the section was measurable by reference to the whole of the respective incomes of the various companies to which the transfers had been made, directly or indirectly, and not only to such parts of the income of those companies as arose from the assets so transferred to them or from assets acquired by the companies as a result of associated operations related to such transferred assets. Under s. 18 (1) the income of the non-resident which the resident individual had the power to enjoy by reason of the transfer either alone or in conjunction with associated operations was that income which was deemed to be income of that individual for all purposes of the Income Tax Acts, and there was no justification in the language of the section for an analysis of that income in order to ascertain the source from which the income arose.

Decision of WROTTESELEY, J., [1946] 2 All E.R. 170, *reversed*.

[FOR THE FINANCE ACT, 1936, s. 18, see HALSBURY'S STATUTES, Vol. 29, p. 230.]

APPEAL from WROTTESELEY, J., reported [1946] 2 All E.R. 170, where the Case Stated is set out.

Assessments to tax under the Finance Act, 1936, s. 18, as amended, were made on a husband and wife, who were both ordinarily resident in the United Kingdom but domiciled abroad, in respect of income arising out of a series of tax-evading transfers between English companies and companies abroad which resulted in the transfer of income to firms abroad. The transactions were entered into in order that the wife, who had a controlling interest in the companies, might escape the incidence of income tax and sur-tax. The special commissioners of income tax found that the wife was an individual who had, by means of a transfer in conjunction with associated operations, acquired rights by virtue of which she had, within the meaning of s. 18, power to enjoy the income covered by the assessments, which was income payable to persons resident or domiciled out of the United Kingdom. On appeal, WROTTESELEY, J., held that (i) it was a condition precedent to the application of the section that the transfer be made by the person striving to avoid liability to tax, (ii) the section did not apply to cases where the transfer was made to a company in the United Kingdom which, after the transfer, removed abroad, and (iii) it was only the income referable to assets which the wife transferred herself or caused to be transferred that was to be deemed to be her income for the purpose of the Income Tax Acts and not the whole income of the company concerned. WROTTESELEY, J., therefore, allowed the appeal and remitted the Case to the commissioners to deal with it in accordance with his judgment. From this order the Crown appealed and the taxpayers cross-appealed asking that the decision of the commissioners be reversed on all points.

D. L. Jenkins, K.C., J. H. Stamp and Reginald P. Hills for the Crown.

J. Millard Tucker, K.C. and F. Heyworth Talbot for the taxpayers.

Cur. adv. vult.

Dec. 9. COHEN, L.J., read the following judgment of the court. This case raises the question of the liability of Mr. and Mrs. Congreve (hereinafter collectively referred to as "the taxpayers") to income tax and sur-tax under the provisions of the Finance Act, 1936, s. 18, as amended by subsequent Finance Acts. The determination of the question involves the consideration of a large number of transactions which are clearly set out in the Case.* As counsel said at the outset of his address on behalf of the taxpayers the facts are not in dispute. We shall only refer to so much of those facts as is necessary to make clear the questions of law which now arise for decision and shall refer to the various companies involved in the matter by the descriptions assigned to them in the Case and adopted by WROTTESELEY, J.

* See [1946] 2 All E.R., p. 171.

Mrs. Congreve was the only child of a Mr. Glasgow, an American citizen who resided in England from 1892 until 1939, when he gave up his residence in England and returned to America with his wife. He built up a most successful business which he sold in 1912 to an English company, Humphreys & Glasgow (England). By December, 1927, he had become the owner of a little over 93,000 shares out of the 100,000 issued shares of £1 each of the company. He was chairman and managing director of the company from the date of its incorporation until Sept. 30, 1939. It is, we think, a fair inference from the facts found that throughout the transactions with which we are concerned he was acting with the authority of his daughter who signed such documents as he advised her to sign. Mrs. Congreve was born in England and has throughout been resident in England, although on coming of age she confirmed and has since retained her American citizenship. She married Mr. Congreve on July 30, 1935. At a late stage in these proceedings it was ascertained that Mr. Congreve was domiciled in Eire, but he and his wife have at all material times been ordinarily resident in England. Humphreys & Glasgow (England) was a trading concern. All the other companies concerned were merely investment companies, and it is plain from the facts found in the Case that every one of them was formed for the purpose of avoiding liability to sur-tax. At all material times (a) Mrs. Congreve was directly or indirectly the controlling shareholder of Humphreys & Glasgow (England); (b) she owned all the issued share capital of Humphreys & Glasgow (Canada) and Rockbridge, (c) she owned all the issued share capital of Margreve and through Seventy-Three the outstanding debentures of Margreve, (d) through her holding of £430,000 debentures in Seventy-Three which had been issued at 50 per cent. discount and were repayable on demand at 20 per cent. premium she was in a position within the meaning of the section to enjoy the whole income of Seventy-Three, (e) as the controlling shareholder of Humphreys & Glasgow (England) which held substantially the whole share capital of Humglas and until Dec. 1, 1937 the whole of the class A debentures of Humglas, she was able to control Humglas and enjoy within the meaning of the section the income of Humglas, (f) as the controlling shareholder of Humphreys & Glasgow (England) which held all the debentures of Glow, she was able to enjoy within the meaning of the section the income of Glow. We must add that Margreve, Seventy-Three and Glow were incorporated in England, but that at the material dates the control of each of these companies had been vested abroad with the result that they had become resident outside the United Kingdom for the purpose of the Income Tax Acts. Humphreys & Glasgow (Canada) and Rockbridge were Canadian companies resident in Canada.

We now turn to the Finance Act, 1936, s. 18, which so far as material is in the following terms :

For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of assets by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the United Kingdom, it is hereby enacted as follows : (1) Where such an individual has by means of any such transfer, either alone or in conjunction with associated operations, acquired any rights by virtue of which he has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled out of the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all the purposes of the Income Tax Acts.

In the section in its original form there followed the following proviso :

Provided that this sub-section shall not apply if the individual shows in writing or otherwise to the satisfaction of the special commissioners that the transfer and any associated operations were effected mainly for some purpose other than the purpose of avoiding liability to taxation.

By the Finance Act, 1938, s. 28 (2), the proviso was repealed and the following provision substituted :

(1b) The last two foregoing sub-sections shall not apply if the individual shows in writing or otherwise to the satisfaction of the special commissioners either—(a) that the purpose of avoiding liability to taxation was not the purpose or one of the purposes for which the transfer or associated operations or any of them were effected ; or (b) that

the transfer and any associated operations were bona fide commercial transactions and were not designed for the purpose of avoiding liability to taxation.

Section 18 (2) of the Act of 1936 defines "associated operations" as follows :

For the purposes of this section an associated operation means, in relation to any transfer, an operation of any kind effected by any person in relation to any of the assets transferred or any assets representing, whether directly or indirectly, any of the assets transferred, or to the income arising from any such assets, or to any assets representing, whether directly or indirectly, the accumulations of income arising from any such assets.

Section 18 (3) of the Act of 1936 supplies the test to be applied in deciding whether an individual ordinarily resident in the United Kingdom is to be deemed to enjoy income of a person resident or domiciled abroad. It was admitted that, if the taxpayers were otherwise liable to tax, they must be deemed to have power to enjoy the income of the companies resident abroad with whom we are concerned. I need not, therefore, read this subsection.

Section 18 (4) was relied on by the judge in the court below as supporting his decision on one aspect of the case, but counsel for the taxpayers said in this court, and we think rightly, that it was not in point. I need not, therefore, pause to read it. Section 18 (5) so far as material, is as follows :

For the purposes of this section—(a) a reference to an individual shall be deemed to include the wife or husband of the individual ; (b) the expression "assets" includes property or rights of any kind, and the expression "transfer," in relation to rights includes the creation of those rights ; (c) the expression "benefit" includes a payment of any kind . . . (e) references to assets representing any assets, income or accumulations of income include references to shares in or obligations of any company to which, or obligations of any other person to whom, those assets, that income or those accumulations are or have been transferred.

Section 18 (7) is as follows :

The provisions of this section shall apply for the purposes of assessment to income tax for the year 1935-36 and subsequent years, and shall apply in relation to transfers of assets and associated operations whether carried out before or after the commencement of this Act : Provided that, for the year 1935-36, no income shall be charged to tax at the standard rate by virtue of the provisions of this section, but sur-tax shall be assessed and charged as if any income which would, but for this proviso, have been charged as aforesaid had in fact been so charged.

In pursuance of this section Mrs. Congreve was assessed to sur-tax for the financial year 1935-36 and Mr. Congreve was assessed in right of his wife to income tax for the five years beginning with the year 1936-37 and to sur-tax for the six years beginning with the year 1935-36.

Before the special commissioners the taxpayers sought to escape liability under the proviso to sub-s. (1) or under sub-s. (1B) which was substituted for that proviso, but the commissioners rejected that contention. Their finding on this point was one of fact and the taxpayers did not seek to disturb it before the judge or before us. They, however, raised three other points.

First, they contended that a transfer was not within the mischief of the section unless it was a transfer by the individual whom it was sought to charge with tax or by his agent. Accordingly, they said they could not be taxed on the income of Humglas or of Glow since the only transfer of assets to Humglas was by Humphreys & Glasgow (England). Secondly, they argued that an individual ordinarily resident in the United Kingdom could not be charged with tax on the income of a person resident or domiciled outside the United Kingdom unless that person was so resident or domiciled at the date of the relevant transfer or associated operation. Accordingly, they said that as Margreve, Seventy-Three and Glow were resident and domiciled in England at the date of the transfers to them respectively, Mr. Congreve could not be assessed to tax on the income of these companies. Thirdly, they contended that in any event their liabilities under the said sections were measureable by reference, not to the whole of the respective incomes of the various companies to which transfers had been made, directly or indirectly, but only to such parts of the income of those companies as arose from the assets so transferred to them or from assets acquired by the companies as a result of associated operations related to such transferred assets. The judge decided in favour of the taxpayers on the second and third points. On the first point he accepted

the argument that the section deals only with transfers made by the individual by means of which he or she acquired rights, but he held that a person who, by owning all or practically all of the capital of an investment company, is able to bring about such a transfer as is referred to in the section is a person who has avoided tax by means of a transfer. In the result, he held that the taxpayers were not liable to tax on the income of Humglas, Margreve, Seventy-Three or Glow, and he allowed the appeal and remitted the Case to the commissioners to deal with in accordance with his judgment. From this order the Crown appealed and the taxpayers cross-appealed asking that the decision of the special commissioners be reversed on all points.

I return to the section. As pointed out by the judge ([1946] 2 All E.R. 170, at p. 181):

... this section contains something in the nature of a preamble, for it opens with a statement as to the purpose of the section, and the court is therefore not left to ascertain the purpose of the section by a consideration of the language of the operative part merely. The court knows in advance what the purpose is. If, therefore, any question should arise as to whether the language of the section applies to any particular transaction, and if this question is not clearly answered in the operative part of the section, the court may properly resort to the express intention to see if this affords any help.

Indeed, the opening words are something more than a preamble, since by reason of the words "such an individual" and "such a transfer" a court construing the section is bound to import into the operative part portions of the preamble. Making the necessary interpolations, sub-s. (1) reads as follows: "Where an individual ordinarily resident in the United Kingdom has, by means of any transfer of assets by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the United Kingdom, either alone or in conjunction with associated operations acquired any rights" etc. These are the only interpolations which are necessary to give effect to the word "such," but counsel for the taxpayers says that the wording of the preamble necessitates one further interpolation, namely, the addition after the words "transfer of assets" of the words "made by him." In support of this argument he relies mainly on the use in the preamble and in the operative portion of the phrase "by means of." This phrase, he says, in contrast to the phrases "by virtue of" and "in consequence of" which also appear both in the preamble and in sub-s. (1) means something active, and, having regard to the expressed purpose of preventing the avoiding by individuals of liability to income tax, the activity which the legislature had in mind must be activity by the individual whose liability to tax is under consideration. Counsel relied in further support of this construction on the proviso to sub-s. (1) (as it stood in the Act of 1936) whereby the subsection was excluded if the individual could satisfy the commissioners that the transfer and any associated operations were effected mainly for some purpose other than the avoidance of tax. We do not think, however, that the proviso is really of any assistance to counsel, since the language of the proviso would be equally appropriate if the transfer were by any person other than the individual concerned. Counsel further relied on sub-s. (2) which provides that, for the purpose of the section, an associated operation means in relation to any transfer an operation of any kind effected by any person in relation to any of the assets transferred. He contended that the words "by any person" would be unnecessary if a transfer was within the mischief of the section though not executed by the individual concerned as transferor. We are unable to agree with this contention. We think that the reason for the insertion of the words "by any persons" is to make it clear that the associated operation might be effected by any person and need not be effected by the transferor whoever the transferor might be.

I return to counsel's main argument. We do not think the words "by means of" connote activity by the individual concerned. According to the SHORTER OXFORD DICTIONARY the primary meaning of the words is "by the instrumentality of a person or thing" and they are fully satisfied if the avoidance of tax is effected through the instrumentality of the transfer by whosoever it is executed. *A fortiori* is this the case if we take the secondary meaning given in that dictionary "in consequence of, owing to." Nor do we think that the use of the phrase in the preamble in conjunction with the word "avoiding"

compels us to interpolate something that is not there and read "by means of transfer of assets" as if it were "by means of transfer of assets made by them." Moreover, we agree with the judge that the taxpayers' argument derives no support from the use of the word "acquired" in connection with the words "by means of" in sub-s. (1) since, as he points out, "as used by lawyers the word 'acquired' has long covered transactions of a purely passive nature and means little more than receiving." Indeed, that is the second ordinary meaning given in the SHORTER OXFORD DICTIONARY. In addition, it would be contrary to the expressed object of the section if the words "means" and "acquired" were construed in the active sense for which the taxpayers contend. It would put back on the Revenue the burden of proving affirmatively that the benefits to the taxpayer, resulting to him in fact through transfers and associated operations, had all been brought about by his own activities, whereas the section is, in our opinion, plainly and successfully drafted with the intent of casting the burden of disproving tax avoidance on the taxpayer. For these reasons, we agree, on this point, with the conclusion of the commissioners.

But, even if we were prepared to accede to the argument that the preamble connoted activity by the individual concerned, we think this condition would be fulfilled if the execution of the transfer were procured by the individual concerned, even though it was not actually executed by him or his agent. Counsel for the taxpayers, in commenting on the judgment of WROTTESELEY, J., said, and counsel for the Crown agreed, that execution by a company could not be said to be execution by the individual even though the individual owned all or practically all the shares in the company. We think, however, that the decision of the judge can be upheld on the ground we have stated, since it is, we think, in the present case a reasonable inference from the facts found that the execution and performance of the transfers and associated operations in question by all the companies concerned were procured by Mrs. Congreve acting through her agent, Mr. Glasgow. We should have been prepared, if it had been necessary, on this alternative ground to uphold the decision of the commissioners.

I turn now to the second point. Counsel for the taxpayers said that, on its true construction, the section required that at the date of the execution of the transfer, the transferee should be resident or domiciled outside the United Kingdom and that the subsequent removal of the control abroad was not an associated operation since it was not effected "in relation to any of the assets transferred or any assets representing... any of the assets transferred or to the income arising from any such assets, or to any assets representing... the accumulations of income arising from any such assets." We think this argument fails *in limine*, since it is, we think, reasonably clear that, on the true construction of the preamble, the material date, so far as residence is concerned, is the date at which the income becomes payable and not the date of the transfer or associated operation. Having come to this conclusion, we do not find it necessary to decide whether the removal of the control abroad was an associated operation. We think, however, that there was considerable force in the argument of counsel for the Crown that the removal abroad was an associated operation in relation to the assets transferred, since the effect of the removal was to alter the incidence of taxation under case IV in relation to the income of the assets transferred.

I turn now to the third point. Having regard to our decision on the first point, I doubt whether it really arises, but since the case may go higher and the point was decided in the court below and fully argued before us, we think it better to express our opinion on it. The contention was tentatively put forward by this court in *Lord Howard de Walden v. Inland Revenue Commissioners* (1). It was rejected by counsel on both sides in that case and we think it is obvious from the language of LORD GREENE, M.R., in his judgment that he doubted whether it was tenable. In that case the Master of the Rolls said ([1942] 1 All E.R. 287 at p. 289):

An intermediate suggestion favoured by neither side was to the effect that the only income of the non-resident which is to be deemed to be income of the transferor is that part of the income which is traceable to the assets transferred. No doubt, in the majority of cases which in practice come within the scope of the section, the transferee will have been constituted, either individually as a trustee or as a corporation, for the sole

purpose of carrying out the transaction and will have no other income, but cases might arise where the transferee selected was, for example, an existing corporation with very large assets and income of its own, and the income attributable to the assets transferred might be a very small proportion of its total income. It cannot be supposed, argues counsel for the appellant, that the legislature can have intended to produce such an extreme result as might be produced upon the second of the three constructions, since it would impose an entirely disproportionate penalty on the taxpayer, and, rejecting the intermediate view, which, he said, could not be reconciled with the language used, he arrived, by a process of elimination, at his own construction as being the only possible one. We find it impossible to accept the argument of counsel for the appellant. If, as it seems to us, the language of the section clearly does not limit the income of the non-resident, in respect of which the taxpayer is charged, to the actual benefit which he draws from the income of the non-resident—a construction, he it observed, which would largely defeat the expressed purpose of the section—it is illegitimate to force upon that language a strained construction merely because it may otherwise lead to a result which to some minds may appear to be unjust. However, even if the only alternative to the construction of counsel for the appellant is the second of the three constructions, we are not prepared to say that it is necessarily as unjust as he contends. The section is a penal one, and, whatever its consequences may be, they are intended to be an effective deterrent to practices which the legislature considers to be against the public interest. For years a battle of manoeuvre has been waged between the legislature and those who are minded to throw the burden of taxation off their own shoulders on to those of their fellow subjects. In that battle the legislature has often been worsted by the skill, determination and resourcefulness of its opponents, of whom the present appellant has not been the least successful. It would not shock us in the least to find that the legislature has determined to put an end to the struggle by imposing the severest of penalties. It scarcely lies in the mouth of the taxpayer who plays with fire to complain of burnt fingers. It is not, however, necessary for us to choose between the second and third constructions. We would rather defer that choice until a case which raises the issue can be considered on its own facts.

We agree with counsel for the taxpayers that sub-s. (3) is not dealing with *quantum*, but is merely defining the test to be applied in determining whether an individual has power to enjoy the income of a non-resident. To ascertain the *quantum* on which tax can be levied, one must return to sub-s. (1). Under that subsection the only question is: What income of the non-resident does the resident individual have power to enjoy by reason of the transfer either alone or in conjunction with associated operations? It is that income which is deemed to be income of that individual for all purposes of the Income Tax Acts, and we find no justification in the language of the section for an analysis of that income in order to ascertain the source from which the income arises. It may be, as was said by the judge in the court below, that the result may in some cases be capricious, but, as was said by the Master of the Rolls in the passage we have cited, "it is illegitimate to force upon the language of the section a strained construction merely because it may otherwise lead to a result which to some minds may appear unjust." The section is a penal one, and, if the penalty is considered to be too high, that is a matter for the legislature and not for us.

One point was taken before us which is not dealt with by the judge. It relates only to Humglas. It was said that the taxpayers could not be liable to tax on the income of Humglas since at the date of the transfer by Humphreys & Glasgow (England) to Humglas, Mrs. Congreve was already the holder of her 65,000 shares in Humglas and she acquired no rights by virtue of the transfer. Such rights as she could enjoy, she already possessed. Counsel for the taxpayers admitted, however, that, if he was wrong on the first contention dealt with above, this argument would not be open to him. We need not, therefore, consider it.

For these reasons we think the appeal ought to be allowed and the cross-appeal dismissed. The taxpayers must pay the costs here and below.

Appeal by the Crown allowed. Cross-appeal by the taxpayers dismissed. Costs in both courts to be paid by the taxpayers.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Slaughter & May* (for the taxpayers).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

WALLACE v. CLENCH.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Lewis, JJ.), December 20, 1946.]

Magistrates—Summary jurisdiction—Limitation of time—Prosecution under Defence (Price Control) Regulations, 1945, reg. 6—Supplies and Services (Transitional Powers) Act, 1945 (c. 10), s. 2 (1), (3)—Defence (Price Control) Regulations, 1945, reg. 10 (1).

Emergency Legislation—Price control—Prosecution for selling goods at a price in excess of the maximum price—Period within which summary proceedings may be brought—Supplies and Services (Transitional Powers) Act, 1945 (c. 10), s. 2 (1), (3)—Defence (Price Control) Regulations, 1945, reg. 10 (1).

Prosecutions under the Defence (Price Control) Regulations, 1945, reg. 6, may be brought within 12 months of the offence being committed, as provided by reg. 10 (1), and are not required to be brought within 6 months, as provided by the Summary Jurisdiction Act, 1848, s. 11, in cases where no special limit of time is prescribed by another statute or provision having the force of statute.

[AS TO LIMITATION OF TIME UNDER SUMMARY JURISDICTION, see HALSBURY, Hailsham Edn., Vol. 21, pp. 598, 599, para. 1043; and FOR CASES, see DIGEST, Vol. 33, pp. 325-327, paras. 392-395.]

FOR THE SUPPLIES AND SERVICES (TRANSITIONAL POWERS) ACT, 1945, see HALSBURY'S STATUTES, Vol. 38, p. 629; and FOR THE DEFENCE (PRICE CONTROL) REGULATIONS, 1945, reg. 10 (1), see *ibid.*, p. 827.]

CASE STATED by Epping, Essex, justices.

Informations were preferred by the appellant on behalf of the Board of Trade against the respondent under the Defence (Price Control) Regulations, 1945. The justices held that, under the Summary Jurisdiction Act, 1848, s. 11, they had no jurisdiction to inquire into the offences, because the informations were not laid within 6 months of the offences being committed. The appellant appealed. The facts appear in the judgment.

H. L. Parker for the appellant.

J. L. Elson Rees for the respondent.

LORD GODDARD, C.J.: This is a Case Stated by the justices of Epping, Essex, on prosecutions by the Board of Trade against the respondent for selling goods at a price in excess of the maximum price, contrary to the Utility Furniture (Maximum Prices and Charges) Order, 1944, art. 1, as amended; the Utility Bedding (Maximum Prices) Order, 1945, arts. 1 and 3; the Cloth and Household Textiles (Utility) (Maximum Prices) Order, 1945, arts. 1 and 3; the Goods and Services (Price Control) Act, 1941, s. 1; and the Defence (Price Control) Regulations, 1945, reg. 6. The simple question raised by the Case is whether a prosecution for those offences can be launched within twelve months of the offence being committed or whether the time limit of six months which is imposed by the Summary Jurisdiction Act, 1848, s. 11, applies and the summonses were out of time. The justices came to the conclusion that the Summary Jurisdiction Act, 1848, applied, and that, as the offences were more than six months old, they had no jurisdiction to inquire into them.

In spite of the able argument of counsel for the respondent, I think it is reasonably clear that the appeal must be allowed. It is necessary to remember that, under the Summary Jurisdiction Act, 1848, s. 11, the time limit of six months is only imposed where no other statute imposes a longer period. A regulation has the effect of a statute provided it is within the powers conferred on His Majesty for making regulations.

The point which arises here is this. Under the Supplies and Services (Transitional Powers) Act, 1945, which was passed on Dec. 10, 1945, at a time when the Emergency Powers (Defence) Act, 1939, was in force, it was provided [by s. 2 (1)] that the powers conferred on His Majesty by the principal Acts (*i.e.*, the Emergency Powers (Defence) Act, 1939, and certain amendments thereof) should be extended so as to enable His Majesty to make such defence

regulations as appeared to him necessary or expedient :

...for controlling the prices to be charged for goods of any description or the charges to be made for services of any description, whether or not such regulations are necessary or expedient for the purposes specified in [the Emergency Powers (Defence) Act, 1939, s. 1 (1)].

Those concluding words were inserted so that it should not be necessary for His Majesty, on making regulations which are authorised by the Act of 1945, to consider whether they were necessary for the efficient prosecution of the war, the war having, so far as hostilities are concerned, come to an end. Parliament thought it necessary to keep a regulation-making power alive to enable His Majesty to make regulations with regard to fixing prices during what I may call the transitional period from war to peace.

It is clear that His Majesty could legislate by means of regulations under the original powers conferred on him by the Emergency Powers (Defence) Act, 1939. By s. 1 (1) of that Act it was provided that His Majesty could make regulations, and, by s. 1 (2), without prejudice to the generality of the powers conferred by the Act on the Crown, he could make provision for the apprehension and punishment of offenders and for their trial by a court, not being a court-martial, in accordance with such procedure as should be provided for by the regulations. Pausing there, it is beyond argument that a time limit on prosecutions is a matter of procedure. It is what is sometimes called adjective law. By s. 1 (2) (d) of the Act of 1939, regulations might be made :

...amending any enactment,...suspending the operation of any enactment, and for applying any enactment with or without modification.

I need not stop to consider whether there is any difference between amending an enactment or applying it with a modification, but it seems to me beyond question that the plain words of this Act enable His Majesty to make a regulation which has the effect of amending an Act already in force.

When the Supplies and Services (Transitional) Powers Act, 1945, was passed, the Act of 1939 was nearing the end of its life. It expired, in fact, on Feb. 24, 1946. In view of the fact that the Act of 1939 was coming to an end, Parliament passed the Supplies and Services (Transitional) Powers Act, 1945, which enables His Majesty to make certain regulations which have effect under s. 2 (3) notwithstanding that the original Act (*i.e.*, the Act of 1939) has expired. The power to make regulations under the Act of 1939 was still in existence when the Act of 1945 was passed, and it is clear that s. 2 (1) of the Act of 1945 provides that His Majesty might still, in the time between the passing of the Act of 1945 and the expiration of the Act of 1939, make regulations on certain matters, such as the controlling of prices to be charged for goods, which regulations would remain in force notwithstanding that the Act of 1939 had expired. Among other regulations which His Majesty made were the Defence (Price Control) Regulations, 1945, which dealt with the control of the price of goods. A necessary part of control is the imposing of penalties and making provision for the prosecution of offenders, because that is the only way in which control can be made effective. The Defence (Price Control) Regulations, 1945, reg. 10 (1), provides :

Summary proceedings in respect of an offence under the principal Act or the Act of 1941 may, notwithstanding anything in the Summary Jurisdiction Acts, be commenced at any time not later than 12 months from the date of the commission of the offence.

It seems to me to be clear beyond argument that, in so enacting, His Majesty made a regulation which amended the Summary Jurisdiction Acts, or applied those Acts with the modification that a prosecution should take place within twelve months and not six. It seems to me, therefore, that this regulation is perfectly valid, and we need not consider whether or not the Goods and Services (Price Control) Act, 1941, applies. Section 2 (2) of the Act of 1945 provides :

Without prejudice to the generality of the power conferred by the last foregoing subsection, any defence regulation made in pursuance thereof may amend the Goods and Services (Price Control) Acts, 1939 to 1943.

Accordingly, in my opinion, under s. 2 (1) and (3) of the Act of 1945, the Defence (Price Control) Regulations, 1945, reg. 10, is valid to extend the time during which prosecutions may be brought from six to twelve months. The appeal will be allowed, and this case must go back to the justices that they may hear the case and adjudicate on it.

HUMPHREYS, J. : I agree and have nothing to add.

LEWIS, J. : I agree.

A

Appeal allowed with costs.

Solicitors : *Solicitor, Board of Trade* (for the appellant) ; *R. I. Lewis & Co.* (for the respondent).

[*Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.*]

B

I.T.P. (LONDON) LTD. v. WINSTANLEY.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Lewis, JJ.), December 16, 1946.]

Gaming and Wagering—Prize competition—Conducted “in connection with trade or business”—Football pool coupons sold by newsagent and tobacconist by agreement with promoters—Betting and Lotteries Act, 1934 (c. 58), s. 26 (1) (a).

C

Promoters of a football pool entered into an agreement with a newsagent and tobacconist under which the latter sold coupons for a penny each, retained the money and, in addition, received a commission in respect of every customer who bought coupons and entered the football pool. The promoters were convicted under the Betting and Lotteries Act, 1934, s. 26 (1) (a), of having unlawfully conducted in connection with a business of newsagent and tobacconist a competition in which prizes were offered for forecasting results, and the newsagent was convicted for aiding and abetting :—

D

HELD : there must be some nexus between the carrying on of the competition and the trade or business in connection with which it was alleged to have been carried on, and, subsequently, the convictions must be quashed.

E

[FOR THE BETTING AND LOTTERIES ACT, 1934, s. 26 (1) (a), see HALSBURY'S STATUTES, Vol. 27, p. 292.]

Case referred to :

(1) *Thomson v. Clanmorris* (Lord), [1900] 1 Ch. 718 ; 69 L.J.Ch. 337 ; 82 L.T. 277 ; 9 Digest 132, 703.

CASE STATED by Liverpool justices.

F

The first appellants were convicted under the Betting and Lotteries Act, 1934, s. 26 (1) (a), of having unlawfully conducted in connection with a business of newsagent and tobacconist a competition in which prizes were offered for forecasting football results. The second appellants, the proprietors of the business, were convicted of aiding and abetting. The facts appear in the judgment of LORD GODDARD, C.J.

G

Gilbert Beyfus, K.C. and *James Amphlett* for the appellants.

Basil Neild, K.C., and *Edward Steel* for the respondent (the chief constable of Liverpool).

H

LORD GODDARD, C.J. : This is a Case Stated by a court of summary jurisdiction for the city of Liverpool before whom the appellant company, I.T.P. (London) Ltd., who are promoters of football pools, were summoned for a breach of the Betting and Lotteries Act, 1934, s. 26 (1) (a), for having unlawfully conducted, in connection with a business of newsagent and tobacconist, a certain competition in which prizes were offered for forecasting football results. The circumstances stated by the justices showed that when it became unlawful, under the Control of Paper (No. 70) (Economy) Order, 1945, to supply coupons for football competitions without making any charge for them, it being provided that people could be supplied with coupons for entering into these competitions only on payment of not less than a halfpenny, the appellants entered into an agreement with the second appellants, a man and his wife who carried on a newsagent's and tobacconist's shop in Liverpool, under which

they were to sell coupons for a penny each, which they were allowed to keep, and were also promised eighteen pence commission for every customer who bought a coupon and entered the football pool. The second appellants were charged with aiding and abetting the commission of the offence.

Section 26 (1) simply provides :

It shall be unlawful to conduct . . . in connection with any trade or business . . . (a) any competition in which prizes are offered for forecasts of the result . . . of a future event.

The sub-section does not indicate what connection there should be with the trade or business and when one has to construe an Act which is altering the law one is entitled, in the words of LINDLEY, M.R., in *Thomson v. Clanmorris*, [1900] 1 Ch. 718, at p. 725, to have regard

not only to the words used, but to the history of the Act, and the reasons which led to its being passed. You must look at the mischief which had to be cured as well as at the cure provided.

The history of the Act and the mischief which had to be cured is, I think, within the memory of all of us. Before the Act it was common for people who were carrying on a trade or business to offer prizes for a competition as an encouragement to people to do business with them. That was regarded as being undesirable, and it was prohibited.

Here it is said that the appellant company were conducting their competition in connection with the trade or business of the second appellants. The second appellants are carrying on a business, but the Act does not say "in connection with any person who carries on a trade or business." The Act says: "in connection with any trade or business", and there must be some nexus, as it seems to me, between the carrying on of the competition and the trade or business in respect of which it is said to have been carried on. I do not think the words of the sub-section are apt to create an offence in the present case. At any rate, whatever may have been the intention, if there is a doubt about the matter one must always, with a penal section, construe it in favour of the accused person who must be given the benefit of the doubt, it being held that there is no offence.

One thing which naturally weighs with me very much is the difference between this section and s. 22 in the same part of the Act of 1934, which deals with lotteries and prize competitions, because, when dealing with a lottery, there are the most elaborate provisions as to what is prohibited. The printing of any tickets is prohibited, the distribution or offering or advertising for sale or distribution of any tickets is forbidden. In this case, as counsel for the appellants has pointed out, (and, to my mind, it is perfectly sound) if there has been an offence, it was equally an offence to ask a printer to print the tickets because the printing of the tickets was, no doubt, a necessary part of conducting one of these competitions. It seems to me to be extravagant, in those circumstances, to say that the printer might be penalised, or that a person who is conducting a competition of this sort might be penalised if he got tickets printed, though it would be equally in connection with the business of a printer. I cannot say that I think these words are at all apt to create the offence which is said to have been committed here, and, in my opinion, the appeal should be allowed with costs.

HUMPHREYS, J. : I am of the same opinion.

LEWIS, J. : I agree.

Appeal allowed with costs.

Solicitors : *Amphlett & Co.* (for the appellants) ; *W. H. Baines*, Town Clerk, Liverpool (for the respondent).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

ROUTH AND ANOTHER v. JONES,

[CHANCERY DIVISION (Evershed, J.), December 6, 20, 1946.]

Trade—Restraint of trade—Reasonableness—Covenant by doctor in “assistantship” agreement—Covenantees general practitioners—Covenant not to “practise or cause or assist any other person to practise in any department of medicine surgery or midwifery nor accept nor fill any professional appointment” within 10 miles for 5 years—Severability.

On Mar. 8, 1943, the defendant, a qualified surgeon and physician, became medical assistant to the plaintiffs, who carried on together the business of general medical practitioners in a small town. By an agreement, dated Dec. 31, 1943, the defendant covenanted not to “practise or cause or assist any other person to practise in any department of medicine surgery or midwifery nor accept nor fill any professional appointment . . . whether paid . . . or whether honorary within a radius of 10 miles” from the partnership address for 5 years after the termination of his assistantship. The assistantship was determined in Mar., 1946, and the defendant desired to exercise his profession in or near the town in question:—

HELD: (i) in the case of a general medical practise, there existed a subject-matter of contract or a proprietary interest properly entitled to protection.

(ii) the restriction in the second part of the covenant, *i.e.*, not to “accept nor fill any professional appointment,” was not reasonable or necessary for the protection of any proprietary interest of the plaintiffs, and was too wide to be enforced.

(iii) the covenant not to “practise or cause or assist any other person to practise in any department of medicine surgery or midwifery” was not severable and such a restriction could not be justified.

British Reinforced Concrete Co. v. Schelff (6) *applied*.

(iv) assuming that severance of the first part of the covenant was permissible, the plaintiffs’ practise being that of country general practitioners, a covenant against practising (as a principal or assistant) in any department of medicine, surgery or midwifery, during the period and in the area limited, was too wide to be enforced. Protection against competition could only be against competition with the business in fact conducted by the employers at the material date.

[AS TO RESTRAINT OF TRADE IN CONTRACTS OF EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 32, pp. 408—418, paras. 683—698; and FOR CASES, see DIGEST, Vol. 43, pp. 21—26, Nos. 135—173, and pp. 63—65, Nos. 657—675.

AS TO SEVERABILITY, see HALSBURY, Hailsham Edn., Vol. 32, pp. 427—430, paras. 712, 713; and FOR CASES, see DIGEST, Vol. 43, pp. 46—50, Nos. 473—509.] Cases referred to:

(1) *Fitch v. Dewes*, [1921] 2 A.C. 158; 90 L.J.Ch. 436; 125 L.T. 744; 43 Digest 34, 276.

(2) *Mason v. Provident Clothing & Supply Co., Ltd.*, [1913] A.C. 724; 82 L.J.K.B. 1153; 109 L.T. 449; 43 Digest 22, 143.

(3) *Herbert Morris, Ltd. v. Saxelby*, [1916] 1 A.C. 688; 85 L.J.Ch. 210; 114 L.T. 618; 43 Digest 24, 154.

(4) *Attwood v. Lamont*, [1920] 3 K.B. 571; 90 L.J.K.B. 121; 124 L.T. 108; 43 Digest 20, 131.

(5) *Mills v. Dunham*, [1891] 1 Ch. 576; 60 L.J.Ch. 362; 64 L.T. 712; 43 Digest 62, 641.

(6) *British Reinforced Concrete Engineering Co., Ltd. v. Schelff*, [1921] 2 Ch. 563; 91 L.J.Ch. 114; 126 L.T. 230; 43 Digest 35, 310.

MOTION by the plaintiffs, general medical practitioners, for an interlocutory injunction to restrain the defendant, formerly employed as an assistant in their partnership business, from committing breaches of a covenant contained in the agreement under which he had been employed. At the hearing of the motion the parties requested the court to treat the motion as the trial of the action. The facts appear in the judgment.

H. C. Dickens for the plaintiffs.

I. J. Lindner for the defendant.

Dec. 20. EVERSLED, J. read the following judgment. This is a motion on the part of the plaintiffs, who carry on together the business of general medical practitioners in the small town of Okehampton, in Devon, asking for an interlocutory injunction to restrain the defendant, formerly employed as an assistant in the business, from committing breaches of a covenant in restraint of trade contained in the "assistantship agreement" (as it is called) dated Dec. 31, 1943, which regulated the terms of the defendant's employment by the plaintiffs.

Soon after counsel for the plaintiffs had begun to open the motion it became apparent to me that, in the circumstances of the case, there would be difficulties in the way of my making any interlocutory order, particularly since it would be necessary for me to express a view on the construction of the material clause in the agreement. The parties thereupon requested me to treat the motion as the trial of the action and to determine the issues finally between them on the facts before me in evidence. I have felt some uneasiness, I confess, in regard to this request, in case the matter goes to a higher court, but since it was agreed that the evidence contained all the material facts and that there was no dispute as to these facts between the parties, I have thought it my duty to accede to the parties' request to save them from further expense.

I first turn to the agreement itself. The document discloses that the business of the plaintiffs was the familiar one of a general medical practise. The defendant (who was and is a qualified surgeon and physician) was engaged as medical assistant at an annual salary of £590 per annum, together with certain other privileges. No term was fixed for the appointment, which was determinable by one month's notice on either side. It is unnecessary to travel in detail through the thirteen clauses of the agreement. It is clear that the defendant would be required to act, as he did act, in his professional capacity on behalf of the partners and, in that capacity, to attend, as he did, the patients of the business.

Clause 12 of the agreement was as follows :

The assistant agrees with the principals that he will not during this contract of service save in the employ of the principals nor within the space of 5 years thereafter practise or cause or assist any other person to practise in any department of medicine surgery or midwifery nor accept nor fill any professional appointment whether whole time or otherwise whether paid by fees salary or otherwise or whether honorary within a radius of 10 miles from 11 East Street Okehampton aforesaid. And if the assistant shall so practise or cause or assist any other person to practise within the radius aforesaid or in any way violate this provision he shall forthwith pay to the principals or as they shall direct or to their successors in title the sum of £100 for every month or part of a month during which he shall violate or continue to violate this provision as ascertained as liquidated damages and not by way of penalty and without prejudice to the right of the principals or their successors in title to obtain an injunction to restrain such violation. Provided that nothing in this clause contained shall prevent the assistant from practising within the said radius under any scheme for State medical service hereafter introduced in the event of his being required so to do under any statutory powers orders or regulations.

Although the agreement is dated Dec. 31, 1943, it appears from the first clause that the defendant's engagement had been effective from Mar. 8, 1943, and it is the fact that the agreement was presented to the defendant by or on behalf of the plaintiffs for his execution some considerable time after he had started work for the plaintiffs. The defendant was not, in fact, separately advised on it.

At the time of the defendant's engagement and for the greater part of his service, one of the plaintiffs, Dr. Wilson, was, I understand, away on military service, and the defendant's engagement was, no doubt, in part attributable to that fact. The defendant's services were duly determined by a month's notice in Mar., 1946. The defendant has bought a house in Okehampton and desires, so far as he lawfully can, to earn his living by the exercise of his profession in and around Okehampton.

Counsel, in the course of his argument, referred me to certain cases and I have since referred to others. I am reluctant to attempt any addition to what LORD BIRKENHEAD, L.C., [in *Fitch v. Dewes* (1)] has called the generous elucidation of these matters, but, in view of the reference made by counsel for the plaintiffs to some of the older cases, tabulated in the ENGLISH AND EMPIRE DIGEST, I feel it necessary for me to state briefly what I conceive to

be the general principles of law applicable to cases of this character, so far as material to the present action.

If, as a matter of history, all contracts in restraint of trade were at one time regarded as obnoxious to the policy and principles of the common law (see, for instance, *HOLDSWORTH'S HISTORY OF ENGLISH LAW*, Vol. VIII, pp. 56-62), later, and particularly in the nineteenth century, this conception was greatly modified. The courts reflected the social and economic ideas of the time by the emphasis placed on freedom of contract. Later, again in accordance with changing social concepts, and especially after the two decisions of the House of Lords in *Mason v. Provident Clothing & Supply Co.* (2) and *Morris v. Saxelby* (3) in 1913 and 1916, the law, as I understand it, was again modified. I take its present complexion to have been fully and accurately explained and described by YOUNGER, L.J., with the approval of ATKIN, L.J., in *Attwood v. Lamont* (4). According to this formulation of the law it must, as I conceive, be regarded as now clear that provisions in restraint of trade comprised in contracts between masters and servants in (contracts for the sale of goodwill contrast to) are treated as *prima facie* unenforceable and will only be sustained if and so far as they can be shown to be reasonably required for the protection of some subject-matter of contract, some proprietary interest properly entitled to protection. In the absence of special circumstances, an employer has no such proprietary interest as entitles him to protection from the competition of his former servant *per se*, nor can a former servant be restrained from turning to account his own business or professional skill, although that skill was acquired while he was in the service of his former master. On the other hand, where the circumstances are such that the servant has, by virtue of his engagement, been put in the position of learning his master's trade secrets, or of acquiring a special or intimate knowledge of the affairs of the customers, clients or patients of his master's business or of means of influence over them, there exists a subject-matter of contract, a proprietary interest or goodwill in the matter which is entitled to protection, since otherwise the master would be exposed to unfair competition on the part of his former servant—competition flowing not so much from the personal skill of the assistant as from the intimacies and knowledge of the master's business acquired by the servant from the circumstances of his employment.

It is, in my judgment, clear that the character of a general medical practise is such that one who is employed therein (as was the defendant) as a medical assistant, necessarily acquires such a special and intimate knowledge of the patients of the business that the employers, in a contract of service with the servant, are entitled to protect themselves against unfair competition on the servant's part. In other words, that in such a case there exists a subject-matter of contract or a proprietary interest properly entitled to protection. I conceive I am entitled to come to this conclusion, in the absence of any evidence directed to the point, as a matter of general notoriety or from a reading of such cases as have come before the courts in reference to the business of doctors. I have also in mind the evidence in this respect of Mr. Tattersall and Dr. Burns, put in on the plaintiffs' behalf, by my leave, since the motion was heard. And I refer again to the language of LORD BIRKENHEAD, L.C., applied to the case of a solicitor's business, in *Fitch v. Dewes* (1). He said ([1921] 2 A.C. 158, at p. 164):

Such a business depends upon the existence of goodwill; upon the association and the intimacy which exist between him who carries on that business and the clients of the firm, an intimacy founded upon many complex considerations not easily to be defined, but very easily to be understood.

But it is also clear, in my judgment, from the formulation of the law which I have attempted (and it is in terms so stated by YOUNGER, L.J., in *Attwood v. Lamont* (4)) that, in all cases of master and servant, the onus lies upon the master seeking to enforce the covenant to prove both that some subject-matter of contract entitled to protection exists and that the covenant sought to be enforced is reasonably required for its protection. It follows, in my judgment, that since the two decisions of the House of Lords in *Mason v. Provident Clothing & Supply Co.* (2) and *Morris v. Saxelby* (3), some of the earlier judicial statements in regard to the onus of proof—e.g., that of LINDLEY, L.J., in *Mills v. Dunham* (5) ([1891] 1 Ch. 576, at p. 586)—can no longer be regarded as

good law. I do not understand any of the observations in *Fitch v. Dewes* (1) to be in conflict with this proposition.

Certain other general propositions may also be stated. (i) As regards severability, a composite covenant may only be severed if, and to the extent that, on its true construction, the covenant in truth consists of two or more separate covenants. (ii) In contracts in restraint of trade, as in other contracts, the principle will be applied in case of real ambiguity and doubt that the contract will be construed *contra proferentes*. (iii) In considering the efficacy of a covenant such as is here in question, it is true that not only the proper interest of the covenantor and the covenantee, but also the proper interest of the public must be considered. But it is also, in my judgment, true that, if the covenant in question is shown to conform to the proper interests of the covenantor and the covenantee in the light of the general formulation of the law which I have above attempted, then the public interest would equally be served. I say this because in the present case the defendant's evidence was, in fact, directed to showing that there was a dearth of doctors in and around Okehampton, and it was argued that that fact ought at least to have a bearing on the question whether the defendant's covenant should be enforced. In my judgment, there is no substance in this argument. If it be true that the inhabitants of this region should have more doctors, it does not follow that they should have the defendant as one of them. If the public interest is invoked, it must not be forgotten that it is very much in the public interest that contracts should be honoured.

In the light of these statements of principle I turn to the particular covenant in this case involved. It is, in my judgment, reasonably clear that the covenant is severable into two parts, the second part being covered by the words "nor accept nor fill," etc. Whether it is further severable remains to be considered later, but it is also, in my judgment, plain that the second part of the covenant covered by the language to which I have referred is too wide and cannot be enforced. Assuming in the plaintiffs' favour that the time limit of five years ought to be read into this second branch of the covenant, and that the phrase "any professional appointment" ought to be limited to any appointment connected with the profession of a doctor or surgeon, still it would cover such appointments as honorary lecturer to the St. John Ambulance and, indeed, any appointment under a local authority or otherwise for which medical or surgical skill might constitute a qualification. In my judgment, notwithstanding the argument in Mr. Tattersall's affidavit, such a restriction cannot be justified as reasonable or necessary for the protection of any proprietary interest of the plaintiffs, but, having regard to the severance, the covenant or covenants comprehended in the earlier part of the clause are not so far vitiated.

I find it extremely difficult to appreciate in what circumstances the defendant might be supposed to "cause" another to practise in medicine, surgery or midwifery, but the word "assist" cannot, I think, exclude financial assistance, so that the defendant is, for example, by his covenant prohibited from advancing money to a lady to enable her to establish a maternity home within the area. Again, in my judgment, such a restriction cannot, in the circumstances, be justified. Unless, therefore, a further severance is permissible, the whole covenant necessarily falls. I have come to the conclusion that, on the principles which I have stated, no further severance is allowable.

In my judgment, as a matter of construction, the covenant not to practise or cause or assist another to practise is a single and indivisible covenant, just as would be a covenant not to practise directly or indirectly or as a principal or an agent. The so-called "blue pencil" test can, since *Attwood v. Lamont* (4), no longer, I think, be accepted as sufficient. The essential words "in any department of medicine surgery or midwifery" are not repeated, and the language of the provision in regard to liquidated damages "if the assistant shall so practise or cause or assist any other person to practise within the radius aforesaid or in any way violate this provision," etc., seems to me to indicate that the true intent and purport of the covenant was a single covenant against exercising the defendant's profession as a principal or as a servant or agent, and I do not think it was intended to draw a distinction between practising as a principal on the one hand and exercising the profession vicariously or as another's servant on the other, so that the former might take effect notwith-

standing the invalidity of the latter. As the clause stands, I have little doubt that the word "practise" means practise as a principal. It might, however, well be argued that if (as a result of severance) the words "or cause or assist," etc., are excluded, the word "practise" in its new context would include practising either as a principal or as another's assistant, and, if there is substance in this argument, the effect of the severance would be to alter the construction of what is left—a result fatal to severance. My view is, I think, supported by the decision of YOUNGER, L.J., in *British Reinforced Concrete Co. v. Schelff* (6), in which he pointed out that, although there was reputable authority for severance of areas or of trades or of classes of customer, there was none for such severance as was there, and is here, in question, and that in the light of the more recent authorities such an extension of the doctrine of severability should not be countenanced.

A This conclusion disposes of the case, but I add that if, contrary to my opinion, further severance is permissible so as to permit consideration of a separate covenant against practising, i.e., as a principal or as another's assistant, or even as a principal only, in any department of medicine, surgery or midwifery, during the period and within the area respectively limited, I am, to say the least, gravely doubtful whether on the evidence the covenant can be supported. Much of the evidence filed on the defendant's behalf was adduced to show that the prohibited area was too wide, but having regard to the comparatively rural character of the area I should not be prepared to hold that a ten mile radius was excessive, nor that the time limit of five years, notwithstanding the insecurity of the defendant's tenure of his office, was fatal to the enforceability of the covenant. The difficulty in the plaintiffs' way seems to me to arise from the use of the formula "any department of medicine, surgery or midwifery." In the case of surgery, the formula would appear necessarily to cover such specialised branches of the art as ophthalmic, orthopaedic or plastic surgery, as it would also presumably cover dental and even veterinary surgery. In the case of medicine, to take but one example, radio therapeutics or radiology would be barred. There is in the evidence no suggestion that any such "departments" of surgery or medicine were comprehended in the plaintiffs' practise, and I should certainly not expect to find them covered by the practise of a "country g.p." Even, therefore, if the relevant clause in the agreement is construed in all respects most favourably to the plaintiffs (notwithstanding the general rule of construction, i.e., *contra proferentes*, to which I have already alluded), the objections to the plaintiffs' claim are formidable. In saying this I am not suggesting that, where a proprietary interest, entitled to protection, is shown to exist, a covenant in order to be enforceable must in terms be expressed to be referable strictly to that interest. Proper and reasonable protection may well justify a general restriction against competition, but it must be competition with the business or businesses in fact conducted by the employers at the material date.

E It is, no doubt, true (as appears from the evidence of Mr. Tattersall and Dr. Burns) that, if any of the restrictions contained in the present covenant are unenforceable, the selling value of the plaintiffs' business will be *pro tanto* diminished, but I do not think that such a result is (as the deponents seem to suggest) sufficient justification for the restriction. In his affidavit Mr. Tattersall (who is manager of the British Medical Bureau) goes so far as to say that the restraint in the present case is reasonably necessary for the protection of the plaintiffs. It is necessary for me to point out that that question is for me to decide and that Mr. Tattersall is not, by qualification or otherwise, entitled to give evidence in that form. In any case, for the reasons I have given, I disagree with him.

H I propose, however, to rest my conclusion on the view that, fairly construed, the obligation of the defendant under cl. 12 of the agreement cannot be severed so as to consist of more than two separate covenants. I confess I have not arrived at my conclusion without some regret, for I take the view that a man ought to honour his part of a bargain, the corresponding obligations of which he expects to be observed by the other party, and it is no part of the duty of the court in such cases to relieve an obligor of bad bargains merely because they are bad. But my regrets are tempered by two considerations. First, it is to be remembered that in contracts between a master and servant the latter

is necessarily at a disadvantage, and in cases of covenants in restraint of trade on the part of servants there is, I think, an obligation on the part of masters to be scrupulous to see that such covenants are framed with precision and care and do not attempt exaction beyond the requirements of propriety. On no view can the present covenant pass satisfactorily the first part of this test, though it is stated to be commonly imposed indiscriminately, be it noticed, upon assistants and vendors. Secondly, counsel for the defendant has stated that, whatever the result of the present action, the defendant is ready and willing to undertake for some period not to accept as patients any persons who were patients of the plaintiffs' business at the time when the defendant's service was terminated. The undertaking, when formulated, may be incorporated in the order of this court. Subject to such undertaking and to a recital of the parties' consent to treat the motion as the trial, the order will be that this action is dismissed with costs.

Motion dismissed with costs, the parties consenting to treat the motion as the trial, and the defendant undertaking for the period of 18 months from Mar., 1946, not to accept as patients any persons who were patients of the plaintiffs' business at the time when the defendant's service was terminated.

Solicitors: *Hempsons* (for the plaintiffs); *Biddle, Thorne, Welsford & Barnes*, agents for *G. D. Cann & Hallett*, Okehampton (for the defendant).

[Reported by B. ASHKENAZI, ESQ., Barrister-at-Law.]

SUMMERS AND OTHERS v. MINISTER OF HEALTH.

[KING'S BENCH DIVISION (Morris, J.), December 9, 10, 1946.]

Public Health—Housing—Compulsory purchase order—Confirmation by Minister—Matters to be considered by Minister—Originating notice of motion entered at Crown Office within 6 weeks after publication of notice of confirmation, but notice of motion not served on Minister or local authority within the 6 weeks—Whether notice of motion out of time—Power of court to enlarge time for service—Housing Act, 1936 (c. 51), sched. II, para. 2—R.S.C., Ord. 55B, r. 74; Ord. 64, r. 7.

The objectors to a compulsory purchase order (made on Feb. 9, 1946), in sending their objections to the Ministry of Health, stated that the objections set out were "the principal grounds of objection." The Minister, after considering the objections and certain other documents which were before him, confirmed the compulsory purchase order, the confirmation order being published on May 4, 1946. The objectors made an application under the Housing Act, 1936, sched. II, para. 2, for the Minister's order to be quashed on the grounds (a) that a requirement of the Act had not been complied with, in that the Minister had failed properly or fully to consider their objections, no opportunity having been given to them to elaborate the objections which had been set out; (b) that documents which were before the Minister when he made his decision had not been made available to the objectors. Of the six documents objected to, three had been received by the Minister from another government department before the compulsory purchase order had been made (*i.e.*, while the Minister was still acting in an administrative capacity) and two were communications between the Minister and the local authority, also written before that date. The sixth, dated Mar. 15, 1946, was from another government department to the local authority stating that that department raised no objection to the proposed use of the site for housing purposes. The originating notice of motion by which it was sought to quash the confirmation order was entered at the Crown Office on June 14, 1946, but the notice of motion was not served on the Minister or on the local authority until June 20, 1946, more than six weeks after the publication of the confirmation order and a preliminary point was taken by the Minister that the notice was out of time:—

Held: (i) the notice of motion was out of time because not only should the originating notice of motion have been entered at the Crown Office within 6 weeks from the date of the publication of the confirmation order

as provided by sched. II, para. 2, to the Act of 1936, but also, under R.S.C., Ord. 55B, r. 74, the notice of motion should have been served within that period on the Minister and on anyone else on whom it was to be served. The court had, however, power under R.S.C., Ord. 64, r. 7, to enlarge the time for service, since the period for service was specified by the rules and not by the Act, the "application" (the period for which was specified by sched. II, para. 2, to the Act) being, as indicated by R.S.C., Ord. 55B, r. 71, the originating notice of motion.

(ii) it was not necessary for the Minister, before adjudicating on the matter, to send any of the documents in question to the objectors, and they had not been prejudiced by not having them.

Miller v. Minister of Health (2) and *Offer v. Minister of Health* (4) applied.

(iii) it was not established that the Minister had failed properly and in a correct manner to consider the objections and there was no ground for quashing the order.

Miller v. Minister of Health (2) followed.

[AS TO COMPULSORY PURCHASE, see HALSBURY, Hailsham Edn., Vol. 26, pp. 571—573, paras. 1207—1211; and FOR CASES, see DIGEST, Supp., Public Health, Nos. 502 *m et seq.*]

Cases referred to:

- (1) *Stafford v. Minister of Health*, [1946] K.B. 621; 110 J.P. 210; *sub. nom. Mowsley No. 1 Compulsory Order*, 175 L.T. 101.
- (2) *Miller v. Minister of Health*, [1946] K.B. 626; 110 J.P. 353.
- (3) *Errington v. Minister of Health*, [1935] 1 K.B. 249; 104 L.J.K.B. 49; 152 L.T. 154; 99 J.P. 15; Digest Supp.
- (4) *Offer v. Minister of Health*, [1936] 1 K.B. 40; 105 L.J.K.B. 6; 153 L.T. 270; Digest Supp.

APPEAL under the Housing Acts, 1925-1944, against an order of the Minister of Health confirming a compulsory purchase order made by the rural district council of Atcham.

Notice of the confirmation of the order was published on May 4, 1946. On June 14, the objectors entered at the Crown Office an originating notice of motion asking for the Minister's order to be quashed on the ground that their interests had been substantially prejudiced by reason of a requirement of the Housing Act, 1936, not having been complied with. The notice was not served on the Minister until June 20, 1946. A preliminary point was taken by the Minister that the notice of motion was out of time, but the court was asked to hear the matter on its merits before dealing with the preliminary objection. The facts appear in the judgment.

A. W. L. Franklin for the applicants (the objectors).

H. L. Parker for the Minister.

MORRIS, J.: On February 9, 1946, the rural district council of Atcham made an order for the compulsory purchase of certain land. Notice of that order was given to the applicants on the present motion, and on Feb. 27 notice of objection was sent to the Minister of Health. The order for compulsory purchase was confirmed by the Minister on Apr. 23, 1946, notice thereof being given on Apr. 24, and on May 4, the order was published. The present originating notice of motion is brought on the ground stated therein, namely, that the order of the Minister should be quashed because the interests of the applicants have been substantially prejudiced by reason of a requirement of the Housing Act, 1936, not having been complied with. What is said is that the Minister failed to consider the objections of the applicants before confirming the order. Schedule II, para. 2, to the Act of 1936 provides that if any person is aggrieved by an order for compulsory purchase or a clearance order, or is otherwise aggrieved as set out in the paragraph, and:

... desires to question the validity thereof on the ground that it is not within the powers of this Act or that any requirement of this Act has not been complied with, he may, within 6 weeks after the publication of the notice of confirmation of the order, or of the approval of the plan, make an application for the purpose to the High Court ...

A preliminary point was taken in this case that the notice of motion was out of time. That matter was argued, but I was asked, whatever view I formed in regard to that objection, to hear this matter on its merits, and, after hearing

the argument on the preliminary point, I proceeded so to do. I propose, therefore, first to deal with this matter on the merits of the submissions addressed to me, and afterwards to deal with the preliminary objection.

If an application is made to the High Court, sched. II, para. 2 (ii), to the Act of 1936 provides that the court :

if satisfied upon the hearing of the application that the order, or the approval of the plan, is not within the powers of this Act or that the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with, may quash the order, or the approval of the plan, either generally or in so far as it affects any property of the applicant.

The precise ground given in the present notice of motion being that a requirement of the Act has not been complied with in that the Minister failed to consider the objections of the applicants, it is necessary to consider what took place after the objections of the applicants were lodged.

The objections were sent to the Minister of Health on Feb. 27. They stated six grounds, stated to be "the principal grounds of objection." Schedule I, para. 3 (a), to the Act provides that, before submitting the order to the Minister, the local authority must publish in one or more newspapers a notice in the prescribed form and set out what that notice must state. No complaint is made in regard to that matter. By sched. I, para. 3 (b), it is provided that the local authority shall :

serve on every owner, lessee and occupier . . . a notice in the prescribed form stating the effect of the order and that it is about to be submitted to the Minister for confirmation and specifying the time within and the manner in which objections thereto can be made.

There is a prescribed form, and no point is taken that the notice in this case was not given in the appropriate manner. The notice informed the present applicants that the rural district council of Atcham had made a compulsory purchase order. It informed the applicants as to the way in which they could object, and it also informed them, in summary form, as to the requirements of the Acts in regard to the duties of the Minister. The notice in the latter part was in the following terms :

Where, however, the order is submitted to the Minister after Aug. 3, 1944, and before the expiration of 2 years from that date, the Housing (Temporary Provisions) Act, 1944, provides that where any objection is made to the order and is not withdrawn, the Minister may after considering the objection, confirm the order (with or without modification) without causing a public local inquiry to be held.

That is a reference to s. 2 of the Act of 1944 and the notice accurately states the effect of the section.

The present case came within the time limit indicated by that section. The Minister, therefore, was under a duty to consider the objection, but might decide not to hold a public local inquiry. The evidence which is before the court includes an affidavit from Mr. Thomas William Williams, a principal in the Housing Division of the Ministry of Health, who in the course of his official duties was responsible for the consideration of this compulsory purchase order. Mr. Williams says :

In such consideration I considered the objections made on behalf of the applicants herein by the letter of Feb. 27, 1946, from Messrs. Barber & Son . . .

On the face of it, therefore, it appears that the Minister did not fail to consider the objections of the applicants to the order before he confirmed the order, but the matter requires far deeper consideration, because what is said on behalf of the applicants is that the Minister did not fully or properly consider the objections. In particular, it is said that no opportunity was given to the applicants to elaborate the objections which they had formulated. Further, it is said that certain material and certain documents which were before the Minister were not made available to the applicants, and it is submitted that the documents in question ought to have been made available. On behalf of the applicants, reliance was placed on the decisions in both *Stafford v. Minister of Health* (1) and *Miller v. Minister of Health* (2), as well as on passages in *Errington v. Minister of Health* (3).

The documents which were before the Minister when the objections of the applicants were being considered are set out in the affidavit of Mr. Williams.

It is said by counsel for the applicants that, although there was no objection to the Minister looking at the documents referred to in Mr. Williams' affidavit, those documents ought to have been submitted to the applicants so that they might consider them. In this connection, counsel for the applicants relies on a passage in the judgment of HENN COLLINS, J., in *Miller's case* (2), where the judge said ([1946] K.B. 626, at pp. 628, 629):

A That does not mean, as the authorities have shown, that he is not to use any knowledge which has come to him, so to speak, extra-judicially, but all the material which has been formulated for his judicial consideration must be available to him on both sides.

B Further, in dealing with *Miller's case* (2), counsel for the applicants submits that there was far more material before the Minister in the present case than existed in *Miller's case* (2). Counsel for the applicants also says that there are other passages in the judgment of HENN COLLINS, J., in *Miller's case* (2) which assist him, for he submits that it would appear in the present case that the Minister did not accept the "principal heads of objection" formulated by the applicants in their notice, and that, not having accepted them, the Minister should have invited the applicants to elaborate those points. Counsel for the applicants calls attention to the fact that the notice of objection refers to the grounds of objection as "the principal grounds of objection," and submits that that was an indication that the applicants would wish to elaborate or to add to the grounds unless the Minister was accepting what they were, by the notice of objection, submitting.

C It is necessary to consider the nature of the documents which were before Mr. Williams (as he states in his affidavit) at the time when he was considering, in the course of his duty, the objections of the applicants. There was, first, a report of a conference held at Atcham on Jan. 1, 1946, attended by the engineer and surveyor to the Atcham rural district council, the county planning officer, and representatives of the Midland Regional Office of the Ministry of Health and of the Midland Regional Office of the Ministry of Town and Country Planning. There was, secondly, a copy of a letter of Jan. 18, 1946, addressed by the Midland Regional Office of the Ministry of Town and Country Planning to the clerk to the Atcham rural district council in which it was stated that, although no objection on planning or agricultural grounds would be raised to the development of the said site, it had been requested by the Ministry of Agriculture that consideration should be given to development taking place first at an alternative site. Thirdly, there was a copy of a letter, dated Jan 16, 1946, addressed by the Midland Regional Office of the Ministry of Agriculture and Fisheries to the Midland Regional Office of the Ministry of Town and Country Planning. These three documents had been sent on Jan. 18, 1946 by the Midland Regional Office of the Ministry of Town and Country Planning to the Midland Regional Office of the Ministry of Health.

F These documents all appear to have come into existence before what has been conveniently described as the *lis* came to be adjudicated on. In this connection, I think that what was said by GREER, L.J., in *Offer v. Minister of Health* (4), is of importance. He said ([1936] 1 K.B. 40, at p. 48):

G To my mind, Parliament intended that these semi-official duties should be conferred upon a Minister who naturally will have some knowledge of the matter before he begins his semi-judicial inquiry, and will possibly have had communications with the local authority before what I have called the "*lis*" is joined between the objecting property owners and the local authority, and who will therefore have some knowledge and have given some opinion about the matter.

I think, also, it is relevant to observe in *Stafford v. Minister of Health* (1), that CHARLES, J., in his judgment, said (175 L.T. 101):

H Before the matter was gone into at all, the Minister had, quite properly, taken the opinion of several people of competence and in positions of importance, such as Mr. Clay, the Ministry's regional architect. He visited the site, accompanied by Mr. Mitchell of the Ministry of Town and Country Planning and the council's sanitary inspector and surveyor, and he recommended that subject to clearance from the regional planning officer, the local authority be authorised to negotiate for the purchase of six properties, one of them being the site in question, the Mowsley site.

Reference to that circumstance is also found in the report in the LAW REPORTS ([1946] K.B. 621, at p. 622) where, in a statement of the facts, this sentence is to be found:

The Minister had previously taken the opinion of competent persons, including the Ministry's regional architect, who visited the land in question in company with an official of the Ministry of Town and Country Planning, and the sanitary inspector and surveyor of the rural district council, and recommended that, subject to the regional planning officer's approval, the local authority should be authorised to negotiate for the purchase of six properties, one of them being the appellant's land in question. In his judgment, in *Miller's case* (2), HENN COLLINS, J., refers to the distinction between material that had come into existence before the *lis*, and material which he describes as being material formulated for the judicial consideration of the Minister. A

It seems to me that the first three documents which I have mentioned in this case came into existence before the *lis* was joined, and that they were not documents which the Minister was obliged to submit to the applicants before the Minister came to a decision. The position in this regard is very different, as it seems to me, from the position with which CHARLES, J., was dealing in *Stafford v. Minister of Health* (1). In that case, after a landowner had submitted grounds of objection to the Minister, the Minister sent the notice and those grounds to the local authority for their observations thereon without informing the landowner. The local authority sent a detailed reply to the Minister, and it was with that situation that CHARLES, J., was dealing. In that connection, CHARLES, J., said ([1946] K.B. 621, at p. 625): B

If the rural district council's view was to be taken, and it was proper that it should be, it ought to have been communicated to the appellant, who should then have had an opportunity of presenting in adequate form the case which he had done no more than adumbrate by the headings in his grounds of objection. C

The three documents to which I have referred came into existence because of the normal practice of having a visit to a site, and of ascertaining the views of any other government departments that might be affected. I am told that it is the practice to obtain a clearance from other government departments—in other words, to ascertain whether they have any objection to the proposed acquisition of land. D

The other documents are as follows. The fourth was a letter dated Feb. 4, 1946, addressed by the clerk to the Atcham rural district council to the Midland Regional Office of the Ministry of Health. The fifth was a copy of a letter dated Feb. 8, 1946, addressed by the Midland Regional Office of the Ministry of Health to the clerk to the Atcham rural district council. Both those letters were in date prior to the *lis* being ready for adjudication. The sixth document was a copy of a letter dated Mar. 15, 1946, addressed by the Midland Regional Office of the Ministry of Town and Country Planning to the clerk of the Atcham rural district council, confirming that, so far as the Ministry of Town and Country Planning and the Ministry of Agriculture were concerned, no objection was taken to the proposed use of the site. The affidavit says that this copy had been sent on Mar. 15 by the Midland Regional Office of the Ministry of Town and Country Planning to the Midland Regional Office of the Ministry of Health. That letter from the regional planning officer states that he had pleasure in confirming that, so far as his department of the Ministry of Agriculture was concerned, no objections were raised to the proposed use of the site for housing purposes. That letter is dated Mar. 15, and is subsequent to the notice of objection being sent to the Minister, but it appears from the consideration of Mr. Williams' affidavit that the application of the council to the Minister for his confirmation was not in fact made until the second half of March, and I think it is reasonable to assume that it was not made until after the date of this letter. Apart, however, from that consideration, the letter is comparable in its contents with the letter dated Sept. 13, 1945, which was the document considered by HENN COLLINS, J., in *Miller v. Minister of Health* (2). That was a letter from the regional planning officer to the clerk of the particular rural district council, and by it information was given that certain sites were considered satisfactory, the observations of other interested government departments having been received and considered. That letter, and, indeed, the letter of Mar. 15 to which I have referred, indicate that other government departments which might be interested had informed the Minister of Health that they did not wish to present any considerations or objections. E F G H

A In my view, none of these documents was a document which the Minister was obliged to send to the applicants before he adjudicated on this matter. There was a seventh document, or rather series of documents, consisting of the reports of the district valuer and the mineral valuer in regard to the site. Quite properly, no point was taken by counsel for the applicants in regard to those documents, which dealt purely with matters in regard to which the district valuer and the mineral valuer could give information, and they are in an entirely different category. It seems to me, therefore, that no complaint can be made by the applicants that these documents were not sent to them, and that it cannot be urged that the Minister had failed properly or judicially to consider their objections or that there had been anything by way of violation of the principle of natural justice. I cannot conceive that it would have assisted the applicants to know that other departments did not object to the confirmation order or that the Ministry of Agriculture were not supporting the objections of the applicants.

B That, I think, is sufficient to indicate the reasons why I consider that this motion must fail, but, in deference to the argument of counsel for the applicants, I must say a word in regard to some submissions that he made about *Miller's* case (2). He said that in the present case the Minister had a greater volume of material before him than existed in *Miller's* case (2). That really only means that in the present case, there are six or seven documents now being considered, whereas in *Miller's* case (2), there was one document that gave rise to the legal argument. I do not think that that makes any difference in regard to the principle of the matter.

C Lastly, counsel for the applicants submitted that in the present case it would appear that the Minister of Health had not accepted what the objectors urged in their heads of objection, and that it was therefore obligatory for the Minister to have invited the objectors to elaborate. It does not follow that because the Minister confirmed the order, he did not consider that there was validity from the objectors' point of view in many of the grounds indicated by them. Counsel for the applicants relied on the words "principal grounds of objection." I do not think that by the use of the word "principal" objectors are saying that they propose to follow up their letter by some further letter. The objectors are invited to send objections, and it is open to them to draft their objections as fully as they choose. If they use the words "principal grounds of objection," that may only mean that they are urging the objections that they regard as their principal objections and those which they wish the Minister to consider, but, if one looks at the particular objections here, it may well be that the Minister considered that what the objectors were urging was correct in substance. For example, by the first objection, the applicants said that the land proposed to be scheduled was land that was absolutely vital for the proper occupation, management and agricultural development of the farm. The Minister may have been persuaded of that. He may have accepted that suggestion. He may have accepted also what was set out in other objections, but he may have thought that other considerations which he had to take into account were overriding considerations and that he ought in the public interest to confirm the order. It is argued that different considerations apply to grounds 5 and 6, in which it is stated that more suitable sites were available. It is to be observed that in *Miller's* case (2), one of the grounds of objection was ([1946] K.B. 626):

G . . . that there was other more suitable land available for the council's housing scheme and that it was not necessary for the purpose of the scheme to take the land in question.

H In spite of the fact that there was that objection, HENN COLLINS, J., dismissed the appeal of the objectors. That objection, as it seems to me, raises an issue of policy regarding which the Minister, acting in the capacity in which he has to act, has all the material available for arriving at a correct determination. In my view, therefore, the ways in which counsel for the applicants seeks to use the authority of *Miller's* case (2) do not avail him to succeed in this application. In my opinion, therefore, it is not established that the Minister failed properly and in a correct manner to consider the objections of the applicants, and, therefore, this appeal fails.

I can deal briefly with the preliminary point that was raised in regard to time. The confirmation of the Minister was published on May 4, 1946, and sched. II, para. 2, to the Act of 1936 provides that an objector may:

. . . within six weeks after the publication of the notice of confirmation of the order . . . make an application for the purpose to the High Court.

R.S.C., Ord. 55B, r. 71, provides :

An application under the Housing Act, 1936, sched II, para. 2 . . . shall be made by an originating notice of motion to a judge of the High Court selected for the purpose by the Lord Chancellor.

R.S.C., Ord. 55B, r. 74, provides :

The notice of motion shall, within the time limited by the said respective enactments for making the application, be entered at the Crown Office and be served on the appropriate Minister and also :—(i) if the application relates to a clearance order or a compulsory purchase order on the authority by whom the order was made. . . .

Six weeks from May 4 elapsed on June 15. The originating notice of motion in this case was entered at the Crown Office on June 14, *i.e.*, within the six weeks. It was not served upon the Minister until June 20, *i.e.*, after the six weeks. Though I have not the precise date, I understand that it was not served on the council until after the six weeks. The first question that arises is on R.S.C., Ord. 55B, r. 74, whether the service on the Minister and on the council must be within the six weeks as well as the entering of the notice of motion at the Crown Office. My view is quite clear—that within the six weeks there should be both entry at the Crown Office and the service on the Minister and on anyone else who has to be served. In my view, therefore, this notice of motion was not served on the Minister or on the council within the appropriate time, and so was out of time.

The next question that arises, however, is whether there is any power in the court, under R.S.C., Ord. 64, r. 7, to enlarge the time, for I was invited by counsel for the applicants, in the event of my being against him on the construction of R.S.C., Ord. 55B, r. 74, to enlarge the time. This depends on the question whether the application to the High Court includes both the entering of the originating notice of motion and the service on any persons who must be served. If all the steps (*i.e.*, the entering in the Crown Office and service) must take place to constitute an application, then the application was not made within the time limit specified by statute. If, however, the application is to be deemed to be the originating notice of motion entered at the Crown Office, then such entry was within the statutory period, but the service was not effected within the period specified by the rules. If the service was not within the period specified by rules as opposed to statute, then under R.S.C., Ord. 64, r. 7, there would be power in the court to enlarge the time. In my view, the application to the High Court is indicated by R.S.C., Ord. 55B, r. 71, to be the originating notice of motion which was entered within the six weeks. The service was specified by the rules, and, though it was not effected within the time indicated, I think that there is power in the court to enlarge the time. In the present case, therefore, it is within my power to enlarge the time under R.S.C., Ord. 64, r. 7. In the circumstances it would, I think, be appropriate to enlarge the time, and so permit the applicants to present their case to the court. The motion, in my view, fails, and must be dismissed.

Application dismissed with costs.

Solicitors : *Tamplin, Joseph & Flux*, agents for *Dean & Espley*, Wellington, Salop (for the applicants) ; *Solicitor, Ministry of Health* (for the respondents).

[Reported by B. ASHKENAZI, ESQ., Barrister-at-Law.]

WILLIS AND ANOTHER v. BROOKS AND OTHERS

[KING'S BENCH DIVISION (Oliver, J.), October 24, 25, November 12, 1946.]

Libel—Trade union—Right of union to sue—Allegation of “rigging” a ballot.
Trade Unions—Libel against union—Right of union to sue—Allegation of “rigging” a ballot.

A Defamatory statements were published in a newspaper accusing a trade union of deliberately “rigging” a ballot of its members.

HELD : the union itself could maintain an action for libel, for its entity could not be divided up into different parts so as to deprive it of its right to sue if it were libelled, and it was no defence to such an action to say that the accusation was not against the union but only against its officers.

National Union of General and Municipal Workers v. Gillian (3) *applied*.

B [AS TO DEFAMATORY STATEMENTS CONCERNING CORPORATIONS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 390, 391, para. 473; and FOR CASES, see DIGEST, Vol. 13, p. 408, Nos. 1282-1285.

AS TO ACTIONS BY TRADE UNIONS, see HALSBURY, Hailsham Edn., Vol. 32, pp. 529, 530, paras. 829, 830.]

Cases referred to :

- C** (1) *Williams v. Beaumont* (1833), 10 Bing 260; 3 Moo. & S. 705; 3 L.J.C.P. 31; 10 Digest 1220, 8628.
 (2) *Manchester Corp'n. v. Williams*, [1891] 1 Q.B. 94; 60 L.J.Q.B. 23; 63 L.T. 805; 54 J.P. 712; 13 Digest 408, 1284.
 (3) *National Union of General and Municipal Workers v. Gillian*, [1945] 2 All E.R. 593; [1946] K.B. 81; 115 L.J.K.B. 43; 174 L.T. 8.

D ACTION for damages for libel. The plaintiffs, the London Society of Compositors, a trade union, sued the editor, publishing company and printers of an article appearing in TRUTH. The main defence was that the union, as a whole, had no cause of action since the article in question was an accusation, not against the union, but against its officers. The facts and the article complained of appear in the judgment.

Gilbert Paull, K.C., and F. H. Lawton for the plaintiffs.

E *Sir Valentine Holmes, K.C., and H. P. J. Milmo* for the defendants.

Cur. adv. vult.

Nov. 12. OLIVER, J. : This is an action for libel brought by the secretary of the London Society of Compositors and by the trade union itself against the editor, publishers, and printers of an article appearing in TRUTH on Oct. 26, 1945. The first plaintiff accepted a sum of money paid into court by the defendants with a denial of liability, and he fell out of the action.

F The article complained of is as follows :

G TRUE TO TYPE ? One of my many compositor friends has shown me a circular recently issued by the London Society of Compositors giving notice of a ballot to be taken on affiliation to the International Typographical Secretariat. Neither my friend nor the fellow members of his “ chapel ” had heard of this organisation before. They are still in the dark about its objects, as the union [*i.e.*, the plaintiff society] has taken no steps to enlighten them ; it is, in fact, highly secretive about the matter. The circular was sent to fathers of the chapel (*i.e.*, chairmen of the house branches) who are enjoined to apply for “ the exact number of ballot papers required.” One would expect a democratic union like the London Society of Compositors to send to each branch one ballot paper for each member. Otherwise, there is bound to be a strong suspicion of selective balloting ; it would obviously be quite simple to issue a ballot paper only to those who are internationally minded and would vote for anything having an international flavour. To get a truly democratic result the union should clearly issue a ballot paper to each member, and with it a statement explaining the International Secretariat, giving reasons for and against affiliation. It is to be feared that our powerful trade unions have long discarded what many of them openly call “ old-fashioned ” democracy. Long and successful practice in the manipulation of the undemocratic “ block-vote ” has made trade unions expert in devising ballots guaranteed always to give a desired result.

For the plaintiff union it was contended that this article clearly conveyed to readers that the ballot named in the article was deliberately “ rigged ” by substantially confining the opportunity to vote to such members as were known

to be "internationally minded." For the defendants it was contended that the article was incapable of any such meaning and that, if fairly construed, it came to no more than a criticism of a system of voting which might be used to secure the result desired. It was expressly conceded by counsel for the defendants that it was no part of his case that there was a word of truth in the suggestion that anything improper had in fact been done.

[HIS LORDSHIP held that the article contained "an unequivocal suggestion that in the case of this ballot the plaintiff union rigged the voting in the way suggested and does so habitually in other ballots where a result is desired," and he continued:] The second contention of counsel for the defendants was that in the circumstances of this case there was no actionable libel on the trade union. Counsel for the defendants drew my attention to a series of old authorities beginning with *Williams v. Beaumont* (1) and continuing down to *Manchester Corporation v. Williams* (2). Counsel for the plaintiff union drew my attention to FRASER ON LIBEL AND SLANDER, 7th ed., p. 90, in which the editors criticise the decision in *Manchester Corporation v. Williams* (2) and suggest that it would not be upheld in the Court of Appeal. The question came before the Court of Appeal in *National Union of General and Municipal Workers v. Gillian* (3), after reading which I make bold to express my agreement with the comment of the editors of FRASER ON LIBEL AND SLANDER. Counsel for the defendants did not seriously contend that an action for libel imputing something very like corruption, as in this case, would not lie in any circumstances at the suit of a trade union, but he put forward the proposition that this was an accusation that one part of the union, namely, its officers, had cheated of their right to vote another part of the union, namely, those of its members who were not "internationally minded," and he argued that in such circumstances the union as a whole could not be plaintiff. It appears to me that the Court of Appeal have decided in *Gillian's* case (3) that there is no difference in this matter between a trade union and a limited company, and that the entity of a trade union cannot be divided into different parts consisting of various of its members so as to deprive it of its right to sue if it is libelled. So to decide would be to say that a member of the union could not sue the union if it libelled him, or that a shareholder in a company could not sue the company in such a case. I think the contention of counsel for the plaintiff union is sound and that this contention of the defendants fails. On the question of damages, I call this rather a bad and spiteful libel, published in a paper with a wide circulation without the slightest inquiry into the facts. I award damages of £500, with costs, and there will be judgment for that amount against each of the defendants.

Judgment for the plaintiff union for £500 damages with costs.

Solicitors : *Shaen, Roscoe & Co.* (for the plaintiffs) ; *Lewis & Lewis & Gisborne & Co.* (for the defendants).

[Reported by B. ASHKENAZI, ESQ., Barrister-at-Law.]

TENDLER v. SPROULE.

[COURT OF APPEAL (Morton, Bucknill and Asquith, L.JJ.), January 14, 1947.]

Landlord and Tenant—Rent restriction—Recovery of possession—Breach of an obligation of the tenancy—Covenant not to use premises for any business but only “as a private dwelling-house”—Tenant taking in paying guests—Reasonableness of order for possession—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3 (1) (a), sched. I, para. (a).

By a tenancy agreement the tenant agreed “not to use the premises . . . for any trade or business but keep the same as a private dwelling-house only.” After the contractual tenancy had expired, the tenant held over as a statutory tenant under the protection of the Rent Restrictions Acts. The tenant having taken in two lodgers or “paying guests,” the landlord brought an action for possession under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1) (a) and sched. I, para. (a), on the ground that there had been a breach of an obligation of the tenancy under the contract.

HELD: (i) the taking in of lodgers or “paying guests” was a breach of the covenant not to use the premises for any business, and also of the covenant to keep them “as a private dwelling-house only,” and there had, therefore, been a breach of an obligation of the tenancy within sched. I, para. (a), of the Act of 1933.

Thorn v. Madden (1) followed.

(ii) whether it was reasonable to make an order for possession was a matter for the discretion of the judge. When evidence was led which was directed to the question of reasonableness and the judge gave a decision giving possession to the landlord, the Court of Appeal would always assume that he had applied his mind to the question of reasonableness before giving his decision.

[AS TO RESTRICTIONS ON USE OF PREMISES, see HALSBURY, Hailsham Edn., Vol. 20, pp. 227-230, paras. 249, 251; and FOR CASES, see DIGEST, Vol. 31, pp. 157-160, Nos. 2905-2915, and Nos. 2918-2932.]

AS TO ORDER FOR POSSESSION ON BREACH OF AN OBLIGATION OF THE TENANCY, see HALSBURY, Hailsham Edn., Vol. 20, pp. 329, 330, paras. 392, 393.]

Cases referred to:

(1) *Thorn v. Madden*, [1925] Ch. 847; 31 Digest 158, 2909.

(2) *Hobson v. Tulloch*, [1898] 1 Ch. 424; 67 L.J. Ch. 205; 78 L.T. 224; 40 Digest 320, 2713.

(3) *Porter v. Gibbons and Bissett* (1904), 48 Sol. Jo. 559; on appeal, 48 Sol. Jo. 814; 31 Digest 158, 2908.

APPEAL by the tenant from an order of His Honour DEPUTY JUDGE MARKS, at Kingston-on-Thames County Court.

In an action for possession the judge held that the taking in of two paying lodgers by the tenant constituted a carrying on of a trade or business contrary to a covenant in the tenancy agreement, and he made an order for possession under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1) (a) and sched. I, para. (a). The tenant appealed. The facts appear in the judgment.

G. H. Crispin for the tenant.

S. N. Bernstein for the landlord.

MORTON, L.J.: Counsel for the tenant has said all that could possibly be said in support of this appeal, but, in my view, the decision of the deputy county court judge was right.

On May 28, 1941, the predecessor in title of the landlord entered into an agreement with the tenant. That agreement was made between one Ellis, thereafter called the landlord, of the one part, and Mr. Sproule, thereafter called the tenant, of the other part. The landlord agreed to let and the tenant agreed to rent premises known as No. 35 Claremont Road, Teddington, in the county of Middlesex, for a term of three years from Feb. 1, 1941. There is no doubt that the contractual tenancy has expired and that the tenant has held over as a statutory tenant under the protection of the Rent Restrictions

Acts. The lease contained an agreement by the tenant :

... not to use the said premises or any part thereof for any trade or business but keep the same as a private dwelling-house only and not to exhibit any notice plate of name or profession on any part of the said premises.

On Dec. 18, 1945, the plaintiff bought the property, subject to the existing occupation, under the Acts, of the tenant, and the point which now arises is this. It is said that by taking in two lodgers or paying guests the tenant has committed a breach of the covenant which I have read; that the case comes within the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (a); and that the deputy county court judge had jurisdiction to make an order for possession in favour of the landlord if he thought it reasonable so to do. The deputy county court judge held that, following the judgment of TOMLIN, J., in *Thorn v. Madden* (1), what had occurred constituted a carrying on of a trade or business contrary to the covenant in the agreement, and he gave judgment for the landlord for possession in six months. A

Before us, counsel for the tenant has taken two points—first, that there was no breach of the covenant, and, secondly, that, even if there was a breach of covenant, it was not reasonable for the deputy county court judge to make an order for possession. Dealing with the first point, all that we know in the present case is that during the tenancy the tenant took in (to quote the judge) “two paying lodgers.” In my view, the taking in of two paying lodgers is a breach of a covenant “not to use the said premises or any part thereof for any business.” I think also that it is a breach of the covenant to keep the premises “as a private dwelling-house only.” Counsel for the tenant has pointed out that in *Thorn v. Madden* (1) the tenant had taken active steps to secure paying guests by writing letters to various parties, whereas in the present case we do not know from the evidence or from the finding of the judge what steps, if any, were taken to obtain those paying guests. In *Thorn v. Madden* (1) TOMLIN, J., said ([1925] Ch. 847, at p. 851): B

I think that, where, as here, a lady is of set purpose occupying a house which she is aware is beyond her means and, for the purpose of supplementing her means and enabling her to live in the house, is securing, to use a neutral term, visitors to come and live there for short or long periods upon payment for board and residence, it is impossible to say that the house is being used as a private residence only . . . I think that such a case as this . . . amounts to carrying on a business. C

I do not think that the decision of TOMLIN, J., was based on the fact that the tenant wrote letters to persons to endeavour to induce them to become paying guests. I think that the real gist of the decision is that the taking in of paying guests is a business and that a house which, or part of which, is used to take in paying guests is not a house which is being kept as a private dwelling-house only. In the course of his judgment TOMLIN, J., said (*ibid.*, at p. 851): D

This is not like a case between two friends, when to the one desiring to pay a visit the other says: “I cannot afford to keep you, but I shall be delighted to see you if you will pay.” E

I express no view on the question whether that would or would not be a breach of such a covenant as this court has to construe to-day. That question can be decided if and when it arises. F

With regard to the other cases which have been cited to us, the decision of ROMER, J., in *Hobson v. Tulloch* (2) supports the view which I have formed, and I do not think that the decision of KEREWICH, J., in *Porter v. Gibbons and B'ssett* (3) was well-founded. The case is very shortly reported, and it may be that there were matters before the judge which do not appear in the report, but according to the report (48 Sol. Jo. 559) the defendant, who was the lessee : G

... had received friends and acquaintances who, with their families, stayed for long periods and contributed to the cost of carrying on the establishment by a fixed weekly or monthly payment. H

It seems to me that this was a breach of the covenant “not to use the said premises except as a private dwelling-house.” For these reasons I am of opinion that in the present case there has been a breach of an obligation of the tenancy.

As to the second question, whether it was reasonable to make an order for possession, that is, of course, a matter within the discretion of the judge.

Evidence was given as to the position of the landlord. She said :

I am married. I have a child of 17 months. My husband was discharged from the forces sick in 1943.

And, apparently, she was living with her mother. I can see no grounds on which this court can interfere with the exercise of his discretion by the deputy county court judge. It was at one time suggested that he had not applied his mind to the question of reasonableness at all, but we are informed by counsel for the landlord, who appeared in the court below, that the judge said he considered it reasonable to make an order, although that does not appear in his written judgment. Apart from that, when evidence is led which is directed to the question of reasonableness, and when the judge gives a decision giving possession to the landlord, this court will always assume that he has applied his mind to the question of reasonableness before giving his decision. For these reasons I think that this appeal must be dismissed.

BUCKNILL, L.J. : I agree, and have nothing to add.

ASQUITH, L.J. : I also agree and have nothing to add.

Appeal dismissed with costs.

Solicitors : *Culross & Co.* (for the appellant); *Jacques, Asquith & Jacques* (for the respondent).

[*Reported by R. L. ZIAR, Esq., Barrister-at-Law.*]

Re VICKER'S LEASE ; POCOCK v. VICKERS.

[CHANCERY DIVISION (Roxburgh, J.), January 13, 1947.]

Lease—Fishing rights—Grant for a term of years—Retention by owner of "one rod for her own use"—Effect of retention.

By a lease, dated Dec. 15, 1933, the owner granted to the lessee the exclusive right of fishing in the River T. and the right to have and carry away the fish when caught together with the right of access and egress to the river and of passing and repassing along its banks for a term of 21 years from Dec. 25, 1933, at a certain rent. By cl. 3, the owner retained "for her own use a rod in the said fishing." The lessee died on May 24, 1943, and the owner died on Feb. 19, 1946. The question for determination was whether the right which the owner had reserved under cl. 3 conferred on her an inalienable life interest or whether all rights under it came to an end on her death :—

HELD : on the true construction of the lease, the provision in cl. 3 was not limited to the owner personally during her life, but reserved to her a beneficial interest in a rod in the fishing during the term of the lease.

[AS TO RESERVATION OF FISHING RIGHTS, see HALSBURY, Halsam Edn., Vol. 20, pp. 110, 111, para. 118,; and FOR CASES, see DIGEST, Vol. 25, p. 20, Nos. 168-171.]

ADJOURNED SUMMONS to determine the construction of a lease.

A. C. Nesbitt for the executors of lessee.

G. C. D. S. Dunbar for the executors of owner.

ROXBURGH, J. : By a lease dated Dec. 15, 1933, made between Bertha Vickers, of The Mill House, Greatbridge, near Romsey, in the county of Southampton, spinster (thereinafter called the owner), of the one part, and Percy Coventry Tarbutt (thereinafter called the tenant), of the other part, the owner thereby granted and demised to the tenant

the exclusive right, privilege and liberty of shooting (subject to such rights already given) over the land coloured pink and of fishing in the River Test as shown on the plan annexed hereto in the parish of Romsey in the county of Southampton, and the right to have and carry away the fish when caught together with the right of access and egress thereto and of passing and repassing along the banks of the said river [and certain other hereditaments] to hold to the tenant for the term of twenty one years from December 25, 1933 [at a certain rent.]

Clause 3 is as follows :

It is hereby understood and agreed that the owner shall retain for her own use a rod in the said fishing but not on either bank between the Mill and Greatbridge.

By Clause 4:

The tenant hereby covenants with the owner that he will observe and perform the provisions and stipulations contained in the first schedule.

I need not read the provisions of the first schedule in detail, but they impose on the tenant far-reaching obligations for the preservation of the fishing.

The question which I have to determine is what was the extent of the right which the owner reserved under cl. 3. Miss Vickers died on Feb. 19, 1946. Mr. Tarbutt had already died on May 24, 1943, and his executors contend that on the death of Miss Vickers all rights under cl. 3 came to an end. There is in the lease no reference to the successors in title of either the owner or the lessee, but it is conceded that the lease itself remains in force notwithstanding the death of both the original parties and that in every other place in which the word "owner" occurs in this lease—and it occurs in a good many places—it includes not only Miss Vickers but also her successors in title. It is, however, said that in cl. 3 the word "owner" is to be restricted to Miss Vickers personally by reason of the words "for her own use."

Mr. Nesbitt, on behalf of the executors of the lessee, has submitted that the true effect of cl. 3 was to confer on Miss Vickers an inalienable life interest. He says that she could not have authorised even her nephew to fish. He argues that she might herself have fished even though she had ceased to have any interest in the reversion, and he asks me to give that meaning to this reservation or exception—I do not think it makes much difference which it is—because of the words "for her own use." I do not feel able to give that meaning to those words. It seems to me that the draughtsman contemplates the fishing, which is the subject-matter of this lease, as consisting of a bundle of rods and visualises the owner as granting the rods, but retaining one rod for her own use. I do not think that the words "for her own use" involve any conception except the conception that that rod is to belong beneficially to the owner. It is a narrow and difficult point, but, bearing in mind that the tenant had only a term of years and, therefore, could not grant Miss Vickers a life interest, bearing in mind that there is no reference in terms to the lady's life at all, and bearing in mind the extraordinary consequence that would follow from Mr. Nesbitt's submission, namely, that she could not even have authorised a nephew to use a rod, on the whole I prefer the view which I have stated.

I will make a declaration in the following form:

Upon the true construction of the lease, the provision in cl. 3 thereof was not limited to Bertha Vickers personally during her life, but reserved to her a beneficial interest in a rod in the said fishing during the term of the lease which was capable of devolving on her personal representatives.

Declaration accordingly.

Solicitors: *Holmes, Son & Pott* (for the lessee); *Montagu's & Cox & Cardale*, agents for *Branson & Son*, Sheffield (for the owner).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

R. v. NATIONAL ARBITRATION TRIBUNAL, *Ex parte* MIDGLEY HARMER, LTD.

[COURT OF APPEAL, (Lord Greene, M.R., Morton and Somervell, L.JJ.),
December 20, 1946.]

Emergency Legislation—National Arbitration Tribunal—Jurisdiction—"Trade dispute"—Claim by employees for increase in wages following an agreement between an employers' confederation and trade unions—Employers in question not parties to agreement—Employers already paying higher rate of wages than that mentioned in agreement—Conditions of Employment and National Arbitration Order, 1940, (S.R. & O., 1940, No. 1305), arts. 5, 7.

Under the Defence (General) Regulations, 1939, reg. 58 AA (1), the Minister of Labour and National Service was empowered to make Orders (*inter alia*): "(a) for establishing a tribunal for the settlement of trade disputes . . . (c) for requiring employers to observe such terms and conditions of employment as may be determined in accordance with the order

to be, or to be not less favourable than, the recognised terms and conditions." By the Conditions of Employment and National Arbitration Order, 1940, the National Arbitration Tribunal was set up. By art. 5 of the Order there was an obligation on employers in any particular trade or industry to observe recognised terms and conditions of employment, and by art. 7 "trade dispute" was defined as "any dispute or difference between employers and workmen . . . connected with . . . the terms of the employment." On May 23, 1945, the Minister referred to the tribunal a dispute arising out of a claim by some of the employees of M.H., Ltd., for an increase of pay under the terms of an agreement, dated Aug. 9, 1944, between the Engineering and Allied Employers' National Federation and certain trade unions. M.H., Ltd., who were not a party to that agreement, were paying their employees at a higher rate than that mentioned in the agreement, and they contended that the agreement did not, therefore, apply to them, that art. 5 of the Order of 1940 did not make it apply, and that the tribunal had no jurisdiction to entertain the dispute.

HELD : the dispute between M.H., Ltd., and their employees was a "trade dispute" within the meaning of the Order of 1940 and the National Arbitration Tribunal had jurisdiction to entertain the dispute.

[FOR THE CONDITIONS OF EMPLOYMENT AND NATIONAL ARBITRATION ORDER, 1940, see HALSBURY'S STATUTES, Vol. 33, p. 734].

APPEAL by the employers, Midgley Harmer, Ltd., from an order of a Divisional Court of the King's Bench Division (LORD GODDARD, C.J., HUMPHREYS and SINGLETON, JJ.), dated May 31, 1946, dismissing a motion for an order of prohibition directed to the National Arbitration Tribunal to prohibit them from entering into the consideration of a particular reference.

The Minister of Labour and National Service had referred to the tribunal, under the Conditions of Employment and National Arbitration Order, 1940, a dispute arising out of a claim by certain workmen employed by Midgley Harmer, Ltd., for increases in rates of pay under the terms of an agreement, dated Aug. 9, 1944, between the Engineering and Allied Employers' National Federation and certain trade unions. Midgley Harmer, Ltd., were paying their employees at a higher rate than that mentioned in the agreement, and they claimed that, therefore, the agreement did not apply to them, that art. 5 of the Order of 1940 was inapplicable, and that the National Arbitration Tribunal had no jurisdiction to entertain the dispute. The facts appear in the judgment of LORD GREENE, M.R.

Robert Fortune for the employers.

The Solicitor-General (Sir Frank Soskice, K.C.) and *W. Arthian Davies* for the Minister of Labour and National Service.

Lord Meston for the Iron and Steel Trades Confederation.

LORD GREENE, M.R. : The appellants are an electrical firm, Midgley Harmer, Ltd., who employ a number of female employees, and we are told that the wages that they have been in the habit of paying have always been higher than those generally prevalent in the industry. On May 23 1945, the Minister of Labour and National Service, purporting to act under the Conditions of Employment and National Arbitration Order, 1940, art. 2, referred to the National Arbitration Tribunal what is described as a dispute. The nature of the dispute is set out in the schedules to that order of reference. The parties were Midgley Harmer, Ltd. and the female members of a union known as the Iron and Steel Trades Confederation employed by Midgley Harmer, Ltd. in the machine shop and at inspecting and assembling. The particulars of the dispute were as follows :

The dispute arises out of a claim made by the workmen mentioned in sched. I for increases in rates of pay under the terms of the agreement dated Aug. 9, 1944, between the Engineering and Allied Employers' National Federation and certain trade unions.

The dispute, in substance, is this. It is said on behalf of the workpeople that, under the agreement of Aug. 9, 1944, they are entitled to certain increases of wage which that agreement provided for, irrespective of what wages they were previously receiving. The employers, on the other hand, say that they are not bound to give the increases referred to, having regard to the fact that the level of wages they were paying to their female employees was already as high

as it was. It is argued on behalf of the employers that the National Arbitration Tribunal has no jurisdiction to entertain this dispute, for reasons which I shall endeavour to explain in a moment. Before I do so, I will refer to the Orders which constitute the National Arbitration Tribunal and lay down its jurisdiction.

Under the Defence (General) Regulations, 1939, reg. 58AA (1), the Minister of Labour and National Service, "with a view to preventing work being interrupted by trade disputes," was empowered to make provision by Order for a number of matters. The only ones that are relevant to the present question are these :

(a) for establishing a tribunal for the settlement of trade disputes, and for regulating the procedure of the tribunal . . . (c) for requiring employers to observe such terms and conditions of employment as may be determined in accordance with the Order to be, or to be not less favourable than, the recognised terms and conditions.

Under the powers so given, the Minister made the Conditions of Employment and National Arbitration Order, 1940, art. 1 of which is as follows :

For the purpose of settling trade disputes which cannot otherwise be determined there shall be constituted by the Minister a tribunal to be called "the National Arbitration Tribunal" and the provisions of the schedule to this Order shall have effect with respect to the constitution and proceedings of the tribunal.

Then follow various provisions prescribing the conditions and the manner in which trade disputes are to be referred to the National Arbitration Tribunal. The only limit on the jurisdiction of the tribunal which appears there is that the matters that can be referred to it are confined to trade disputes. The definition of "trade dispute" is to be found in art. 7 of the Order. It is as follows :

... "trade dispute" means any dispute or difference between employers and workmen, or between workmen and workmen connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person.

It appears to me to be really incapable of argument that, on the true construction of that definition, the present dispute is not a trade dispute within the meaning of the Order. The employers, on the one hand, and the workpeople, on the other, are in dispute or difference connected with the terms of employment, namely, the wages which the employees are to be paid. *Prima facie*, therefore, the matter is clearly a trade dispute in respect of which the National Arbitration Tribunal is the competent body to decide. I must, however, explain more about these Orders to bring out the point which I understand counsel for the employers to be making. The Minister was given power, under the Defence (General) Regulations, 1939, reg. 58AA (1) (c), to make provision :

for requiring employers to observe such terms and conditions of employment as may be determined in accordance with the Order to be, or to be not less favourable than, the recognised terms and conditions.

Pursuant thereto the Conditions of Employment and National Arbitration Order, 1940, provides in art. 5 for an obligation on employers to observe what are described as "recognised terms and conditions." Putting it shortly, the machinery adopted is of this nature. The object of art. 5 is to compel all employers to fall into line with such terms and conditions as have been negotiated in the industry by representative bodies of employers, on the one hand, and by trade unions, on the other. In other words, its object is to bring the terms and conditions observed by all employers, including those who are not bound by such a national or general trade agreement by being parties to it, (being, perhaps, outside the federation), up to the same level as those recognised in the negotiated trade agreement. They need not, however, necessarily be brought up to that precise scale, because the regulation provides an alternative, namely, "conditions . . . not less favourable than the recognised terms and conditions". Article 5 (1) is as follows :—

Where in any trade or industry in any district there are in force terms and conditions of employment which have been settled by machinery of negotiation or arbitration to which the parties are organizations of employers and trade unions representative respectively of substantial proportions of the employers and workers engaged in that trade or industry in that district (hereinafter referred to as "recognised terms and

conditions") all employers in that trade or industry in that district shall observe the recognised terms and conditions or such terms and conditions of employment as are not less favourable than the recognised terms and conditions.

The agreement of Aug. 9, 1944, mentioned in sched. II of the reference, was an agreement dealing with the wages of females and providing for certain increases. It was made between the Engineering and Allied Employers' National Federation, on behalf of the employers, and the Amalgamated Engineering Union, the Transport and General Workers Union and the National Union of General and Municipal Workers, on behalf of the workmen. Midgley Harmer, Ltd., were not parties to that agreement, and it is to meet such a case as this that art. 5 of the Order of 1940 was made. The employers' case, as far as I understand it, is of this nature. They say that this agreement, which, for convenience, I shall call the national agreement, does not provide for increases to be given to female workers save in the case of those who are earning wages at rates mentioned in the agreement itself. It does not apply, they argue, and art. 5 does not make it applicable, to a case where the wages of the female workers are already above the scales mentioned in the agreement. Therefore, it is said, the National Arbitration Tribunal has no jurisdiction to take this controversy into consideration, in other words, it is not competent to the employees to say that this agreement applies to them and gives them the right, pursuant to art. 5 of the Order of 1940, to the increase which they are demanding. The employees say that the effect of the agreement, on its true construction, as put into force against the employers under art. 5 of the Order, gives to the female employees of Midgley Harmer, Ltd. the right to the increases mentioned, irrespective of what they were earning before.

Why that does not constitute a trade dispute, I am afraid I am incapable of understanding. I have endeavoured to follow the argument of counsel for the employers and, while understanding it, I am unable to detect in it any foundation at all. He tried to fortify his argument by a reference to a previous decision of the National Arbitration Tribunal in a case which, for all practical purposes, we are told, was on all fours with the present case. That decision is described as Award No. 696 of the tribunal. The dispute was described in the reference in that case as a dispute arising out of a claim made by the workmen that the company should observe the agreement dated Aug. 9, 1944, which is the same agreement as in this case. The tribunal, in its award, made it clear that it had directed its mind to the question whether or not the agreement of Aug. 9, 1944, on its true construction and as compulsorily applied to the employers under art. 5 of the Order, compelled the employers to give an increase of wages mentioned in the agreement, irrespective of what the workers had been earning before. They addressed their minds to that very question and said that the agreement of Aug. 9, 1944, provided for an advance on the rate which each worker was receiving immediately before Aug. 1, 1944, whatever such rate may have been. So there is the very same question, and the National Arbitration Tribunal construed the national agreement in that sense. They have, of course, exclusive jurisdiction and it is not for this court, or for any other court, to say whether their construction was right or wrong, but the question whether it was right or wrong has nothing to do with their jurisdiction. Once a matter falls within their jurisdiction, they are entitled to decide it. Counsel for the employers says that, when he comes before the tribunal, he will be met by this previous decision, and the probabilities are that the tribunal will follow what they have already decided. It may be that they will. I am not suggesting that they will or that they should. They have, undoubtedly, power to come to whatever decision they think is proper and in accordance with the language of the relevant documents, but the fact that they followed this decision, if they did, would not mean that they were doing something outside their jurisdiction. It would merely mean, if the view of counsel for the employers of the meaning of the national agreement is right, that they were deciding wrongly. I cannot understand how that situation can afford any support for the suggestion that they would be acting outside their jurisdiction if they entertained the reference. It seems to me it is based on a confusion between two conceptions, (i) the rightness or wrongness of a decision, and (ii) the jurisdiction to make that decision. These are two different things.

Counsel for the employers also argued that, if the tribunal has jurisdiction on the language of the Order of 1940 to treat this present controversy as a trade dispute within their competence, then it would follow that the Order, in so far as it gives them that jurisdiction, must be *ultra vires* the Defence (General) Regulations, 1939, reg. 58AA. I cannot find that counsel gave any reason for such a submission, which seems to me, with all respect to him, to be perfectly hopeless. It is clear, first that the Conditions of Employment and National Arbitration Order, 1940, on its true construction, gives ample jurisdiction to deal with this dispute, which is a trade dispute within the meaning of the Order, and that the Order, in so far as it does so, is competently made under reg. 58AA. I have done no more than express the conclusions to which the Divisional Court came. I should have been satisfied to accept what they have said without adding anything of my own, but the point is, possibly of general interest, and I thought it desirable, as it had been fully presented to us by counsel for the employers, to say in my own words why I agree with the conclusion of the Divisional Court. The appeal must be dismissed with costs.

MORTON, L.J.: I agree. In the present case there is a dispute as to the meaning and effect of the agreement of Aug. 9, 1944. In my judgment, that is plainly a trade dispute within the definition contained in the Conditions of Employment and National Arbitration Order, 1940. The argument of counsel for the employers really amounts to this: "The construction which my clients seek to place on the agreement of Aug. 9, 1944, is clearly right. If the National Arbitration Tribunal decides against my clients, it will be deciding wrongly. On Feb. 28, 1945, in a similar case, the National Arbitration Tribunal did decide wrongly, and I am apprehensive that they will do the same again." That is not an objection to jurisdiction. It is merely a suggestion that the tribunal has misconstrued the agreement once and will misconstrue it again. It is not for this court to form any view about the meaning of the agreement. That is entirely a matter for the tribunal, and I, of course, have formed no view one way or the other. I see no reason to doubt that, if counsel for the employers convinces the tribunal either that this is a different case from the one which they decided on Feb. 28, 1945, or that their decision on the construction of the agreement on that occasion was wrong, the tribunal will give effect to his argument. The matter is entirely one for them, and I can see no ground on which the objection to jurisdiction can be sustained. I agree that this appeal must be dismissed.

SOMERVELL, L.J.: I agree completely with the two judgments which have been delivered and with the analysis given as to the particular dispute in this case, but as it seems to me—and I am sure this is not inconsistent with anything that has been said by my brethren—counsel for the employers fails *in limine* for grounds which are very shortly stated by LORD GODDARD, C.J. He said this:

It is abundantly clear here that a trade dispute has arisen. Therefore, the National Arbitration Tribunal has got jurisdiction at once. The Minister refers the matter to them to decide that trade dispute. How they decide that trade dispute is not a matter with which this court has any concern, because these matters are in effect removed from the jurisdiction of the court.

That seems to me the short and the first answer to the submission of counsel for the employers. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Powell, Skues & Graham Smith* (for the appellants); *Solicitor for the Ministry of Labour and National Service* (for the Minister of Labour and National Service); *Russell Jones & Co.* (for the Iron and Steel Trades Confederation).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

IN Re KINSETH

[CHANCERY DIVISION (Vaisey, J.), December 20, 1946.]

Infants—Custody—Maintenance—Maintenance order granted to wife under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5—Wife's subsequent application to justices for custody of children and weekly sum for their maintenance under Guardianship of Infants Act, 1925 (c. 45), s. 3 (2)—Competence.

A A wife applied to justices under the Summary Jurisdiction (Married Women) Act, 1895, s. 5 (c), for a maintenance order on the ground that her husband had deserted her, and he was ordered to pay to her £2 a week. The wife did not apply under s. 5 (b) of the Act for an order for the custody of the children of the marriage, or for an order for their maintenance under the Married Women's (Maintenance) Act, 1920, s. 1, under which the court has power to direct payment by a husband of a sum for the maintenance of a child not exceeding 10s. a week, but she took out a summons under the Guardianship of Infants Act, 1886, s. 5 (as amended by s. 7 (1) of the Guardianship of Infants Act, 1925), asking that the custody of the infant be committed to her and that her husband be asked to pay to her a weekly sum for the infant's maintenance. Under s. 7 (1) (c) of the Guardianship of Infants Act, 1925, a court of summary jurisdiction may award a sum not exceeding 20s. a week for an infant's maintenance. The justices refused to make any order on the second application, on the ground that, an order having been made in favour of the wife under the Summary Jurisdiction (Married Women) Act, 1895, it would be an evasion of the law for her to be allowed to avail herself of both that Act and the Guardianship of Infants Act, 1925, and they dismissed the application.

D HELD: the justices were wrong, for the wife was entitled to have the benefit of both statutes.

[EDITORIAL NOTE. This case is important, in that it decides that a practice, which has been followed in the Metropolitan Magistrates Courts, has no foundation in law.

E AS TO CUSTODY AND GUARDIANSHIP OF INFANTS GENERALLY, see HALSBURY, Hailsham Edn., Vol. 17, pp. 663-665, para. 1381 and 28 DIGEST, pp. 256-294, 1118-1507; AS TO JURISDICTION OF MAGISTRATES, see HALSBURY, Hailsham Edn., Vol. 10, pp. 834-848, paras. 1336-1354 and 27 DIGEST, pp. 558, 559, 6133-6151; for STATUTES, see HALSBURY'S STATUTES, Vol. 9, pp. 405, 413, 414, 787, 820.]

APPEAL from refusal of Stratford justices to grant an order under the Guardianship of Infants Acts, 1886 to 1925. The facts appear in the headnote.

H. B. Grant for the wife.

The husband did not appear.

F VAISEY, J.: In this case the magistrates have refused, on the ground of lack of jurisdiction, an order committing the custody of two children to the mother and an order giving that mother some sum for maintenance.

The point appears to involve a supposed overlapping of statutory provisions which arises in this way. By the Summary Jurisdiction (Married Women) Act, 1895, a right is given to married women who have grounds of complaint against their husbands to apply to a court of summary jurisdiction for relief.

G Section 5 of that Act provides:

The court of summary jurisdiction to which any application under this Act is made may make an order or orders containing all or any of the provisions following, viz. . . .

H (b) A provision that the legal custody of any children of the marriage between the applicant and her husband, while under the age of sixteen years, be committed to the applicant. (c) A provision that the husband shall pay to the applicant personally, or for her use, to any officer of the court or third person on her behalf, such weekly sum not exceeding £2 as the court shall, having regard to the means both of the husband and wife, consider reasonable.

That Act of 1895, although it enables the legal custody of the children to be given to the mother, does not include any specific provision for the payment to her by her husband of money for the children's maintenance, but by an amending Act of 1920, called the Married Women's (Maintenance Act), it is enacted that such an order as I have mentioned as being made under the Act of 1895 may include a provision that the husband should pay to the applicant, or to any officer of the court, and so forth,

... a weekly sum not exceeding 10s. for the maintenance of each such child until such child attains the age of sixteen years. [s. 1 (1)].

Therefore under those two Acts, which are, undoubtedly, still on the statute book, a wife situated as the applicant in the present case is, having been deserted by her husband, may obtain an order for the legal custody of her infant children, payment of the sum of £2 a week for herself, and a payment of 10s. for the maintenance of each of her infant children.

In the present case the wife, under advice, obtained an order for payment to her of £2 a week under the Act of 1895, but refrained from asking for the custody of the children under that Act because she was advised that another Act, which was more beneficial to her in this regard, enabled her to get better provision for her children, that is to say, the Guardianship of Infants Act, 1925. Under that Act, a court making an order for the custody of an infant is entitled to order the payment by the father to the mother towards the maintenance of the infant of such weekly or other periodical sum as the court, having regard to the means of the father, may think reasonable, with the restrictive provision that a court of summary jurisdiction may not award a sum to be paid to a mother for the maintenance of her infant child exceeding 20s. a week.

The matter, therefore, stood thus. If the wife made the whole of her application under the Acts of 1895 and 1920 she was limited to 10s. per child, whereas under the Guardianship of Infants Act she was entitled to get £1 per child per week. This alternative method of approach seems to have caused some trouble to the magistrates, not only in this case, but, I understand, in other cases.

The magistrates, under the advice of their clerk, decided that they had no jurisdiction to make an order under the Act of 1925 because the mother had already obtained some relief under the Act of 1895, despite the fact that both the father and the mother were represented before the magistrates and a solicitor representing the husband, who attended the court and agreed to the proposed order, which was to hand the custody of the two children, one aged nearly 16 and another aged nearly 13, to the mother, and to allow her £1 a week for each child, or, at any rate, for the younger child, as, indeed, was reasonable. The wife's evidence not being contradicted, the evidence before the magistrates was that the husband was making something in the neighbourhood of £20 a week. He held a responsible position as secretary of a company and, having gone to live with some other woman, he did not think it unreasonable that his wife should have her own £2 a week and £1 a week for each of the children. In spite of that, and in spite of the submission that there was no objection to the jurisdiction, the clerk to the justices has certified their reasons for rejecting the mother's application in these words :

Since the complainant already has an order made in her favour under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 and 1925, it would be an evasion of the law to use both these statutes and the Guardianship of Infants Act at one and the same time, and, therefore, the justices hold that they have no jurisdiction to make a further order under the latter Act.

If one Act gives the mother the right to get 10s. a week from the magistrates for her infant child and another Act says she can get £1 a week, I cannot see why she should not elect to go under the latter. I gather that the magistrates would have made this order if they had not been troubled about the question of jurisdiction. As the father attended by his solicitor and raised no objection to what was proposed, it seems to me that the proper course for me to take is to say that the magistrates, under the guidance of their clerk or otherwise, took a wrong view. I cannot see the slightest reason for supposing that these Acts on the statute book are not available to be used by those who have occasion to use them. In my opinion, the proper course is for me to say that the appeal is allowed, award the mother the custody of the younger child until it attains the age of 16 years, and make an order for the payment of £1 per week in the case of the younger child, I having been informed that as the older child is now earning some money no order is sought in regard to her.

I am told that in the courts of summary jurisdiction in the metropolis it is a matter of routine or practice not to allow summonses under both Acts to proceed or be taken out. I do not propose at the moment to lay down any pronouncement on the subject, but, having dealt with this appeal, I myself can see no possible ground why women who have been deserted by their husbands should not be

entitled to have the benefit of both these sets of statutes and the rule or practice that they may not proceed under more than one of the two appears, in my judgment, as at present advised, to be misconceived.

Appeal allowed with costs.

Solicitor : *Peter Stainsby* (for the wife).

[*Reported by B. ASHKENAZI, Esq., Barrister-at-Law.*]

A *Distinguished.* REED v. GRAY.
[1952] 1 All E.R. 241.

GOODWIN AND ANOTHER v. STORRAR

[KING'S BENCH DIVISION (Denning, J.), December 19, 1946.]

Practice—Costs—Taxation—“Taxation as between solicitor and client”—R.S.C. Ord. 22, r. 14 (11).

B In R.S.C. Ord. 22, r. 14 (11), taxation “as between solicitor and client” means an inquiry as to the costs which a client ought properly to pay to his own solicitor as distinct from taxation as between party and party, and not an inquiry as to the costs to be paid to the solicitor out of a common fund in which the client and others are interested.

C A settlement falling within R.S.C. Ord. 22, r. 14, was embodied in a consent order approved by the court and the order contained a provision for the defendant to pay to the plaintiffs' solicitors the cost of the action “as between solicitor and client to be taxed.”

HELD : taxation “as between solicitor and client” in the consent order had the same meaning as in R.S.C. Ord. 22, r. 14 (11).

Giles v. Randall (1) *questioned.*

D [For R.S.C., ORD. 22, r. 14 (11), see YEARLY PRACTICE OF THE SUPREME COURT, 1940, p. 387.]

Case referred to :

(1) *Giles v. Randall*, [1915] 1 K.B. 290 ; 84 L.J.K.B. 786 ; 112 L.T. 271 ; Digest, Practice 948, 4881.

E APPLICATION by the defendant for an order to review the taxation in an action which was settled, the settlement falling within R.S.C., Ord. 22, r. 14. The question to be determined was the meaning of taxation “as between solicitor and client” in R.S.C., Ord. 22, r. 14 (11), and in the consent order approved by the court. The application was heard in chambers, but was adjourned into open court for judgment. The facts appear in the judgment.

J. E. Moore (of Gregory, Rowcliffe & Co.) for the plaintiffs.

H. L. Parker for the defendant.

F DENNING, J. : This case raised a question of taxation of costs of general application, so I decided to give my reasons in open court.

Mr. and Mrs. Goodwin were killed in an explosion at a munitions works. Their two children were unhurt, as they were at school at the time. The personal representatives of the deceased brought an action against the defendant, which was settled on the terms that £250 was to be paid under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of Mr. Goodwin, £250 under that Act in respect of Mrs. Goodwin, and a sum of £1,750 under the Fatal Accidents Act, 1846, for the benefit of the children.

The settlement fell within R.S.C., Ord. 22, r. 14, and it was only valid if approved by the court. The money had to be paid as the court directed, and, with regard to the costs, R.S.C., Ord. 22, r. 14 (11), provides :

I The costs of the plaintiff . . . shall be taxed by the taxing master, or, if such cause or matter is proceeding in a district registry by the district registrar, as between party and party and as between solicitor and client, and the taxing master or district registrar shall certify the respective amounts of the party and party and solicitor and client costs, and the difference (if any) and the proportion of such difference (if any) payable respectively by any adult party to the cause or matter and by or out of the moneys of any party who is an infant or person of unsound mind, and no costs other than those so certified shall be payable to the solicitor for any plaintiff in the cause or matter.

In pursuance of that sub-rule, the settlement was embodied in a consent order approved by the court, which contained this provision as to costs :

The defendant pays to the plaintiffs' solicitors the costs of this action as between solicitor and client to be taxed such costs to include the costs properly incurred before the issue of the writ and in relation to the subject-matter of the action.

The words "taxation as between solicitor and client" have two meanings. One meaning, which I will refer to as meaning (A), is an inquiry as to the costs which a client ought properly to pay to his own solicitor, as distinct from "taxation as between party and party," which is an inquiry as to the costs which he should recover from the opposite side. The distinction is based on common sense, for if a client authorises his solicitor to incur an unusual or unnecessary expense, it is only right that the client should reimburse his own solicitor for it, but it does not follow that he should be able to recover it from the opposite side. The other meaning of "taxation as between solicitor and client," which I will refer to as meaning (B), is an inquiry as to the costs to be paid to the solicitor out of a common fund in which the client and others are interested, and is substantially a taxation as between party and party, but on a more generous scale. When meaning (B) is used a different form of words is needed to describe an inquiry as to the costs which a client ought properly to pay his own solicitor, and that is then described as a "taxation as between solicitor and own client."

The plaintiffs' solicitors say that in R.S.C., Ord. 22, r. 14 (11), and the order as to costs, the words are used in meaning (A), and they cite the notes to the rule in the ANNUAL PRACTICE, and rely also on the practice of the taxing office. The defendant says that the meaning is meaning (B), and he cites *Giles v. Randall* (1). The practical difference is pointedly illustrated by the fees of leading counsel in this case. The plaintiffs' solicitors consulted one leading counsel, who advised a settlement at £1,900. The fee of that counsel was £13 2s. The plaintiffs were not satisfied and instructed their solicitors to consult another leading counsel. He advised a settlement at £2,500, and his fee was £11. Armed with the second opinion, a settlement was reached at the sum of £2,250. On a taxation according to meaning (A), the fees of both leading counsel would be allowed, but on a taxation on meaning (B) the fee of one leading counsel only would be allowed, because the fee of a second leading counsel would be an unusual expense.

In my opinion, in R.S.C., Ord. 22, r. 14 (11), the words are used in meaning (A). The rule is designed to protect widows and children in accident cases by disentitling solicitors from deducting from the compensation a lump sum for their costs and by subjecting their claim for costs to taxation, *i.e.*, to an inquiry in every case as to the costs properly payable to them. If meaning (A) is given, that result is achieved, but, if meaning (B) is given, the effect of the sub-rule, especially the concluding words thereof, would mean that the solicitor would be deprived of costs properly payable to him. In the present case, for instance, the solicitors would have to pay the fee of £11 for the second leading counsel out of their own pockets although the expenditure had been authorised by the plaintiffs and proved, in fact, greatly to the benefit of the estate and the children. I reject an interpretation of the sub-rule which leads to such a result.

If I am right in thinking that in the sub-rule the words are used in meaning (A), it shows that it is a valid meaning to be attached to them in any legal document, and this enables me to distinguish *Giles v. Randall* (1). The court in that case recognised that meaning (A) was the ordinary meaning, but felt compelled to give the words the meaning (B) because that was the technical meaning, and where words in a legal document have a technical meaning, it is the technical meaning that should be received. Now that a rule of the Supreme Court has been made, in which are used the words in meaning (A), it follows that meaning, (A) at the present day is, not only the ordinary meaning, but also a valid technical meaning, and that there is no reason why, in construing a legal document, that meaning should not ordinarily be given. In the order as to costs in this case, therefore, there is no reason why I should not adopt meaning (A) when that appears to be the meaning intended by the parties, as I think it is. In view of this development, it may be that *Giles v. Randall* (1) would be decided differently at the present day.

At the instance of the parties and with their consent, I have seen the senior taxing master, and he tells me that the practice in cases under R.S.C., Ord. 22, r. 14, is to tax according to meaning (A), *i.e.*, to ascertain the costs properly payable by the client to the solicitor. In *Giles v. Randall* (1), it is to be noticed that the Court of Appeal were much influenced by the practice of the taxing

office. I would hesitate long before I disturbed the present practice. I decline to do so. I hold that the taxation of this bill by the senior taxing master of this court was on the correct principles, and I do not interfere with it. The result is, therefore, that the present taxation stands.

Application dismissed.

Solicitors: *Gregory, Rowcliffe & Co.* (for the plaintiffs); *Treasury Solicitor* (for the defendant).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

WICKS v. DIRECTOR OF PUBLIC PROSECUTIONS.

[HOUSE OF LORDS (Viscount Simon, Lord Thankerton, Lord Macmillan, Lord Wright, Lord Porter, Lord Simonds and Lord du Pareq), December, 12, 1946.]

Criminal Law—Offences under temporary statute—Offence committed during currency of statute—Prosecution and conviction after expiry—Effect of expiry on operation “as respects things previously done”—Emergency Powers (Defence) Act, 1939 (c. 62), s. 11 (3).

Statutes—Operation—Temporary statute—Expiry—Effect of expiry on operation “as respects things previously done.”

The appellant was convicted on an indictment which charged him with doing acts likely to assist the enemy with intent to assist the enemy, contrary to the Defence (General) Regulations, 1939, reg. 2A, made under the Emergency Powers (Defence) Act, 1939, s. 1 (1). The acts with which the indictment charged the appellant were all committed between April, 1943, and January, 1944, and the trial took place on May 27 and 28, 1946. The Emergency Powers (Defence) Act, 1939, after numerous extensions, expired on Feb. 24, 1946. Section 11 (3) of the Act provided: “The expiry of this Act shall not affect the operation thereof as respects things previously done or omitted to be done.” The question for decision, which turned entirely on the construction which ought to be placed on that subsection, was whether the subsection authorised the conviction of the appellant notwithstanding the previous expiry of the Act:—

HELD: giving the words of s. 11 (3) their natural meaning, it was clear that Parliament did not intend the subsection to expire with the rest of the Act and that its presence in the Act preserved the right to prosecute after the date of expiry.

Per cur.: when a statute enables an authority to make regulations, a regulation which is validly made under the Act, *i.e.*, which is *intra vires* of the regulation-making authority, should be regarded as though it were itself an enactment: *Willingdale v. Norris* (1) *approved*.

Decision of the Court of Criminal Appeal, [1946] 2 All E.R. 529, affirmed

[AS TO OPERATION OF TEMPORARY STATUTES, see HALSBURY, Hailsham Edn., Vol. 31, pp. 511-513, paras. 664-668; and FOR CASES, see DIGEST, Vol. 42, pp. 714, 715, Nos. 1335-1344.]

Case referred to:

(1) *Willingdale v. Norris*, [1909] 1 K.B. 57; 78 L.J.K.B. 69; 99 L.T. 830; 72 J.P. 495; 14 Digest 203, 1826.

APPEAL from a decision of the Court of Criminal Appeal (LORD GODDARD, C.J., SINGLETON, DENNING, LYNSKEY and SELLARS, JJ.), reported *sub. nom. R. v. Wicks*, [1946] 2 All E.R. 529, dismissing an appeal against a conviction of the appellant before CROOM-JOHNSON, J., at the Central Criminal Court of doing acts likely to assist the enemy with intent to assist the enemy, contrary to the Defence (General) Regulations, 1939, reg. 2A, and the Emergency Powers (Defence) Act, 1939, s. 3 (1) (b). The facts appear in the headnote and in the opinion of VISCOUNT SIMON.

Melford Stevenson, K.C., and *Sir John Cameron* for the appellant.

The Solicitor-General (Sir Frank Soskice, K.C.), *Gerald Howard* and *J. S. Bass* for the Crown.

VISCOUNT SIMON: My Lords, the Solicitor-General, in the exercise of the discretion which is vested in him under the Law Officers Act, 1944, when the

Attorney-General is not available, has certified that the decision of the Court of Criminal Appeal, dated Nov. 4, 1946, in this matter involves a point of law of exceptional public importance, and that, in his opinion, it is desirable in the public interest that a further appeal should be brought. Accordingly, the House is called on to deal with the appeal.

Having heard the arguments for the appellant, my Lords, I have formed the clear conclusion that the decision of the Court of Criminal Appeal is right and that the appeal should be dismissed. The point involved can be stated in very few words. The appellant, who is a British subject, was convicted at the Central Criminal Court before CROOM-JOHNSON, J., sitting with a jury on an indictment containing a number of counts charging him with doing acts (such as entering the service of an enemy broadcasting station and preparing propaganda for enemy broadcasts) on various dates between April, 1943, and January, 1944—acts which were “likely to assist the enemy” and were done “with intent to assist the enemy,” contrary to reg. 2A of the Defence (General) Regulations, 1939, as applied to British subjects abroad by s. 3 (1) (b) of the Emergency Powers (Defence) Act, 1939.

There is, of course, no doubt that, when a statute like the Emergency Powers (Defence) Act, 1939, enables an authority to make regulations, a regulation which is validly made under the Act, *i.e.*, which is *intra vires* of the regulation-making authority, should be regarded as though it were itself an enactment. As the Court of Criminal Appeal has pointed out in its judgment, that was decided by the Divisional Court in *Willingdale v. Norris* (1), and it appears to me that that decision is perfectly correct. Consequently, the charge against the appellant here was, in effect, that he had committed crimes defined or contained in the Act of Parliament.

At the date when these acts were committed, the regulation to which I have referred was in force, and if the appellant had been prosecuted immediately afterwards—he may not have been in England at that time, but if he had been prosecuted immediately afterwards—then the validity of his conviction could not be open to any challenge at all. But the Act of 1939 was a temporary Act, and after various extensions it expired on Feb. 24, 1946. The trial of the appellant, however, only took place in May, 1946, and he was convicted and sentenced to 4 years’ penal servitude on May 28.

The question raised by this appeal, therefore, is simply this. Is a man entitled to be acquitted when he is proved to have broken a defence regulation at a time when that regulation was in operation because his trial and conviction take place after the regulation has expired? As was pointed out in the course of the argument, very strange results would follow if that were so. Supposing the case were one in which a man broke the regulation a week or two before it expired, then, on the argument of the appellant, as those appearing for him have frankly admitted, he could never be punished, unless, indeed, the trial was carried to the point of conviction before the regulation itself expired. One could put a more extreme case. The authorities may have been so prompt as to start the prosecution before the regulation had expired, but, if the trial were not over, then at the very moment when the regulation expired the trial would necessarily cease and the man would go free. In so far as one is entitled to consider the reasonableness of the contentions put forward by the appellant, obviously those results would be far from reasonable, but, of course, the question is not or, at any rate, not mainly, whether such a result would be reasonable or such as one should expect. The question is a pure question of the interpretation of sub-s. (3) of s. 11 of the Emergency Powers (Defence) Act, 1939.

It is pointed out that s. 38 (2) of the Interpretation Act, 1889, does not apply to the case of a statute or a regulation which has the power of a statute when it expires by effluxion of time. The sub-section is addressed to Acts which have been repealed, and not to Acts which expire owing to their purely temporary validity. It is, I apprehend, with this distinction in mind, which is certainly well-known to the authorities who frame statutes, that the draughtsman inserted the words used in s. 11 of the Emergency Powers (Defence) Act, 1939. Section 11 begins with the words “Subject to the provisions of this section,” which warn anybody that the provisions which follow are not absolute, but are subject to qualification. It is, therefore, not the case that, at the date chosen, the Act expires in every sense. There is a qualification. Without discussing whether the

intermediate words are qualifications, sub-s. (3), in my opinion, is plainly a qualification. It begins with the phrase "The expiry of this Act"—a noun which corresponds with the verb "expire"—"shall not affect the operation thereof as respects things previously done or omitted to be done." Counsel for the appellant have, therefore, been driven to argue ingeniously, but to admit candidly, that the contention which they are putting forward is that the phrase "thing previously done" does not cover offences previously committed. In my opinion, that view cannot be correct. It is clear that Parliament did not intend sub-s. (3) to expire with the rest of the Act, and that its presence in the statute preserves the right to prosecute after the date of expiry. This destroys the validity of the appellant's argument altogether.

The Court of Criminal Appeal, after a most careful examination of the whole matter, came to this conclusion—and I am now quoting the words of LORD GODDARD, C.J. ([1946] 2 All E.R. 529, at p. 534):

In our opinion, giving the words of the subsection their natural meaning, there is neither doubt nor ambiguity, and the result would appear to be both just and reasonable.

I think your Lordships unanimously agree with the conclusion of the Court of Criminal Appeal, and I, therefore, move the House that this appeal be dismissed.

LORD THANKERTON: My Lords, I concur in the speech which has just been delivered by my noble and learned friend on the Woolsack. I would like to add that the intention of Parliament is not to be judged by what is in its mind, but by its expression of that mind in the statute itself. The question here arises on the construction of s. 11 (3) of the Act of 1939. As regards the proper construction of that statutory provision I have found no difficulty, and I will only add that I agree with the words of LORD GODDARD, C.J., which have been quoted by my noble and learned friend, VISCOUNT SIMON.

LORD MACMILLAN: My Lords, I also agree.

LORD WRIGHT: My Lords, I also agree, and have nothing to add.

LORD PORTER: My Lords, I concur.

LORD SIMONDS: My Lords, I also concur.

LORD DU PARCQ: My Lords, I concur.

Appeal dismissed.

Solicitors: *Ludlow & Co.* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

Re DOUGHTY, BURRIDGE AND ANOTHER v. DOUGHTY AND OTHERS

[COURT OF APPEAL (Morton, Somervell and Cohen, L.JJ.), December 12, 13, 1946.]

Settlement—Tenant for life and remaindermen—Capital or income—Dividends of company paid out of capital profits.

Wills—Settlement—Tenant for life and remaindermen—Capital or income—Trust funds including shares in company—Dividends paid out of capital profits.

By his will the testator (who died on Mar. 7, 1941) settled his residuary estate which included shares in a company. Under its articles the company had power to "pass a resolution . . . that any surplus capital moneys or capital profits . . . shall be divided amongst the members of the company by way of capital distribution." In Feb., 1946, the company passed a resolution declaring "out of realised capital profits . . . an additional dividend or distribution" for the year ended Dec. 31, 1945. As a result of this resolution, dividends were sent to the executors of the will with a notice stating: "As this is a distribution out of capital profits no income tax is deducted and it is not liable to be included in the taxation returns of the recipients."

HELD: on their true construction, the words "any surplus capital moneys or capital profits . . . shall be divided amongst the members of the company by way of capital distribution," merely authorised distribution of capital profits in such a way as not to attract income tax and did not affect the character of the sums received between tenant for life and remainderman, and, as between the persons entitled thereto the sums were income, and not capital, and were payable to the tenant for life.

Re Bates, Mountain v. Bates (2) approved.

Hill v. Permanent Trustee Co., of New South Wales (4) applied.

Re Ward's Will Trusts (1) doubted and distinguished.

Decision of ROXBURGH, J. ([1946] 2 All E.R. 341) reversed.

[AS TO CAPITAL AND INCOME, see HALSBURY, Hailsham Edn., Vol. 29, pp. 647-650, paras. 929, 930; and FOR CASES, see DIGEST, Vol. 40, pp. 662-666, Nos. 1999-2042, and Supplement.]

Cases referred to:

- (1) *Re Ward's Will Trusts, Ringland v. Ward*, [1936] 2 All E.R. 773; [1936] Ch. 704; 105 L.J.Ch. 315; 155 L.T. 346; Digest Supp.
- (2) *Re Bates, Mountain v. Bates*, [1928] Ch. 682; 97 L.J.Ch. 240; 139 L.T. 162; Digest Supp.
- (3) *Bouch v. Sproule* (1887), 12 App. Cas. 385; 56 L.J.Ch. 1037; 57 L.T. 345; 40 Digest 665, 2035.
- (4) *Hill (R.A.) v. Permanent Trustee Co. of New South Wales, Ltd.*, [1930] A.C. 720; 144 L.T. 65; *sub nom. Re Hill (Richard)*, *Hill v. Permanent Trustee Co. of New South Wales*, 99 L.J.P.C. 191.

APPEAL FROM ROXBURGH, J., reported [1946] 2 All E.R. 341.

The residuary estate of a testator, which had been settled by his will, included shares in a certain company. The testator died on Mar. 7, 1941, and in 1946 the company declared and distributed "an additional dividend or distribution" out of capital profits in respect of the year ended Dec. 31, 1945. The resolution declaring this additional dividend was stated to be made pursuant to an article of the company which enabled the company to divide among its members "by way of capital distribution any surplus capital moneys or capital profits." ROXBURGH, J., held that the company had purported, by the resolution in question, to make a capital distribution out of realised profits, and that the additional dividends were accretions to the capital of the trust funds. The tenant for life (the testators' widow) appealed. The facts appear in the judgment of COHEN, L.J.

J. Neville Gray, K.C., and *A. C. Nesbitt* for the tenant for life.

H. O. Danckwerts for infant remaindermen.

Harman, K.C., and *Wilfrid Hunt* for persons entitled in remainder.

Cecil Turner for the trustees.

COHEN, L.J.: The question raised by this summons is whether certain moneys received by the executors in respect of shares in Consolidated Fisheries, Ltd., which form part of the testator's estate, were payable to the tenant for life under the will of the testator or must be retained by the executors as part of the capital of the estate. The tenant for life is tenant for life of the income of the residuary estate and after her death, in the events which have happened, the trustees will hold the residuary estate as to one-fourth part thereof upon trust to divide the income thereof among the defendants for whom Mr. Danckwerts appears, during their respective lives in equal shares, and, after the death of each of such defendants, to divide among his issue the capital of the share, the income of which had been given to him during his life. The testator made two codicils to his will, the second codicil after the adoption of art. 104A of the articles of association of the company to which I shall refer hereafter. By each of these codicils he confirmed his will except as in the codicil mentioned. He died on Mar. 7, 1941.

Under art. 41 of the articles of association the company had power to increase its capital. By art. 101 there were the usual powers to the directors before recommending dividend to create reserve funds. Art. 102 is in the following terms:

The company shall in respect of the calendar year 1937 and in respect of each subsequent calendar year pay out of the profits of the company or out of moneys standing to the credit of any reserve fund or funds available for the purpose: (a) To the management shareholders by way of a non-cumulative dividend or distribution for such

year in priority to any payment to the ordinary shareholders such sum or sums as after the appropriate deduction of income tax (if any) at the standard rate current at the time of payment will leave or amount to £14,865 per annum such payment to be divided rateably in proportion to the management shares held by such shareholders respectively. (b) Subject as aforesaid: To the ordinary shareholders by way of a non-cumulative dividend or distribution for such year such sum or sums as after the appropriate deduction of income tax (if any) at the like standard rate will leave or amount to £4,955 per annum such sum to be paid at such time or times as the directors may determine and to be divided rateably in proportion to the ordinary shares held by such ordinary shareholders respectively.

It is to be observed that the sum distributable among the management shareholders is three times that distributable among the ordinary shareholders. The article goes on:

Subject as aforesaid any further profits which shall hereafter be determined to be distributed shall be divisible as to three-fourths thereof among the management shareholders rateably in proportion to the management shares held by them respectively and as to one fourth thereof among the ordinary shareholders rateably in proportion to the number of ordinary shares held by them respectively.

Article 104 contains directions that "no larger dividend... shall be declared or made than is recommended by the directors" and:

... no dividend or distribution shall be payable except out of the profits of the company whenever earned whether standing to the credit of the profit and loss account or any reserve funds available for the purposes of such dividend or distribution.

Then comes art. 104A, on which was based most of the argument addressed to us. The first paragraph of art. 104A provides for dividends *in specie* and, in particular, for dividends by way of capitalisation of profits, *i.e.*, by the distribution of paid-up shares, debentures or debenture stock of the company. The second paragraph, which is the paragraph under which the distributions now in question were made, is in the following terms:

The company in general meeting or the directors for the purpose of carrying out the obligations of the company under art. 102 may from time to time and at any time pass a resolution to the effect that any surplus capital moneys or capital profits in the hands of the company whether arising from the realisation of capital assets of the company or received in respect of any capital assets or represented by shares or other property received as consideration or part consideration for the sale or realisation of any capital assets of the company or any investments representing any such surplus moneys as aforesaid shall be divided amongst the members of the company by way of capital distribution in proportion to their rights and interests in the distributable profits of the company and any such resolution shall be effective and shall be carried into effect by the directors accordingly.

Acting on the powers conferred by that paragraph of the article, the company in general meeting on February 26, 1946, passed a resolution in the following terms:

That pursuant to cll. 102 and 104A of the company's articles of association, there be and there is hereby declared out of realised capital profits for payment forthwith and to be divided amongst the members in proportion to their rights and interests in the distributable profits of the company, an additional dividend or distribution to management and ordinary shareholders of £99,100 in respect of the year ended Dec. 31, 1945.

The company acted on that resolution and dividends were sent to the executors in whose names the shares in question were registered notifying them of the amount that they were entitled to receive. I will read one of the notices which relates to the 1,000 ordinary shares registered in the name of the plaintiff, Mr. Burridge.:

I have to inform you that at the annual general meeting of the company held this day, an additional dividend or distribution in respect of the year ended Dec. 31, 1945, was declared out of the realised capital profits of the company, payable forthwith, the sum so payable to the ordinary shareholders being £24,775. The amount payable to you in respect of the 1,000 ordinary shares registered in your name is £250 a cheque for which amount is inclosed herewith. As this is a distribution out of capital profits no income tax is deducted and it is not liable to be included in the taxation returns of the recipients.

Similar amounts were received in respect of the other holdings forming part of the estate, £3,159 being received in respect of the 12,636 ordinary shares and £12,222 *6s. 8d.* in respect of the 148 management shares.

Having received these sums the executors issued the summons in this matter to determine whether the sums in question should be treated as income of the residuary trust fund or as an accretion to the capital of the residuary trust fund. That summons came before ROXBURGH, J., and on July 11, 1946, he came to the conclusion that the whole of the amounts in question ought to be treated as capital. He arrived, I think, at that conclusion mainly as a result of the construction he placed on the second paragraph of art. 104A of the articles of association of the company. He construed it in the same sense as an article which fell to be considered by CLAUSON, J., in *Re Ward's Will Trusts* (1). ROXBURGH, J., considered himself bound to follow the decision of CLAUSON, J., in that case.

Before I turn to the authorities it will, I think, be convenient to consider how I should construe this article apart from authority, bearing in mind certain general principles and, in particular, the principle that a company, while a going concern, cannot distribute capital among its shareholders except by way of return of capital with the sanction required by the law. It can, of course, distribute capital profits, which is quite a different matter, but it cannot return any paid-up capital to its shareholders except by sanction of the court or in some other way expressly authorised by the Act. With that preliminary observation, I revert to the paragraph which authorises the company to :

... pass a resolution... that any surplus capital moneys or capital profits... arising [as therein mentioned] shall be divided amongst the members of the company by way of capital distribution.

Those are the key words on which Mr. Harman fastened in the course of his argument. He said that, on their true construction, those words had exactly the same effect as if they read "shall be divided amongst the members of the company so as to be received by them as capital," but it seems to me that that is not their natural meaning. In my view, they were merely a repetition, *ex abundanti cautela*, of the direction that the distribution was to be made out of capital moneys or capital profits.

Adopting this construction, the case before us is, in my view, indistinguishable in principle from *Re Bates, Mountain v. Bates* (2), a decision of EVE, J. In that case there were no special provisions such as are found in the articles we have to consider, but an article in its amended form provided that no dividends should be paid except out of the profits of the company as shown by the balance sheet. That article did not refer in terms to capital profits, but it was, in my view in wide enough terms to enable the company to distribute capital profits and the directors distributed a bonus which they described in these terms :

It must be clearly understood that this is neither a dividend nor a bonus, but is a capital distribution and therefore not liable to income tax or super tax.

The circumstances were very similar to those in the case before us, since the sum distributed represented the profits on the sale of certain steam trawlers which had previously been owned and operated by the company. EVE J., held that, the amount in question not having been capitalised by the issue of bonus shares increasing the total capital, the payments were income receivable by the tenant for life during her life. The nature of the fund was referred to by EVE, J. ([1928] Ch. 682, at pp. 687, 688) :

In this state of affairs it was a fund which the company could treat as available for dividend and could distribute as profits, or having regard to its power to increase capital could apply to that purpose by, for example, increasing the capital, declaring a bonus and at the same time allotting to each shareholder shares in the capital of the company paid up to an amount equivalent to his proportion of the bonus so declared. Unless and until the fund was in fact capitalised it retained its characteristics of a distributable profit, and on the authority of the passages which have been read from LORD HERSCHELL's speech in *Bouch v. Sproule* (3), the only method by which a company with power to increase its capital can capitalise such a fund is to increase its capital by an amount equivalent to the sum sought to be capitalised.

Re Bates (2) was considered by the Privy Council in *R. A. Hill and Others v. Permanent Trustee Co. of New South Wales* (4) judgment in which was delivered by LORD RUSSELL OF KILLOWEN. In that case trustees had received a sum of 9s. 6d. in respect of each fully-paid share. These sums were described by the company in the circular letter with which they were distributed as follows. The secretary said ([1930] A.C. 720, at p. 727) :

I have been instructed by the directors to advise that at a meeting held on the 11th instant it was decided to pay out of the profits of the company a cash dividend of 9s. 6d. in respect of each fully-paid share in the company... I have also been instructed to state that the dividend is being paid out of the profits arising from the sale of breeding stock, being assets of the company not required for purposes of resale at a profit, and that it is free of income tax.

It was held that the dividend must be treated as income of the trust fund.

A In the course of his judgment LORD RUSSELL OF KILLOWEN laid down five principles which I read as intended to be statements of general principles and not confined to that particular case. They are as follows ([1930] A.C. 720 at pp. 730-732):

B (1) A limited company when it parts with moneys available for distribution among its shareholders is not concerned with the fate of those moneys in the hands of any shareholder. The company does not know and does not care whether a shareholder is a trustee of his shares or not. It is of no concern to a company which is parting with moneys to a shareholder whether that shareholder (if he be a trustee) will hold them as trustee for A. absolutely or as trustee for A. for life only. (2) A limited company not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorised reduction of capital. Any other payment made by it by means of which it parts with moneys to its shareholders must and can only be made by way of dividing profits. Whether the payment is called "dividend" or "bonus," or any other name, it still must remain a payment on division of profits.

C (3) Moneys so paid to a shareholder will (if he be a trustee) *prima facie* belong to the person beneficially entitled to the income of the trust estate. If such moneys or any part thereof are to be treated as part of the *corpus* of the trust estate there must be some provision in the trust deed which brings about that result. No statement by the company or its officers that moneys which are being paid away to shareholders out of profits are capital, or are to be treated as capital, can have any effect upon the rights of the beneficiaries under a trust instrument which comprises shares in the company.

D I pause there to say that if *Re Ward's Will Trusts* (1) can be taken out of that statement of principle it must be on the ground that there was in that case a provision in the articles of the company and not merely a statement by the company or its officers. LORD RUSSELL went on:

E (4) Other considerations arise when a limited company with power to increase its capital and possessing a fund of undivided profits, so deals with it that no part of it leaves the possession of the company, but the whole is applied in paying up new shares which are issued and allotted proportionately to the shareholders, who would have been entitled to receive the fund had it been, in fact, divided and paid away as dividend.

F (5) The result of such a dealing is obviously wholly different from the result of paying away the profits to the shareholders. In the latter case the amount of cash distributed disappears on both sides of the company's balance sheet. It is lost to the company. The fund of undistributed profits which has been divided ceases to figure among the company's liabilities; the cash necessary to provide the dividend is raised and paid away, the company's assets being reduced by that amount. In the former case the assets of the company remain undiminished...

LORD RUSSELL then expressly approved the decision in *Re Bates* (2). With these statements and this approval I respectfully agree.

G It seems to me that on its true construction the article we have to consider and the resolution passed thereunder merely authorise distribution of capital profits in such a way that they cannot attract income tax, and do not purport to deal with the question of their character as between tenant for life and remainderman. The moneys were clearly not capitalised under the first paragraph of art. 104A and I can find nothing in the will directing that they are to be treated as part of the *corpus* of the estate. Accordingly, they must be treated as income and are payable to the tenant for life.

H I turn now to *Re Ward's Trust* (1). The relevant article in that case was in the following terms ([1936] 2 All E.R. 773, at p. 774):

The company in general meeting may from time to time and at any time resolve that any surplus moneys in the hands of the company representing the moneys received or recovered in respect of or arising from the realisation of any capital assets of the company or any investments... representing the same instead of being applied in the purchase of other capital assets or for other capital purposes be distributed amongst the members on the footing that they receive the same as capital and in the shares and proportions in which they would have been entitled to receive the same if it had been distributed by way of dividend.

The will directed payment to the tenant for life of the "dividends, interest and annual income" from the shares in question, and CLAUSON, J. basing himself on the provision in the article that the moneys distributed thereunder were to be received by the shareholders as capital, came to the conclusion that they could not be "dividends, interest, or annual income" within the meaning of the will ([1936] 2 All E.R. 773 at pp. 778-779). I feel great doubt whether the wording of the article can do more than make it clear that any amount distributed thereunder was free of tax or whether it was intended to have any bearing on the ultimate destination in the hands of trustees of the moneys distributed pursuant thereto. I do not think, therefore, that the article justified the conclusion which the judge reached, but, in any event, it is distinguishable from the article before us. For these reasons I have come to the conclusion that the appeal must be allowed.

MORTON L.J. : I agree. The sums in question must be either part of "the residuary trust fund" within the meaning of the will, or part of "the income therefrom" within the meaning of that document. I propose to consider : (i) Are these sums income in the ordinary meaning of that word, or are they capital ? (ii) Is there any reason why the court should give a special meaning to the word "income" in the will ?

These sums were dividends. They were distributions of profits, although it is true they were distributions of profits sometimes described as capital profits, *i.e.* profits resulting from realisation of capital assets. As EVE J. said ([1928] 1 Ch. 682 at p. 687) in *Re Bates* (2) :

... the mere impressing of these distributions with the appellation of "capital distributions" cannot in my opinion determine their true character. One must inquire a little closer for the purpose of ascertaining whether they were in fact distributions of capital or distributions of something which, although in one sense capital, in that it originated by the realisation of assets and not from the ordinary income of the company's business, could not properly be regarded as capital for all purposes.

It seems to me that from *Re Bates* (2) and from *Hill v. Permanent Trustee Co. of New South Wales Ltd.* (4) one must reach the conclusion that these payments are not capital but income, as between the persons entitled thereto, unless the testator has used the word "income" in some special sense in his will. In my view, we cannot find that he has done so. I am not going to assume that in 1940, when the testator confirmed his will, he had in mind the precise terms of art. 104A and the fact that there might be payments to the trustee described as being "by way of capital distribution." Further, I think that, if the testator had thought of this article and had intended that such payments should be treated as capital of his estate and not as income, he would have inserted a special provision in the codicil to that effect.

With regard to *Re Ward's Will Trusts* (1), I do not think the decision in that case was justified, although the wording of the relevant art. 67 (A) was not identical with the wording of art. 104A in the present case. In my view, the sum in question in *Ward's* case (1) came within the words "dividends, interest and annual income to arise therefrom" in the ordinary meaning of those words, and I do not think that the circumstances justified the judge in giving them another meaning. It is likely that the testator in that case had not art. 67 (A) in his mind when he made his will. However that may be, I agree that the present appeal should be allowed.

SOMERVELL, L.J. : Before the decisions which have been cited in this case, it seems to me, a strong argument could have been put forward for the view that, when you find the word "income" in a will, it would not, *prima facie*, extend to sums which were not income under income tax law, but that principle was negatived in *Re Bates* (2) which has been approved by the decision of the Privy Council in *Hill v. Permanent Trustee Co. of New South Wales* (4). In the light of those authorities, the position can be stated quite shortly. Leaving aside *Re Ward's Will Trusts* (1), the position to be gathered from those cases is that where capital profits are distributed by a company during the life of the tenant for life, they fall under the word "income" or similar words in the will in question although they are not subject to income tax in the hands of the recipient. I find great difficulty in reconciling *Re Ward's Will Trusts* (1) with that principle. The fact that there is an article providing a special procedure when capital profits are to be distributed does not seem to me to affect the principles as laid

down in the cases cited. I am not, of course, dealing with the issue of shares or securities on a capitalisation of profits, but with distributions of the same general character as that in question here. It may be that *Re Ward's Will Trusts* (1) can be distinguished, but I find great difficulty in reconciling it with the principles which have been laid down. I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Peacock & Goddard* (for the appellant); *Gregory, Rowcliffe & Co.*, agents for *Ponsonby, Carlile & Booths*, Oldham (for the respondents).

[Reported by R. L. ZIAR, Esq., Barrister-at-Law.]

APLEY ESTATES CO. AND OTHERS v. DE BERNALES AND OTHERS

B [COURT OF APPEAL (Morton, Somervell and Cohen, L.JJ.), November 29, 1946.]

Torts—Liability—Joint tortfeasors—Agreement not to sue one joint tortfeasor—operation as discharge of other tortfeasors.

C The plaintiffs brought an action against 35 defendants for conspiracy and certain joint torts alleged to have been committed in pursuance of that conspiracy. The plaintiffs came to a settlement with one of the defendants, the G.B. company, and an order was made by EVERSHERD, J., staying the proceedings and stating that the parties had agreed that, in consideration of a payment by the company to the plaintiffs of £25,000, "the plaintiffs . . . will not . . . sue or continue to sue the said defendants in respect of any of the matters the subject-matter of the said action . . . but this agreement shall not be construed or operate as a release of any cause of action of the plaintiffs or any of them against the defendants or any of them in the said action . . . and shall not prejudice or affect the rights of the plaintiffs therein to proceed with their claims therein against the defendants other than" the G.B. company.

D HELD: a covenant not to sue one of two or more joint tortfeasors does not operate as a release of the other joint tortfeasors, and, therefore, one of the other 34 defendants was not released from liability to the plaintiffs in respect of the torts in which he was alleged to be a joint tortfeasor with the G.B. company.

E *Duck v. Mayeu* (1) applied.

[EDITORIAL NOTE. It is worthy of note that the Court of Appeal proceeds on the basis that the Law Reform (Married Women & Tortfeasors) Act, 1935, has no retrospective effect, as, indeed, is clear from its terms. The question is left open whether, if the torts in question here had been committed after the Act had come into force, (i.e., after Nov. 1, 1935: see S. R. & O., 1935, No. 1016/L.13), the decision would have been different in any respect. In considering that question it would seem advisable to bear in mind the terms of s. 6 (1) (a) of the Act, which provides that a "judgment recovered against any tortfeasor liable in respect of . . . damage [suffered by any person as a result of a tort] shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage."

G AS TO LIABILITY OF JOINT TORTFEASORS, see HALSBURY, Hailsham Edn., Vol. 32, pp. 187-191, paras. 280-284, and Vol. 7, pp. 251, 252, paras. 345, 346; and AS TO CASES, see 42 DIGEST, p. 978, 89-94, and 12 DIGEST, pp. 510, 511, 4200-4220.]

Cases referred to:

- (1) *Duck v. Mayeu*, [1892] 2 Q.B. 511; 62 L.J.Q.B. 69; 67 L.T. 547; 57 J.P. 23; 12 Digest, 510, 4206.
- (2) *Cocke v. Jennor* (1614), Hob. 66; 80 E.R. 214; 43 Digest 375, 32.
- (3) *Hutton v. Eyre* (1815), 6 Taunt. 289; 1 Marsh 603; 16 R.R. 619; 128 E.R. 1046; 12 Digest, 511, 4218.
- (4) *Lacy v. Kinnaston* (1701) 3 Salk. 298; Holt, K.B. 178; 90 E.R. 996; 12 Mod. Rep. 548; 1 Ld. Raym. 688; 12 Digest, p. 498; 4076.

H APPEAL from a decision of EVERSHERD, J. The facts are set out in the judgment of MORTON, L.J.

G. O. Slade, K.C. and B. MacKenna for Mr. de Bernales and others.

D. L. Jenkins, K.C. and J. F. Bowyer for the Apley Estates Co. and others.

MORTON, L.J. : The plaintiffs, who number 309, sued Mr. Albo de Bernales and 34 other defendants, alleging that the defendants had conspired together and had committed certain joint torts in pursuance of that conspiracy. One of the defendants is a company called the Great Boulder Proprietary Gold Mines Ltd. The plaintiffs arrived at terms of settlement with that company, and, on Jan. 16, 1946, an order was made by EVERSHED, J., which, omitting the formal part, was in the following terms :

"... the plaintiffs and the said defendants [the Great Boulder Co.] by their counsel stating that they have agreed to the terms set forth in the schedule hereto and consenting to this order, this court doth order that all further proceedings in this action against the said defendants, the Great Boulder Proprietary Gold Mines Ltd, be stayed except for the purpose of carrying the said terms into effect for which purpose the parties are to be at liberty to apply.

The terms set out are :

(1) In consideration of the payment of £25,000 by the defendants, the great Boulder Proprietary Gold Mines Ltd., to Messrs Nordon & Co., the solicitors for the plaintiffs, for and on behalf of the plaintiffs in the above-mentioned action, the receipt whereof Messrs. Nordon & Co. hereby acknowledge, the plaintiffs in the said action will not nor will any of them sue or continue to sue the said defendants in respect of any of the matters the subject-matter of the said action... or in respect of their respective claims in respect of such matters or any of them, but this agreement shall not be construed or operate as a release of any cause of action of the plaintiffs or any of them against the defendants or any of them in the said action... and shall not prejudice or affect the rights of the plaintiffs therein to proceed with their claims therein against the defendants other than the defendants, the Great Boulder Proprietary Gold Mines Ltd. (2) The plaintiffs and the defendants, the Great Boulder Proprietary Gold Mines Ltd., hereby consent to the making of an order in the said action whereby all further proceedings therein against the said defendants be stayed upon the above terms, each party bearing his or her or their own costs.

So far as the wording of those terms of settlement is concerned, it is plain that the intention of the parties was that they should not operate as a release or extinguishment of the cause of action against the defendants, the Great Boulder Co., but that they should operate merely as an agreement not to sue Great Boulder. No doubt, the agreement was put in that form so that the other persons who are alleged to be joint tortfeasors should not be released from their liability to the plaintiffs. However, the defendant, Mr. de Bernales, in certain proceedings which I need not describe in detail contends that, whatever may have been the intention of the parties to that agreement, the effect of it in law is that he is released from any liability to the plaintiffs in respect of the alleged torts in which he was said to be a joint tortfeasor with the Great Boulder Co. The matter came before EVERSHED, J. who rejected that contention, and the defendant, Mr. de Bernales, appeals.

I find myself entirely in agreement both with the decision of EVERSHED, J. and with the reasons on which that decision was based. The law applicable here was stated by A. L. SMITH, L.J., in *Duck v. Mayeu* (1) ([1892] 2 Q.B. 511, at p. 513). In my view, it is unnecessary to go back to the earlier cases to which our attention was directed. He said :

It is, we think, clear law, that a release granted to one joint tortfeasor, or to one joint debtor, operates as a discharge of the other joint tortfeasor, or the other joint debtor, the reason being that the cause of action, which is one and indivisible, having been released, all persons otherwise liable thereto are consequently released. The case of *Cocke v. Jennor* (2) is distinct upon the point, and there are many subsequent cases to the same effect. It has also been held that a covenant not to sue one of two joint debtors does not operate as a release to the other joint debtor, *Hutton v. Eyre* (3), the reason being that the joint action is still alive. We have found no case in which it has been held that a covenant not to sue releases a joint tortfeasor; and in our judgment the principle upon which it has been held that such a covenant does not release a joint debtor applies to the case of a joint tortfeasor.

It is admitted that a mere agreement not to sue the Great Boulder Co. could not operate as a release to the defendant, Mr. de Bernales, but it is said that the true test is whether the plaintiffs could, after the order to which I have referred, recover judgment against the Great Boulder Co. and that, if they could not, that operates as a release to Mr. de Bernales. I do not take that view. The reason why a release granted to one joint tortfeasor releases other

joint tortfeasors is, as A. L. SMITH, L.J. said, that the cause of action is one and indivisible and it must necessarily follow that a release of that cause of action against one is a release of that cause of action against all. That is a rule which, in my judgment, should not be extended beyond the limits within which it has hitherto been confined. It is a rule which has often operated to work hardship and I, for one, am certainly not prepared to extend it in any way.

A The only ground on which counsel for Mr. de Bernales can rely is that the proceedings were stayed by the order to which I have referred. Owing to certain procedural difficulties it may be that the plaintiffs, after that order, could not successfully sue the Great Boulder Co., but, in my judgment, the imposition of that stay does not have the effect of extinguishing the cause of action against Great Boulder. Having regard to the reasons on which the rule is founded, I do not accept the argument that by reason of that order the cause of action against Mr. de Bernales is extinguished. Such a result would be entirely contrary to the intention of the parties to the agreement embodied in the order, but, if that were the result of the order as a matter of law, we should be bound to allow this appeal. In my judgment, however, that is not the result as a matter of law. Inability to recover judgment against one of two tortfeasors may be due to the fact that the cause of action against that tortfeasor is extinguished, but it may be also due to other reasons. It is a *non sequitur* to say: "A. cannot recover judgment against one joint tortfeasor, and, therefore, the cause of action is extinguished against all the joint tortfeasors." In my judgment, this appeal should be dismissed.

D SOMERVELL, L.J.: I agree. It may be worth mentioning at the outset that the joint torts relied on in the statement of claim occurred before 1935 and, therefore, the Law Reform (Married Women and Tortfeasors) Act, 1935, does not in any way come into the argument. I am not saying, nor, indeed, is it suggested, that that Act does affect the issues. It may or may not, but it seemed desirable to make clear that the torts complained of were committed before that alteration in the law was made.

E Counsel for Mr. de Bernales agreed that in the settlement which was come to between the plaintiffs and the Great Boulder Co., the plaintiffs had done their best to keep their rights against the other defendants alive. He submitted, however, that effect could not be given to that intention if, in the events which have happened, the defendants have precluded themselves from obtaining judgment against the defendants. He submitted as a proposition that an act discharges a tortfeasor from liability if it precludes the plaintiff from recovering judgment, but that is putting the issue the wrong way round. The question which has to be considered is: Under the terms of the agreement, or having regard to any act which may have been done—for instance, taking out money which has been paid into court—has the plaintiff discharged the cause of action which he previously possessed, bearing in mind, of course, the principle, which has been already stated by Morton, L.J., that the cause of action against joint tortfeasors is one and indivisible? For that proposition counsel for Mr. de Bernales relied on a statement which is in a note to *Lacy v. Kinnaston* (4) (see 3 Salkeld's Reports 298). In that note it is said that where there are two joint tortfeasors and one of them has entered into a covenant with the plaintiff under which the plaintiff covenants never to sue him, that covenant could not be pleaded in bar if the plaintiff sought to take proceedings against both tortfeasors. The only course would be for the action to proceed and for the covenantee, either in that action or, possibly, and, I think, more probably, by bringing an action subsequently, to sue on the covenant for damages. I do not think it follows that under the procedure in force at present it might not be a possible view that the covenantee could obtain an injunction against the plaintiff. I express no opinion on that, because it seems to me that this question cannot fall to be determined according to whether, under the rules of procedure which may from time to time be in force, and according also to what may have happened between the parties, a plaintiff has put himself in a position in which the courts would not allow him to proceed to judgment. In my opinion, the court must direct its mind to what has taken place with regard to the tortfeasor with whom the covenant has been made. Doing that in the present case, it seems to me clear that under the agreement made with the Great Boulder Co. the plaintiffs have released their cause of action. They have not in the technical sense discharged the Great Boulder Co.,

and, therefore, they are free to proceed with their cause of action against the other defendants. I agree that the appeal should be dismissed.

COHEN, L.J. : I agree so entirely with what has been said by my brethren and by the learned judge in the court below that I do not desire to add any observations of my own.

Appeal dismissed with costs.

Solicitors : *Birkbeck, Julius, Edwards & Coburn* (for the defendants); *A Nordon & Co.* (for the plaintiffs).

[*Reported by R. L. ZIAR, ESQ., Barrister-at-Law.*]

SMITH v. POULTER

[KING'S BENCH DIVISION (Denning, J.), November 25, 1946.]

Landlord and Tenant—Rent restriction—Recovery of possession—Procedure—County court to be preferred to High Court—Landlord electing to proceed in High Court—Need for court to be informed of facts—Rent in arrear—Reasonableness of order for possession—Duty of Court—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3.

The provision in the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 that, even though some rent is in arrear and unpaid, the court has no power to make an order for possession of a dwelling-house unless the court considers it reasonable to do so, limits the jurisdiction of the court, with the result that, in any case where there is reason to think the house is within the Rent Restrictions Acts, it is the duty of the court to see whether the conditions required by the Acts are satisfied, even though not pleaded or raised by the tenant.

In the case of houses within the Rent Restrictions Acts, the procedure in the county court is better suited to carry out the intention of the legislature than the procedure in the High Court. If a landlord chooses to proceed in the High Court, notwithstanding the fact that the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 17, discourages such a course by disentitling him to any costs, the High Court should be informed of the facts so that it may be able to act accordingly. It is desirable, therefore, that in actions for possession of a dwelling-house the endorsement of the writ should state, either the reason why the house is not within the Rent Restrictions Acts, or, if it is within the Acts, what is the ground on which possession is sought.

[AS TO JURISDICTION IN ACTIONS FOR RECOVERY OF POSSESSION OF RENT CONTROLLED PREMISES, see HALSBURY, Hailsham Edn., Vol. 20, p. 335, para. 402; and FOR CASES, see DIGEST, Vol. 31, pp. 584, 585, Nos. 7331-7348.]

Cases referred to :

- (1) *Barton v. Finchman*, [1921] 2 K.B. 291; 90 L.J.K.B. 451; 124 L.T. 495; 85 J.P. 145; 31 Digest 579, 7280.
- (2) *Salter v. Lask*, [1924] 1 K.B. 754; 93 L.J.K.B. 685; 130 L.T. 323; 31 Digest 577, 7263.
- (3) *Davies v. Warwick*, [1943] 1 All E.R. 309; [1943] 1 K.B. 329; 112 L.J.K.B. 245; 169 L.T. 130; Digest Supp.

APPEAL by the tenant from the refusal of a master to set aside a judgment by default in favour of the landlord for possession, arrears of rent and mesne profits. The facts appear in the judgment.

Claude Duveen for the landlord.

The tenant appeared in person.

DENNING, J. : The defendant, who was the tenant of an unfurnished house protected by the Rent Restrictions Acts, paid no rent to the landlord after Apr. 22, 1946, giving as his reason that, as the landlord did not pay the tax on the house, the Inland Revenue demanded payment from him, which meant that he had to save up his rent weekly to pay the Inland Revenue the sum due. The landlord said that he did not pay the tax because the tenant did not pay the rent.

I will not stay to consider the merits of that dispute. I am only concerned at present with what took place in consequence of it. The landlord served notice to quit, claiming possession, arrears of rent, and mesne profits. As the tenant did not formally "enter an appearance"—he has said that he did not understand what was meant by "entering an appearance"—the landlord signed judgment for possession, arrears of rent and mesne profits, and costs, and then took out a summons under the Courts (Emergency Powers) Act for leave to proceed.

A That summons was served on the tenant. An application on behalf of the tenant was made to the master to set aside the judgment, and an affidavit was filed claiming the protection of the Rent Restrictions Acts. That application was refused. The landlord, having been given leave to proceed, gave notice of the proceedings to the tenant, and applied for, and was given, leave to enforce the judgment by writ of possession. The tenant appealed against the refusal of the master to set aside that judgment.

B In my opinion, the judgment was wrong for two reasons: (i) When a house is one to which the Rent Restrictions Acts apply, then under s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, even though some rent is in arrear and unpaid, the court has no power to make an order or judgment for possession "unless the court considers it reasonable" to do so. That provision limits the jurisdiction of the court, with the result that in any case where there is reason to think that the house is within the Acts, it is the duty of the court to see

C whether the conditions required by the Act are satisfied, even though not pleaded or raised by the tenant: *Barton v. Fincham* (1), *Salter v. Lask* (2) and *Davies v. Warwick* (3). That was not done in this case before judgment was signed. The subsequent applications under the Courts (Emergency Powers) Act and R.S.C. Ord. 47, r. 1, do not touch the point, because they proceed on the assumption that the judgment was valid. (ii) Under s. 17 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, if a person takes proceedings under the

D Rent Restriction Acts in the High Court which could have been taken in the county court, he is not entitled to any costs. Notwithstanding that enactment, the judgment ordered the tenant to pay costs.

In these circumstances I allow the appeal and set the judgment aside. No costs will be awarded to the landlord.

E I desire to draw attention to the following points: (i) In the case of houses within the Rent Restrictions Acts, the procedure in the county court is better suited to carry out the intention of the legislature than the procedure in the High Court. In the county court the tenant receives a summons to appear at the court on a named day, and on that day the judge inquires into the case to see whether the conditions of the Act are satisfied before he makes an order for possession. In the High Court the tenant receives a writ commanding him to

F "enter an appearance." If he fails to do so, as he may for a number of reasons, then judgment is entered against him automatically without any inquiry whether the conditions of the Act are satisfied, and it may be a judgment which the court has no jurisdiction to give, either in respect of possession or costs. (ii) In cases under the Rent Restrictions Acts the legislature has sought to discourage proceedings in the High Court by disentitling the plaintiff to any costs. If a plaintiff chooses to proceed in the High Court notwithstanding the discouragement, the High Court should be informed of the facts so that it may be able to act accordingly. It is desirable, therefore, that, in actions for possession of a dwelling-house, the endorsement of the writ should state either the reason why the house is not within the Rent Restrictions Acts or, if it is within the Rent Restrictions Acts, what is the ground on which possession is sought.

G
Appeal allowed. Case remitted to Watford County Court.

H Solicitors: *Dixon, Hunt & Tayler* (for the landlord).

[Reported by B. ASHKENAZI, Esq., Barrister-at-Law.]

NEWCASTLE-UNDER-LYME CORPORATION v. WOLSTANTON LTD.

[COURT OF APPEAL (Morton, Somervell and Cohen, L.JJ.), December 5, 6, 9, 10, 11, 12, 1946, January 21, 1947.]

Gas—Local authority owning gas pipes laid under public highways by virtue of statutory powers—Right to subjacent support—Damage to pipes from subsidence of surface land caused by mining operations—Right of authority to damages—Gasworks Clauses Act, 1847 (c. 15), s. 6—Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883 (c. 37), s. 4.

Newcastle-under-Lyme corporation were the gas undertakers for the area covered by their borough, and their gas mains had been laid pursuant to successive local Acts embodying s. 6 of the Gasworks Clauses Act, 1847, which provides: "The undertakers . . . may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act . . . and lay down and place within the same limits, pipes, conduits, service pipes, and other works . . . and they may . . . do all other acts which the undertakers shall from time to time deem necessary for supplying gas to the inhabitants of the district included within the said limits . . ." The defendant company mined certain seams of iron and coal and in the course of their workings let down the surface of the soil and damaged some of the corporation's gas mains. In an action by the corporation against the defendant company for damages in respect of the said damage:—

HELD: (i) Section 6 of the Gasworks Clauses Act, 1847, did not confer on the corporation any legal or equitable right in the soil which surrounded the gas mains, but only a right to possession of the gas mains and the cavity filled by them.

(ii) the corporation never acquired any right of support against the defendant company except the implied right arising from the exercise of the corporation's statutory privilege and founded on the principle that when the legislature gives power to do something the execution of which requires subjacent support from land the persons who do the act acquire such a right to support as against the landowner: see *Normanton Gas Co. v. Pope & Pearson, Ltd.* (3); but that implied right was swept away by s. 4 of the Public Health Act, 1875, (Support of Sewers) Amendment Act, 1883, and the corporation had no right to support for their gas mains whether laid before or after 1883.

(iii) the corporation had failed to prove that, at the passing of the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883, no compensation was recoverable in respect of the right to support of pipes laid before 1883, and so had not satisfied the condition for the preservation of such right in the second part of s. 5 of the Act.

(iv) there was nothing in s. 4 of the Act of 1883 which limited the operation of that section to land within 40 yards from the gas mains, and, therefore, there would be an implied right to support as regards land outside that limit.

Decision of EVERSHED, J., ([1946] 2 All E.R. 447), reversed.

[AS TO SUPPORT OF GAS MAINS, see HALSBURY, Hailsham Edn., Vol. 30, pp. 36 to 40, paras. 69 to 77; FOR CASES, see 41 DIGEST, 36, 263 to 266; and FOR STATUTES see HALSBURY'S STATUTES, Vol. 8 (Gas), p. 1215, Vol. 13 (Public Health), p. 798, and Vol. 20 (Waterworks), p. 186].

Cases referred to:

- (1) *Hilton v. Granville (Lord)* (1844), 5 Q.B. 701; 1 Dav. & Mer. 614; 13 L.J.Q.B. 193; 2 L.T.O.S. 419; 114 E.R. 1414; 34 Digest 703, 923.
- (2) *Wolstanton, Ltd. v. A.-G. of Duchy of Lancaster & Newcastle-under-Lyme Corpn.*, [1940] 3 All E.R. 101; [1940] A.C. 860.
- (3) *Normanton Gas Co. v. Pope & Pearson, Ltd.* (1883), 52 L.J.Q.B. 629; 49 L.T. 798; 32 W.R. 134; 11 Digest 154, 359.
- (4) *New Moss Colliery v. Manchester Corporation* (1908), A.C. 117; 77 L.J.Ch. 392; 98 L.T. 467; 72 J.P. 169; 11 Digest 154, 356.
- (5) *R. v. Chelsea Waterworks Co.* (1833), 5 B. & Ad. 156; 2 Nev. & M.K.B. 767; 2 Nev. & M.M.C. 13; 2 L.J.M.C. 98; 110 E.R. 750; 38 Digest 451, 183.

- (6) *Holywell Union and Halkyn Parish v. Halkyn Drainage Co.*, [1895] A.C. 117; 64 L.J.M.C. 113; 71 L.T. 818; 59 J.P. 566; 38 Digest 424, 7.
- (7) *R. v. West Middlesex Waterworks* (1859), 1 E. & E. 716; 28 L.J.M.C. 135; 32 L.T.O.S. 388; 23 J.P. 164; 120 E.R. 1078; 38 Digest 450, 171.
- (8) *Dalton v. Angus*, [1881] 6 A.C. 740; 19 Digest 7, 4; *sub nom. Public Works Commissioners v. Angus & Co.*, *Dalton v. Angus & Co.*, 50 L.J.Q.B. 689; 44 L.T. 844.
- (9) *L.N.E.R. v. B.A. Collieries, Ltd.*, [1945] 1 All E.R. 51; [1945] A.C. 143; 114 L.J.Ch. 23; 172 L.T. 50; Digest Supp.
- (10) *Stroyan v. Knowles, Hamer & Same* (1861), 6 H. & N. 454; 30 L.J. Ex. 102; 3 L.T. 746; 19 Digest 170, 1187.
- (11) *R. v. Mersey & Irwell Navigation Co. (of Proprietors)* (1829), 9 B. & C. 95; 4 Man. & Ry. K.B. 84; 2 Man. & Ry. M.C. 106; 7 L.J.O.S.M.C. 70; 109 E.R. 36; 38 Digest 469, 308.
- (12) *Dudley Corporation v. Dudley's (Earl) Settled Estates Trustees*, 45 L.T. 733; 46 J.P. 340; *sub nom. Re Dudley Corporation* (1881), 8 Q.B.D. 86; 51 L.J.Q.B. 121; 41 Digest 36, 264.
- (13) *Howley Park Coal & Cannell Co. v. L.N.W.R. Co.*, [1913] A.C. 11; *sub nom. L.N.W.R. Co. v. Howley Park Coal & Cannell Co.*, [1911] 2 Ch. 97; 80 L.J.Ch. 537; 104 L.T. 546; 11 Digest 152, 345, 153, 353.
- (14) *Wath-upon-Deerne U.D.C. v. John Brown & Co., Ltd.*, [1936] Ch. 172; 105 L.J. Ch. 81; 154 L.T. 295; 51 T.L.R. 353; Digest Supp.

APPEAL by the defendant company from a decision of EVERSHED, J. (reported [1946] 2 All E.R. 447), who held that the corporation had, by force of s. 6 of the Gasworks Clauses Act, 1847, the exclusive right to occupy as licensees the space in the soil taken by the pipes and that subterranean part of the soil on which the pipes rested and so were entitled to recover damages as for a nuisance. The company appealed. The facts appear fully in the judgment of MORTON, L.J.

Sir Cyril Radcliffe, K.C., Andrew Clark, K.C., and J. B. Herbert for the company.

Harman, K.C., and Wilfrid Hunt for the corporation.

Cur. adv. vult.

Jan. 21, 1947. The following judgments were read.

MORTON, L.J.: In this action the mayor, aldermen and burgesses of the borough of Newcastle-under-Lyme claimed against Wolstanton, Ltd., a declaration that the company was not and is not entitled to mine or otherwise work any coal, ironstone, or other minerals under or near to the plaintiffs' gas mains laid within the township of Wolstanton or elsewhere in the borough of Newcastle-under-Lyme in such manner as to let down, destroy, or injure any of such gas mains, an appropriate injunction, and damages. In the circumstances presently mentioned the claim resolved itself into one for damages only. EVERSHED, J., awarded the corporation £4,500 damages, and the company appeals.

The corporation sued as the gas undertakers in respect of a considerable area of the township of Wolstanton, the damages claimed being in respect of the gas pipes laid under the streets and pavements in that area. The corporation became the gas undertakers for this area by virtue of the Newcastle-under-Lyme Extension Order, 1931 (made pursuant to s. 46 of the Local Government Act, 1929) which had the effect of abolishing the Wolstanton United Urban District Council and vesting in the corporation all the property of that council and all its powers, duties and liabilities as gas undertakers: see ss. 28 and 30. The Wolstanton United Urban District Council itself became the undertakers for the relevant area by virtue of the Wolstanton United Urban District Council Gas Act, 1906. Briefly, the effect of that Act, which incorporated (subject to immaterial exceptions) the Gas Works Clauses Acts of 1847 and 1871, was that the Wolstanton Council became the compulsory purchasers of the gas works, mains, pipes and other the gas undertaking (so far as related to that area) of the Newcastle-under-Lyme Corporation and of the Burslem Corporation (see ss. 9 and 10), with power to continue and maintain in the area the gas works and gas undertakings of the two corporations mentioned. By other provisions of the Act the Wolstanton Council acquired the undertaking of another body known as the Chesterton Gas Light Co., Ltd., which had certain gas generating plant in the village of Chesterton and also supplied gas in that village. The two local authorities whose gas undertakings within the Wolstanton district were acquired by the Act of 1906 had in turn derived their power from two Acts passed in 1877, namely, the Newcastle-under-Lyme Corporation Act

and the Burslem Local Board Gas Act. These two Acts are (as would be expected from their respective titles) somewhat dissimilar in form, but nothing turns on the dissimilarity. In each case the local authority acquired the gas undertaking previously carried on by the local gas company known (in the one case) as the Newcastle-under-Lyme Gas Light Co., and (in the other) as the Burslem and Tunstall Gas Co. In each case (with immaterial exceptions) the Gas Works Clauses Acts of 1847 and 1871 applied. In each case certain powers to acquire easements by agreement were conferred. In each case the township of Wolstanton was included in the area covered. To complete the history, it is sufficient to refer to the Newcastle-under-Lyme Gas Light Act, 1855, and to the Burslem and Tunstall Gas Company's Act, 1857, as amended by a further Act in 1868, which Acts incorporated and regulated the gas companies respectively taken over by the Acts of 1877 above mentioned. The township of Wolstanton was within the limits of both companies. The Gas Works Clauses Act, 1847, applied to both. Both were empowered to maintain, and repair, etc., the then existing works and were placed under an obligation, if required by the relevant local board so to do, to light streets as therein respectively mentioned.

It is unnecessary to refer in any greater detail to the special statutory provisions affecting the present matter, but I must now read ss. 6 and 7 of the Gasworks Clauses Act, 1847. Section 6 is headed: "Power to break up streets, &c., under superintendence, and to open drains . . ." and it provides:

The undertakers, under such superintendence as is hereafter specified, may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open and break up any sewers, drains, or tunnels within or under such streets and bridges, and lay down and place within the same limits, pipes, conduits, service pipes, and other works, and from time to time repair, alter, or remove the same, and also make any sewers that may be necessary for carrying off the washings and waste liquids which may arise in the making of the gas, and for the purposes aforesaid may remove and use all earth and materials in and under such streets and bridges, and they may in such streets erect any pillars, lamps and other works, and do all other acts which the undertakers shall from time to time deem necessary for supplying gas to the inhabitants of the district included within the said limits, doing as little damage as may be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers.

Section 7 is headed "[Undertakers] not to enter on private land without consent" and enacts:

Provided always, that nothing herein shall authorise or empower the undertakers to lay down or place any pipe or other works into, through, or against any building or in any land not dedicated to public use, without the consent of the owners and occupiers thereof; except that the undertakers may at any time enter upon and lay or place any new pipe in the place of an existing pipe in any land wherein any pipe hath been already lawfully laid down or placed in pursuance of this or the special Act or any other Act of Parliament, and may repair or alter any pipe so laid down.

It is clear, in the circumstances of the present case (1) that all the pipes with which this action is concerned were laid under public highways, including footpaths, (2) that until recent years the gas supplied in the town of Wolstanton was derived from Burslem or (to some extent) from Chesterton and not from Newcastle-under-Lyme, (3) that all the relevant pipes were laid in exercise of the general power contained in s. 6 of the Gasworks Clauses Act, 1847, or in pursuance of the provisions of corresponding clauses in one or other of the private Acts cited, there being no evidence of any exercise for the purpose of any powers to acquire easements or other proprietary interests by agreement. Although, as I have already stated, certain gas appears to have been supplied from the Chesterton works, nothing turns on this fact, and it has been unnecessary to refer to any powers under which the Chesterton Gas Co. in fact laid its pipes and supplied gas.

Wolstanton, Ltd., the defendant company, was incorporated in 1928 and acquired the residue of a lease of certain seams of ironstone and coal granted in 1917 to their predecessors by the Crown in the right of the Duchy of Lancaster. Two only of these seams are material for present purposes, namely, the Red Shagg ironstone seam at a depth of approximately 490 yards at the shaft and the Great Row coal seam at a depth of about 170 yards below that

of the Red Shagg ironstone. Shortly after its incorporation the company began to work the two seams and it has continued since so to do. No trouble arose between the corporation and the company until 1934, but from that year up to the date of the issue of the writ substantial damage was admittedly done to the plaintiff corporation's gas pipes as a result of the movement of the surface land attributable to the defendant company's mining operations.

- A was effected very many years ago, long before any of the gas works or pipes here in question were made or laid. Both surface and minerals appear originally to have been part of the copyhold land of the manor of Newcastle-under-Lyme. After this severance, the Crown, in the right of the Duchy, claimed that they and those entitled through them to work the mines enjoyed the benefit of a customary right to extract the minerals so as to let down the surface without any obligation to pay compensation for surface damage. This assertion was
- B successfully challenged by a surface proprietor as long ago as 1845 in *Hilton v. Earl Granville* (1), but the Duchy and those interested in the minerals through the Duchy appear to have been undeterred by this reverse, and continued to assert the right to let down the surface land without payment of compensation until the corporation, acting as owners of a fire station, again challenged the validity of the alleged custom. On this occasion the litigation
- C proceeded to the House of Lords: see *Wolstanton, Ltd. and A.G. of Duchy of Lancaster v. Newcastle-under-Lyme Corporation* (2). The House affirmed the view of the Court of Queen's Bench that the alleged custom was unreasonable and finally negatived its existence.

- This decision having established that the mineral owners and those claiming through them had no right so to work the minerals as to let down or injure the surface land, and, accordingly, that the owners of the surface in which the
- D pipes here in question were laid have and always have had an unqualified right to the support of the land in its natural state, the defendant company, in order to carry on its undertaking, applied to the Railway and Canal Commission Court. Certain orders have been made by that tribunal, the first on Dec. 17, 1943, empowering the company to work the minerals on terms of payment of compensation for damage caused. Under these orders the company is now admittedly entitled to work the mines so as to let down the surface, but on terms
- E (so far as concerns the corporation as gas undertakers) of being liable to pay compensation to them for any damage done to their gas works and pipes. By reason of these orders the corporation no longer asks for the declaration or the injunction mentioned in the writ, but has confined itself to a claim for damages. The writ was issued on May 11, 1942, and since the corporation concedes that the company can invoke the Limitation Act, 1939, to limit its
- F liability, the claim of the plaintiff corporation is now confined to the damage proved to have been occasioned by the defendant company during the period of six years immediately prior to May 11, 1942. Particulars of the damage alleged were given and are bound with the pleadings in the action. These particulars fall under three heads, namely, (1) damage, equivalent to the cost of repairing a large number of breaks in the gas pipes or mains; (2) damage, equivalent to the cost of replacing cast iron pipes with spun steel pipes where
- G the breaks were such as to render it economically not possible to repair the pipes, or where the risk of further damage was so great as to make it impracticable to maintain iron pipes; (3) damage for gas lost. It is not necessary for this court to consider the *quantum* of the damage suffered, as it was agreed at the trial that the company, by its workings, caused damage amounting to £4,500 to the corporation's apparatus during the relevant period. EVERSHER, J. found as a fact that the damage suffered could not be limited or qualified by
- H reference to such mining operations as took place within 40 yards of the places where the damage occurred. He also found (1) that the company had not failed to work "in a reasonable and proper manner" within the meaning of s. 4 of the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883; (2) that some of the damaged pipes were laid prior to Aug. 25, 1883, that being the date of the passing of the Act of 1883. I should add that no suggestion was made by the company that the movement of the surface land, which caused the damage suffered by the corporation, was in any way caused or aggravated by the presence of the corporation's pipes or mains therein. EVERSHER, J.

decided in favour of the corporation and, as I have said, he awarded £4,500 damages. He decided in favour of the company on two subordinate issues which I shall mention in a moment.

From that judgment the company appeals, and the corporation served a notice on Oct. 10, 1946, in the following terms:

Take notice that upon the hearing of the defendants' appeal from the judgment made in this action and dated July 25, 1946, the plaintiffs [the corporation] intend to contend that, if the appeal succeeds, in any case the plaintiffs [the corporation] are entitled to damages in respect of damage (a) to any gas mains laid prior to the passing of the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883, and also (b) to any gas mains so far as the damage was due to workings of minerals beyond a distance of 40 yards and that all necessary or proper enquiries may be ordered and directions given with a view to the ascertainment of such damages in default of the same being agreed.

This notice raises before the court the two subordinate issues which I have just mentioned, and it will be convenient if I now read ss. 4 and 5 of the Act of 1883. Section 4 is headed "Limitation of right to support for sanitary works over mines," and provides:

Except as in this Act provided, a local authority shall not by reason only of anything contained in the Sanitary Act under the authority of which a sanitary work has been or is constructed or maintained be deemed to have acquired or to be entitled to or to be bound to acquire or to make compensation for any right of support for such sanitary work as against any person owning or working or being lessee or occupier of or entitled to work or otherwise interested in any mine; and nothing in such Sanitary Act shall be deemed to have subjected or to subject any such person to any liability to the local authority in respect of damage to a sanitary work caused in or consequent upon the working of any mines in a reasonable and proper manner.

Section 5 is headed "Savings" and reads:

Nothing in this Act shall be construed to repeal, invalidate, or affect any express enactment in a Sanitary or other Act with respect to rights of support for sanitary works, or any agreement made before the passing of this Act with respect to such rights, or to affect any action, arbitration, or other legal proceeding concluded before or pending at the passing of this Act. Where any right of support has been acquired before the passing of this Act by a local authority in respect of any sanitary work, and no compensation is at the passing of this Act recoverable in respect of such right, nothing in this Act shall be construed to apply to the work in respect of which such right has been acquired, or operate to deprive the local authority of such right or to entitle any person to any compensation in respect thereof, to which such person would not have been entitled if this Act had not been passed.

The main question on the appeal is one of some difficulty, and the court has had every possible assistance from the interesting arguments of counsel on both sides. I think that the contentions before us may be summarised as follows. The company's contentions are:

(i) The corporation can make no claim against the company under any of the provisions of the Act of 1883, or of the so-called mining code incorporated therewith by s. 3 thereof, because the corporation and its predecessors have failed to comply with s. 19 of the Waterworks Clauses Act, 1847, as modified by s. 3 (3) of the Act of 1883. (ii) The corporation could only obtain a right of support against the company under the principle laid down in *Normanton Gas Co. v. Pope & Pearson, Ltd.* (3), where BRETT, M.R. said (49 L.T. 798 at p. 801):

... when the legislature has given power to do something, the execution of which requires subjacent support from the land, I think it follows that the persons who have to do the act in question get a right to subjacent support as against the landowner. This implied grant of a right to support, says the company, arose "by reason only" of the corporation's Sanitary Act within s. 4 of the Act of 1883, and, therefore, it was swept away, as against the mineowners, by that section. (iii) The corporation had no other right of support. Therefore, this action must fail.

The corporation admits contention (i), but seeks to meet contentions (ii) and (iii) by the following line of argument:—(a) On laying its pipes in the soil the corporation or its predecessor in title became the occupier, not only of the cavity occupied by those pipes, but also of the contiguous soil which surrounded those pipes. (b) The owners of that soil had a right of support at common law

as against the company : see *Hilton v. Earl Granville* (1) ; and the corporation' as occupier of that portion of the soil which was contiguous to its pipes, was entitled to that natural right of support. (c) Being entitled to that natural right of support, the corporation never required or acquired any implied statutory right of support against the company under the principle of the *Normanton Case* (3). (d) The right mentioned under (b) above was unaffected by s. 4 of the Act of 1883, because it was not a right arising by reason only of anything contained in the corporation's "Sanitary Act," within the meaning of s. 4 of the Act of 1883.

The line of argument expresses, in substance, the view which was taken by EVERSHED, J., and, as I am in agreement with his reasoning up to a certain point, it will be convenient to set it out in his own words. He referred to ss. 6 and 7 of the Gasworks Clauses Act, 1847, and continued ([1946] 2 All E.R. 447, at p. 453) :

To the contrast with s. 6 of the 1847 Act provided by s. 7 must be added the further contrast provided by s. 10 of the Gasworks Clauses Act, 1871, giving power to the undertakers as therein provided to acquire easements by agreement ; and the latter contrast is reflected in the express powers to be found, for example, in the Burslem Local Board Gas Act, 1877, and the Newcastle-under-Lyme Corporation Act, 1877, to acquire easements by agreement and also (subject to the strict limits imposed) to acquire land. (See *e.g.*, ss. 10 and 11 of the Burslem Act, and ss. 48 and 49 of the Newcastle Act). I add that the exercise of all the powers to which I have referred must plainly be limited by reference to the purpose of the gas undertakers, *i.e.*, the supply of gas, and would, therefore, come to an end if the undertakers ceased to carry on such undertaking. In these circumstances, and bearing in mind the general rule that no greater rights or interests should be treated as conferred upon the undertakers than are necessary for the fulfilment of the object of the statute, it seems to me reasonably clear, as a matter of the construction of s. 6 of the 1847 Act, that the terms of the section are not intended to confer, and are not apt to confer, upon the undertakers any right of ownership or proprietorship of the land affected. Equally, in my judgment, is the language of the section inappropriate to create in favour of the undertakers any tenancy or any easement or interest analogous to an easement. It is true that the rights of the undertakers are the creatures of statute, and that it is within the competence of Parliament to confer or create interests without regard to those incidents which are regarded as requisite to an agreement *inter partes*. Thus Parliament may create an easement in gross as it may, I assume, create a tenancy without provision for the payment of rent and notwithstanding the absence of any term certain. But the absence of the incidents ordinarily appropriate to the existence of a tenancy or an easement is, at the least, an important consideration for the determination of the question whether, upon the true construction of the statute, the creation of any such interest was intended. It is, indeed, somewhat tempting to conclude that some right in the nature of an easement ought to be inferred ; and I have in mind the reference to a wayleave in the speech of LORD ATKINSON in *New Moss Colliery, Ltd. v. Manchester Corporation*, [1908] A.C. 117, at p. 124. But, in my judgment, these considerations are insufficient to give to the language of s. 6 of the Act of 1847 a meaning and intent which that language—particularly in the light of the contrasts to which I have already referred—cannot naturally or properly bear.

I agree with the passage just quoted. Later, EVERSHED, J., expressed the view (with which again, I agree) that the corporation had no title, legal or equitable, in the land itself.

EVERSHED, J., then referred to a number of decided cases and continued (*ibid.*, p. 455) :

I have dealt at some length with this aspect of the matter, since there appears to be in the books no authoritative pronouncement upon the true nature of the interest in, or relating to, the land of persons or corporations authorised by statute in the terms of s. 6 of the 1847 Act, or of other comparable statutes, to lay pipes or cables under highways. I venture to state my conclusion upon the position of the plaintiff corporation as follows. They have by force of the statute the exclusive right to occupy for the purposes of their statutory undertaking the space in the soil taken by the pipes and that (subterranean) part of the soil on which the pipes rest ; but that exclusive right of occupation, which continues so long as the corporation carry on their undertaking, does not depend upon or involve the vesting in the plaintiff corporation of any legal or equitable estate in the land. If the language in HALSBURY'S LAWS OF ENGLAND, Hailsham edn., Vol. 27, p. 355, para. 786, note (a), is to be taken to imply that persons or corporations who have laid pipes or cables under statutory powers, similar to those applicable to the plaintiff corporation and their predecessors in the present

case, have an interest in the land of the nature of an easement and that the rating decisions proceed from such a view, I do not think such a conclusion is justified and I find myself unable to accept it.

I accept the whole of this reasoning with the vital exception that I do not accept the judge's reference to "that (subterranean) part of the soil on which the pipes rest." This is, in my view, the crucial point at which the corporation's line of argument breaks down. I do not think that the corporation has the exclusive right to occupy anything except the space which is filled by its pipes. To test this, let me assume that some person, not authorised by the corporation, removed all the soil round a portion of the corporation's pipe, being careful to do no damage to the surface of the pipe and providing sufficient support to prevent any damage by subsidence. Could it be said that that person had committed a trespass against the corporation? In my judgment, no. If this is so, it seems to follow that the corporation has not the exclusive right to occupy any part of the soil by which its pipes are surrounded. I may add that if the corporation are the occupiers of a "cylinder" of soil round their pipes, I can find no satisfactory answer to the question: "How thick is that cylinder?" EVERSLED, J., went on to say:

It follows that the plaintiff corporation cannot, in my judgment, say that... they are (as counsel on their behalf put it) the inheritors of the right of support admittedly vested in the owners of the surface land.

I have omitted a few words which I find difficult to understand, but they do not, I think, affect the sense of the observation just quoted, with which I entirely agree.

To sum up, accepting as I do the reasoning of EVERSLED, J., with the one vital exception which I have mentioned, we agree: (a) That the corporation has no right of ownership or proprietorship of the soil in which its pipes are laid; (b) that it is not the tenant of any part of that soil; (c) that no easement is vested in the corporation; (d) that the corporation has no title, legal or equitable, in that soil; (e) that the corporation is not the inheritor of the right to support admittedly vested in the owners of the surface land. Further, in my view, and here I differ from the judge, the corporation has not the exclusive right to occupy any portion of that soil, as distinct from the space or cavity occupied by its pipes.

To what conclusion do these findings lead? They lead me to the conclusion that the corporation never acquired any right of support against the defendant company except the implied right arising from the exercise of the corporation's statutory powers, as explained in the *Normanton* case (3). I think that EVERSLED, J., might have arrived at the same conclusion if he had thought, as I do, that the corporation is not in exclusive occupation of any part of that soil in respect of which there exists a natural right of support as against the company. As I have said, all that the corporation has the right to occupy, and does occupy, is a cavity in the ground, which is entirely filled by the pipes in question. A cavity cannot have attached to it a natural right to support; it is merely an empty space. Nor can a gas pipe, although a right to have it supported may be acquired in other ways, e.g., by statute or by prescription. I should add that it was not contended on behalf of the corporation that any prescriptive right to support had arisen in the present case. If I am right so far, it follows that the corporation's line of argument breaks down at an early stage. In my judgment, the only right to support, as against the company, which the corporation possessed up to 1883, was the implied right to support under the principle in the *Normanton* case (3), and that right was swept away by s. 4 of the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883. It was a right which the corporation was deemed to have acquired or be entitled to by reason only of the provisions of the Sanitary Act under the authority of which the corporation's sanitary works were constructed. It is true that s. 4 did not affect any right to support which the corporation acquired, under the principle in the *Normanton* case (3), as against the owners of the soil lying over the mines since that section only deals with rights of support as against persons working mines, but that fact does not assist the corporation in the present action. In my view, the action should have been dismissed on the ground that the corporation had failed to establish any existing right to support as against the defendant company.

EVERSHED, J., in a closely-reasoned judgment, arrived at a conclusion in favour of the corporation. I think the basis for his decision was that the corporation had possession of some part of a stratum of soil which enjoyed a natural right to support. That right was, he thought, enough to entitle the corporation to maintain an action for damage to the pipes suffered as a result of the company's interference with "the natural right of support attaching to the surface land." With respect, I cannot accept his premise, and his conclusion seems to me inconsistent with his view that the corporation was not the "inheritor" of that natural right of support. I think that he was influenced in forming his view as to the company's rights to possession of part of the surface land by certain cases regarding the liability of gas undertakers for rates. For my part, I find nothing in these cases which leads me to doubt the correctness of the view which I have just expressed.

- A
- B When it was said by DENMAN, C.J., in *R. v. Chelsea Waterworks Co.* (5) (5 B. and A. 156, at p. 169) that they, the undertakers "have the exclusive right in a portion of the soil," he was not referring to anything more than the space occupied by the pipes, and the pipes themselves. In the same passage he remarked :

... the company are, on the authority of the decided cases, the occupiers of the land filled by the pipes.

- C Again, in *Holywell Union and Halkyn Parish v. Halkyn Drainage Co.* (6) LORD DAVEY said ([1895] A.C. 117, at p. 133) :

The real question is ... whether the company is *de facto* in occupation of some portion of the soil ... I cannot doubt that the company occupy, with their tunnel, the portion of ground in which the tunnel is constructed, and also those portions which are enclosed within the tunnel, and used by the company for the purpose of their undertaking.

- D LORD DAVEY quoted with approval the statement of the law by WIGHTMAN, J. in *R. v. West Middlesex Waterworks* (7) (1 E. and E. 716, at p. 720) :

In this case the first question is, whether the company are rateable for their mains which are laid under the surface of the highway, without any freehold or leasehold interest in the soil thereof being vested in the company. We think they are. These mains are fixed capital, vested in land. The company is in possession of the mains buried in the soil, and so is, *de facto*, in possession of that space in the soil which the mains fill, for a purpose beneficial to itself. The decisions are uniform in holding gas companies to be rateable in respect of their mains, although the occupation of such mains may be *de facto* merely, and without any legal or equitable estate in the land where the mains lie, by force of some statute.

- E
- F I do not think that any one of the cases cited before us bears out the proposition that the corporation has the exclusive right to possession of the soil surrounding the pipes, as distinct from the pipes themselves and the cavity which is filled by the pipes. Further, it does not appear that the proposition was put forward in any of the cases in which undertakers were claiming a right to support. I would add this. Even if I had agreed with the view of EVERSHED, J., that the corporation had possession of some part of the soil, as distinct from the cavity occupied by its pipes and the pipes themselves, I should still have felt some doubt as to the correctness of his conclusion. I was impressed
- G by the final argument of counsel for the company that the applicability of s. 4 of the 1883 Act cannot depend on whether owners of the soil in which the pipes are laid did or did not possess a right of support, in respect of that soil, as against the owners of subjacent mines. He pointed out that when a long stretch of pipe is laid, portions of it might be in soil which could not be let down and other portions might be in soil which could be let down, and he suggested that it would be an artificial construction of s. 4 to regard it as having
- H had effect in the case of the latter portions but not in the case of the former portions. I think, also, that there is much to be said for the argument that, even if the corporation had such a right of support as the judge held to exist, that right of support existed by reason only of the provisions in its Sanitary Act under the authority of which its pipes were laid. It seems to me a somewhat narrow distinction to say : " True, our right to lay and maintain these pipes arose by virtue of the Sanitary Act, and we could not have obtained our right to support at common law unless we had first been empowered to lay and maintain our pipes in this piece of land. Still, our right to support does

not arise by reason only of anything contained in that Act." This distinction may, however, be justified by the word "only" which appears in s. 4. It is not necessary for me to arrive at a final conclusion on the arguments just mentioned, as I have already arrived at the conclusion that the corporation never had any right of support except the implied right which arose under the *Normanton* case (3).

I cannot feel that the conclusion at which I have arrived involves any injustice. The corporation would have had the extensive protection afforded by ss. 18 to 27 of the Waterworks Clauses Act, 1847, if the provisions of s. 19 of that Act (as modified by s. 3 (3) of the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883), had been carried out. Moreover, neither the corporation nor its predecessors in title ever went to the expense of acquiring a grant of the portion of the land in which their pipes are situate or of an easement of support for those pipes. The view which I have formed seems to me to agree well with the scheme embodied in the Act of 1883. I think the legislature had in mind the object of substituting the protection of the "Mining Code" for the kind of right to support which had previously been enjoyed by the corporation in the present case.

I must now consider the two subordinate issues which I have already mentioned, and I can deal with them shortly, as I find myself in agreement with the views of EVERSHED, J., on these points.

The first of these issues is whether the corporation, if it fails on the main issue in the action, is entitled to damages in respect of damage to any pipes laid before the passing of the Act of 1883. Counsel for the corporation relied on the judge's finding that some, at least, of its damaged pipes were laid before the passing of the 1883 Act. He argued that no compensation was or could ever have been payable in the circumstances in respect of these pipe-laying operations, and, accordingly, that the following portion of s. 5 of that Act applied to the pipes so laid :

Where any right of support has been acquired before the passing of this Act by any local authority in respect of any sanitary work, and no compensation is at the passing of this Act recoverable in respect of such right, nothing in this Act shall be construed to apply to the work in respect of which such right has been acquired.

I agree with the judge's reasons for rejecting that argument and I do not desire to add to those reasons. In brief, he did not accept the proposition that no compensation was, or would ever be, payable in respect of the laying of pipes during the pre-Act period.

The second of those issues is whether the corporation, assuming that it is prevented by s. 4 of the Act of 1883 from recovering damages for any damage to its pipes occasioned by the workings of minerals within the distance of 40 yards, could still recover damages in so far as the damage was occasioned by workings of minerals outside a distance of 40 yards. It was contended that, on the true construction of s. 4, its operation did not extend to land more than 40 yards from the sanitary work in question, and that the corporation still retained its right to support under the principle in the *Normanton* case (3) as against any person working mines outside the 40 yards limit. I cannot accept this argument. It seems to me there is nothing in s. 4 which would justify the court in limiting its operation in the manner suggested. The words are "any right to support for such sanitary work as against any person owning or working or being lessee or occupier of or entitled to work or otherwise interested in any mine." The italics are mine, and these words seem to me as wide as they could well be. With regard to the opening words "Except as in this Act provided," I can find nothing in the provisions of the Act outside s. 4 which supports the argument.

The result is that, in my view, this appeal succeeds, and judgment ought to have been entered in the action for the company. I would add that COHEN, L.J., has read the judgment which I have just delivered and has asked me to say that he agrees with it.

SOMERVELL, L.J. : I will not recapitulate in full the facts and history of this appeal, which have been fully stated by MORTON, L.J. To decide whether the corporation has, as against the company, the right of support on which their claim for damages is based, it is necessary to consider their rights apart

from the Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883, and then to consider whether the necessary right remains in them, having regard to the provisions of that Act.

A It is, I think, important to bear in mind, in the first place, that the natural right of support, as known to the law, is a right of support for land in its natural condition. LORD SELBORNE, L.C., in *Dalton v. Angus* (8) (6 App. Cas. 740, at p. 791-2), said that the "doctrine laid down" (*i.e.*, with regard to the natural right of support) "must, in my opinion, be understood of land, without reference to buildings." VISCOUNT MAUGHAM, in the *L.N.E.R. Co. v. B.A. Collieries, Ltd* (9) said ([1945] 1 All E.R. 51, at p. 53):

The common law right is to have support to the land in its natural state, which is not an easement, but an incident to the land itself.

B He then referred to LORD SELBORNE's judgment in the case which I have cited (*Dalton v. Angus* (8)). If there are buildings which do not contribute to the subsidence, damages for injury to them can be recovered as part of the damage flowing from the defendants' wrongful act in causing the ground on which they stood to subside: *Stroyan v. Knowles* (10) (6 H. & N. 454, at p. 465). If, therefore, as it seems to me, the corporation seek to rely on a natural right of support, they must establish a sufficient right in respect of the land on which their mains rest. A right of support for buildings or works can be acquired by grant, C prescription, or statute. It is conceded that no claim based on prescription can be put forward in respect of these mains, and that there was no grant except such as can be implied by reason of the provisions of the Act under which the mains were laid.

D In considering the position apart from statute, the corporation rely on the fact that the mineral owners, the company's lessors, the Crown, in the right of the Duchy of Lancaster, had no right so to work their minerals as to let down or injure the surface land. No such right, therefore, it is argued, could be conferred on the company. The owners of the land in which these mains were laid have, and always had, the natural right of support as known to the law as against the mine owners. The corporation and their predecessors did not purchase any land or any interest in land from the owners of the land in which the mains are. Nothing in the nature of a proprietary interest in the E land was vested in them. The mains were laid under successive local Acts, which embodied s. 6 of the Gasworks Clauses Act, 1847, which has already been set out.

The first question, therefore, in my opinion is: "What right would the corporation obtain in relation to the land in which their mains were laid?" The rating cases which were cited to us lay down that undertakers with similar powers and duties to those possessed by the corporation have an exclusive F right to occupy and enjoy a portion of the soil. The question is: "What portion?" LORD DAVEY in *Holywell Union & Halkyn Parish v. Halkyn Drainage Co.* (6) says ([1895] A.C. 117, at p. 132):

The law was thus stated by WIGHTMAN, J., in *R. v. West Middlesex Waterworks* (7) (1 E. & E. 716, at p. 720): "In this case," says the learned judge, "the first question is whether the company are rateable for their mains, which are laid under the surface of the highway, without any freehold or leasehold interest in the soil thereof being vested G in the company. We think they are. These mains are fixed capital vested in land. The company is in possession of the mains buried in the soil, and so is *de facto* in possession of that space in the soil which the mains fill, for a purpose beneficial to itself."

In *R. v. Mersey Irwell Navigation Co.* (11) PARKE, J., in referring to gas companies, said (9 B. & C. 95, at p. 112):

H they have the exclusive right of occupying by means of these pipes that portion of the soil in which the main is.

Other statements could be cited. It is submitted for the corporation that they are, through their mains, also in occupation of the land on which the mains rest and of the other land surrounding them.

A question arose in the course of the argument whether the mains remain vested in the corporation as alleged in the statement of claim and admitted in the defence, or whether, as indicated in the passage cited from LORD DAVEY's speech and in other cases dealing with rating, they become part and parcel of the freehold. Counsel for the company was prepared to take the statement

of claim as covering, both as to liability and damages, the claim as based on the latter view if it affected our decision. I was, at one time, inclined to think that it might, but I have come to the conclusion that this issue is immaterial. Whichever view is taken, the question remains, as it seems to me: "Do the corporation occupy any land except that which their mains fill?" And, in particular, "Do they occupy the land on which the mains rest?" The cases cited, and there are others, suggest the answer "No," and, although the matter may not have been of crucial importance in these cases, the principle seems fairly clearly laid down. There are, in any event, to my mind, difficulties about the submission on behalf of the corporation. How far does the occupation go? Could the gas undertakers maintain an action of trespass if someone interfered with the soil within six inches or one inch of their main, or only if he disturbed the soil actually touching the surface of the main? I am assuming that no damage is done to the main. The reality of the matter, as it seems to me, is that what the undertaker, operating under s. 6, wants is, not the occupation of some surrounding undefined area of soil, but a right of support for his mains. Such a right *per se* cannot be claimed under the natural right of support unless the corporation can establish rights in respect of the ground on which they rest. If they could establish this latter right, it is conceded that the mains did not contribute to the subsidence, and this damage to the mains could be claimed as resulting from this letting down of this land on which they rest. On the authorities, and for the reasons which I have given, I do not think they can establish any such right.

Neither the Gasworks Clauses Act, 1847, nor the Public Health Act, 1875, dealing with sewers, gave, in terms, any right of support for the gas mains or sewers laid under the provisions contained in them. The question came before the courts first in *Dudley Corporation v. Dudley Trustees* (12). In that case the owner of the land in which the sewer was laid had no right of support as against the mine owner, as the surface and the minerals were both in the ownership of the defendants. The argument of counsel for the corporation was not, therefore, possible. The decision proceeded on the basis that the purpose of the statute would be defeated if there was no right of support. Both BRETT, L.J., and LINDLEY, L.J., speak of the right of support for a sewer, not for the land on which it rests. The consequent interference with the mineral owner's rights was, it was held, covered by the words of the statute providing for compensation. The court, therefore, held that the Dudley Corporation had, under the provisions in the relevant statute, similar to those in s. 6 with which this appeal is concerned, an implied grant of a right of support for their sewers, coupled with a liability to compensate the mineral owners for the damage done to their property. This implied right differed, as it seems to me, in three respects from the natural right of support. It involved a liability to pay compensation, it was in respect of works and not of land, and it existed although the weight of the works themselves should contribute to the subsidence. The case does not, of course, cover the argument of counsel for the corporation, but counsel for the company relied on the general reasons and on the fact that no reference is made to the land having itself no right of support as being more consistent with his argument than with that of counsel for the corporation. He re-enforced this line of argument by reference to the *Normanton Gas Co. v. Pope and Pearson* (3), where a similar point came before the courts. The actual point decided there is immaterial to the present issue. It was emphasised that the gas mains in question were laid below a highway which had a right of support as against the mineral owners and this was clearly before the courts. It may well be that the mains must have been in a stratum below the highway, and this stratum, being in the ownership of the mineral owners, had no right of support for the same reason as existed in the *Dudley Corporation* case (12). It is, however, of some importance that no one sought to distinguish the stratum in which the pipes were from the highway, nor was the fact that the highway had its right of support regarded as affecting the matter.

It has also been submitted by counsel for the corporation that it is, in effect, impossible to apply the *Dudley Corporation* (12) principle to a case like the present where the mine-owner cannot let down the surface. Everything, he says, can be sensibly dealt with if the corporation enjoy the natural right of support enjoyed by the owners of the land in which the mains are. If you seek to apply

the *Dudley Corporation* (12) principle, there is nothing, he submits, for which the mineral owner can claim compensation as he is already bound to support all the land. All that has happened is that another person has appeared who has the same right as everyone else to be supported. The surface owners could sub-divide their property and make grants carrying with them the natural right of support. On the view which I have taken, the corporation need the *Dudley Corporation* (12) principle to claim damages if their mains are, in fact,

- A let down, and there would be no necessary absurdity if they were able to show that their advent had caused no greater interference than that which the mine-owner already had to bear. I am not, however, clear that the mine-owner might not be able to show some damage. Although a mine-owner may have no right to let down the surface, it may be in the general interest of the inhabitants of the area that the mines should be worked although such working may involve some subsidence. It may be neither difficult nor onerous for him to arrange
- B so that injunctions are not sought against him. The advent of an undertaker with works protected by the *Dudley Corporation* (12) principle may introduce an obstacle to the working of the mines which, on evidence, might support a claim for compensation. Neither the decisions nor the reasoning in these cases are, in my view, conclusive of the present appeal, but, on the whole, they appear to me to fit in with the company's arguments better than with those of the corporation.

- C My conclusions can be summed up in three propositions: (1) The corporation occupy, and occupy only, the space in which the mains are. (2) The only right that they can put forward is a right of support for their mains. (3) The natural right of support possessed by the surface owners is a right of support to the land in its natural state, and the corporation cannot claim this right because their occupation is restricted to their mains. It follows, therefore,
- D that before 1883, and apart from the new protection afforded by that Act, the corporation had no right of support except that which is implied by reason of their powers and duties under the *Dudley Corporation* (12) principle.

- This brings me to the Act of 1883. That Act applied what is usually called the "Mining Code" of the Waterworks Clauses Act, 1847, with modifications to (*inter alia*) local authorities carrying on gas undertakings. Counsel stated, I have no doubt correctly, that local authorities objected to that part of the
- E *Dudley Corporation* principle which made compensation immediately payable when the works were constructed irrespective of whether the mine-owner was at the time about to work seams which would, or might, damage the local authorities' works. The "Mining Code," the general provisions of which are familiar, postpones the question of payment of compensation until the mine owner is about to work within 40 yards or some other prescribed distance of the mains. The general scheme of the Act is clear. It provides a new mode of
- F protection, a new system of compensation, and, subject to certain savings, takes away, by s. 4, the right implied under the relevant local authority statute as laid down in the *Dudley Corporation* case (12). In order, however, to obtain the new protection, the local authority must make and deposit maps as laid down in ss. 19-21 of the Waterworks Clauses Act, 1847. The corporation in this case did not make and deposit maps, and, therefore, admittedly cannot claim the
- G benefits of this part of the code. The relevant words of s. 4 have already been quoted. The corporation have to show that their works are entitled to protection otherwise "than by reason only of anything contained" in s. 6 of the Gasworks Clauses Act, 1847. The judge decided that they could show such a right. He based it on the view that they have, by force of statute, "the exclusive right to the possession of so much of the surface land as is occupied by their pipes and on which the pipes rest." I think the last words are crucial
- H and it is on this point that I come to a different conclusion from the judge, with most of whose judgment I entirely agree. I have already stated my reasons for holding that the corporation have not an exclusive right to possession of the surface land on which these pipes rest. This may seem, and perhaps is, a somewhat technical point, but the conclusion is, I think, in accordance with principle and authority. If it is said that this is a very fortunate result for the mine-owner, it is, as I see it, due to the fact that the local authority did not choose to fulfil the conditions necessary for obtaining the protection which the Acts of Parliament entitled them to claim.

A
A further point was taken. Assuming the judge was right and the corporation were entitled to claim the right of support as it exists in this area by virtue of their occupation, nevertheless that also is a right which arises only by reason of s. 6, that being the sole instrument by virtue of which the corporation and the company are brought into relation with each other. Although it is not, on the view I take, necessary to decide this question, I doubt myself the validity of this submission. If, by virtue of their right of occupation under their Act, the corporation were entitled to claim a right of support under what was described as the local law in this particular area, I should have thought myself that their right did not arise by reason only of the provisions of s. 6.

Before going on to the other points, I should, perhaps, say that, on the basis of the judge's conclusion as set out above, I agree with what he says as to the corporation's right to sustain an action of nuisance.

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On the first of the other points relating to pipes laid before 1883, I do not desire to add anything to what has been said by MORTON, L.J. The second point on the cross-appeal may, I think, be formulated as follows. The "Mining Code," as brought in by the 1883 Act, extends to mining 40 yards on each side of the works in question. Section 4, therefore, ought to be construed as only taking away the *Dudley Corporation* (12) right within the area protected by the new code. We were referred to cases such as the *Howley Park Coal & Cannell Co. v. L.N.W.R. Co.* (13), *Wath-upon-Deerne U.D.C. v. John Brown & Co., Ltd.* (14), and the *New Moss Colliery, Ltd. v. Manchester Corporation* (4), as showing, broadly, that outside the 40 yards limit as prescribed by the code, common law rights continue to exist. These cases do not seem to me really to deal with the question which arises here, which turns on the construction of s. 4 of the 1883 Act. I appreciate, considered generally, the force of an argument that words in a statute taking away a right may be impliedly limited in their scope by the new right which, reading the Act as a whole, is intended to be substituted for what is taken away. I myself doubt whether, in the present case, the necessary basis for any such argument exists. Section 3 (2) of the Act of 1883 modifies the Waterworks Clauses Act, 1847, by conferring, or, at any rate, intending to confer, a power on the local authority to protect itself beyond the distance of 40 yards. It was said that this sub-section was unworkable in that it appeared to be based on the existence of a notice to be given under the Waterworks Clauses Act, 1847, for which that Act did not provide. Whether this is so or not, it seems to me clear that the legislature intended to give the local authority power to take whatever protection it thought it required beyond the 40 yards limit, and, if that is so, the basis on which counsel for the corporation seeks to limit the general words of s. 4 disappears. Apart, however, from this sub-section, I think that the argument would fail. I think the natural construction of the Act is that the legislature, rightly or wrongly, regarded the new protection as fully adequate, and, therefore, by using the general words of s. 4, intended to take away, as against mine-owners, though not others, all the rights which could be based on the *Dudley Corporation* (12) principle. In the result, I agree that this appeal succeeds.

Appeal allowed with costs.

G
Solicitors : *Routh, Stacey, Hancock & Willis*, agents for *Ellis & Ellis*, Burslem (for the company); *Sharpe, Pritchard & Co.*, agents for *J. Griffith*, Town Clerk, Newcastle-under-Lyme (for the corporation).

[Reported by R. L. ZIAR, Barrister-at-Law.]

JORDAN v. MAY AND ANOTHER

[COURT OF APPEAL (Morton, Bucknill and Asquith, L.JJ.), January 14, 1947.]

Emergency Legislation—Requisition of land—Damage to land—Protection against breach of covenant to repair—"Land"—Electric plant—Storage battery—Landlord and Tenant (Requisitioned Land) Act, 1944, (c. 5), s. 1 (1).

The plaintiff demised to the defendants certain premises which included a shed containing an electricity generating plant. The plant consisted of an engine which was sunk in concrete and batteries which were set out on a table in the shed and connected by wires to the engine and the circuit. The lease included a repairing covenant in respect of the premises and plant. In 1943 part of the premises, with the "brick and corrugated iron engine shed" which housed the plant in question, were requisitioned under the Defence (General) Regulations, 1939. The plaintiff claimed damages for breach of covenant to repair in respect of the plant. On behalf of the defendants it was contended that the plant was a "fixture," and, therefore, "land" within the meaning of the Landlord and Tenant (Requisitioned Land) Act, 1944, s. 1 (1), and he claimed the protection of that sub-section. The county court judge decided that the engine was a fixture, and, therefore, part of the land for the purposes of s. 1 (1), but that the batteries were not fixtures, and he awarded damages in respect of the disrepair of the batteries. On appeal:—

HELD: there was evidence before the judge that the batteries were not an essential and integral part of the electricity generating plant and the judge was entitled to find that they were not fixtures.

[AS TO FIXTURES, see HALSBURY, Hailsham Edn., Vol. 20, pp. 96-104, paras. 106-111; and FOR CASES, see DIGEST, Vol. 31, pp. 181-196, Nos. 3161-3325.]

D Cases referred to:

- (1) *Pole-Carew v. Western Counties and General Manure Co.*, [1920] 2 Ch. 97; 89 L.J. Ch. 559; 123 L.T. 12; 31 Digest 196, 3325.
- (2) *Holland v. Hodgson* (1872), L.R. 7 C.P. 328; 41 L.J.C.P. 146; 26 L.T. 709; 31 Digest 188, 3225.
- (3) *Northern Press and Engineering Co. v. Shepherd* (1908), 52 Sol. Jo. 715; 31 Digest 190, 3247.
- (4) *Hulme v. Brigham*, [1943] 1 All E.R. 204; [1943] 1 K.B. 152; 112 L.J.K.B. 267; 168 L.T. 7; Digest Supp.
- (5) *British Economical Lamp Co., Ltd. v. Empire, Mile End, Ltd.* (1913), 29 T.L.R. 386; 31 Digest 186, 3205.

APPEAL by defendants from Basingstoke County Court.

The plaintiff was the landlord and the defendants were the tenants of certain premises which had been requisitioned under the Defence (General) Regulations, 1939. The plaintiff claimed damages for breach of a covenant to repair an electricity generating plant situated on the premises, and the question to be decided was whether this plant was "land" for the purposes of the Landlord and Tenant (Requisitioned Land) Act, 1944, s. 1 (1), so that the defendants could claim the protection of that sub-section. Section 1 (1) of the Act provides:

Where in the exercise of emergency powers, possession of any land comprised in a lease is taken on behalf of His Majesty, then, during the period while possession so taken is retained, no remedy for breach of any repairing covenant contained in the lease shall be enforced, whether by action or otherwise, in respect of any damage to the land occurring during that period; and if the lease determines while possession of the land is so retained, or if upon possession of the land being given up, compensation in respect of the taking of possession thereof becomes payable for any such damage to the person entitled to the benefit of the covenant, no remedy for breach of the covenant shall at any time be enforced as aforesaid in respect of that damage.

The county court judge decided in favour of the plaintiff, and the defendants appealed.

G. G. Baker and *H. B. Grant* for the defendants.

L. A. Blundell and *D. J. Hyamson* for the plaintiff.

MORTON, L.J.: I do not think this is at all an easy case, but in the end it comes down to quite a short point. The landlord claimed that he was entitled to possession of property known as the Bridge Garage and Cafe, Winchester Road, Basingstoke, in the county of Hants, which was let by him to the tenants

by a lease dated July 17, 1937, for the term of 7 years from Sept. 29, 1937. The defendants, who are husband and wife, concede that any tenancy which they had of these premises has come to an end and that they are only statutory tenants. On the other hand, it is conceded that the premises come within the protection of the Rent Restrictions Acts. The plaintiff then claims *mesne* profits and arrears of rent. I need not go into these claims. Lastly, the plaintiff claims £220 damages :

... for breach of the covenant on the part of the defendants contained in the said lease to keep the said premises and the fixtures thereon and the gardens of the same in such repair and condition as therein mentioned. A

There are set out under headings (a) to (j) inclusive particulars of the alleged damage. As regards all of those particulars except (h) and (j) it is only necessary to say that the county court judge, after hearing evidence, came to the conclusion that the plaintiff was entitled to £29 10s. in respect of those minor items. Heading (h) is as follows: "Wiring up and re-setting electric light plant, £23." The judge held, for reasons which will appear later, that the plaintiff was not entitled to recover that item but intimated that, if he had found the plaintiff entitled to recover, he would have awarded £30. Heading (j) is: "Repairs to electric light plant, batteries, and accessories." Under that head the judge found the plaintiff entitled to recover £110 damages. He, therefore, gave judgment for the plaintiff for £139 10s. with costs on scale C, and judgment for £90 19s. for the defendant on his counterclaim, that counterclaim being a claim for rent overpaid. He refused possession. B

By the lease of July 17, 1937, the plaintiff demised to the defendants :

All that piece or parcel of land comprising in area five acres or thereabouts situate in and fronting Winchester Road Basingstoke in the county of Hants together with the cafe shop and living accommodation erected thereover four garages (three being lock-up garages) brick built shed with a Crossley 110 volt generating plant therein brick built building with a two horse-power Lester engine for pumping water therein and three Bowser petrol pumps tennis court gardens orchard and grounds belonging thereto or erected thereon or on some part thereof. C

The *habendum* is to the defendants from Sept. 29, 1937, for a term of 7 years. The only other part of the lease which I need read is the covenant by the tenants n. cl. 2 (4) :

To keep the said Crossley 110 volt generating plant Lester water pump and three Bowser petrol pumps and other apparatus (hereinafter collectively referred to as "the said equipment") for the time being in lease in good working order and condition (fair and reasonable wear and tear and damage caused by latent defects thereof and accident by fire or tempest excepted) and to replace by suitable articles of similar kind and equal value all such parts thereof as shall become broken lost or worn out and to take upon themselves and bear the entire responsibility of the care control and management of the said equipment. D

On the same day there was executed an assignment of the goodwill of the business carried on upon the premises, that assignment being in favour of the female defendant, but on the view I take of the case nothing turns upon that. E

On Apr. 2, 1943, there was served on the plaintiff and also on the male defendant a requisitioning notice by the Hampshire War Agricultural Executive Committee in the following terms :

You are hereby notified that in exercise of the powers conferred upon them by the Cultivation of Lands Orders, 1939, the Hampshire War Agricultural Executive Committee, with the consent of the Minister of Agriculture and Fisheries, will forthwith take possession of the land described in the schedule hereto under the provisions of reg. 51 of the Defence Regulations, 1939, and the committee hereby direct you to give up possession on April 4, 1943. F

The schedule is as follows :

In the municipal borough of Basingstoke, being part of the premises known as the Bridge Garage, Winchester Road, and comprising corrugated iron and timber framed garage, brick and corrugated iron engine shed, range of 2 lock up garages, 2 petrol pumps, and former tennis court, yard space and drive in, as coloured pink on the plan attached hereto. G

The dispute turns on the question whether there was included, under the words "brick and corrugated iron engine shed," the plant and batteries in respect of which £110 damages were awarded for want of repair. If these batteries were included in the requisition, and if possession was taken of them, the defendants would H

be protected from any claim for damages by reason of the Landlord and Tenant (Requisitioned Land) Act, 1944. The Act is headed :

An Act to regulate the rights of the parties to leases of requisitioned land with respect to the making good of damage occurring during the requisition, and for purposes connected therewith.

Section 1 (1) is as follows :

- A Where, in the exercise of emergency powers, possession of any land comprised in a lease is taken on behalf of His Majesty, then, during the period while possession so taken is retained, no remedy for breach of any repairing covenant contained in the lease shall be enforced, whether by action or otherwise, in respect of any damage to the land occurring during that period ; and if the lease determines while possession of the land is so retained, or if upon possession of the land being given up, compensation in respect of the taking of possession thereof becomes payable for any such damage to the person entitled to the benefit of the covenant, no remedy for breach of the
- B covenant shall at any time be enforced as aforesaid in respect of that damage.

Section 5 of the Act defines " damage " as follows :

" Damage " includes dilapidations, but does not include war damage within the meaning of the War Damage Act, 1943.

" Repairing covenant " is defined as follows :

- C " Repairing covenant " means a covenant, whether express or implied, and whether general or specific, to keep in repair any premises comprised in a lease, or to leave or put any such premises in repair, or to pay a sum of money in lieu of leaving or putting the premises in repair, at the termination of the lease, but does not include a covenant to lay out in the reinstatement of any such premises money received under a policy of insurance.

- D I think it is plain that the word " land " when used in s. 1 (1) of the Act would include buildings and any machinery so affixed to the freehold as to become part of it.

On Nov. 4, 1943, a letter was written to the male defendant. Headed " The War Agricultural Executive Committee, County of Southampton, The Castle, Winchester, it was as follows :

- E Dear Sir, The Bridge Garage, Winchester. Further to our interview this morning, will you take this as an authorization, subject to Mr. Murray's [manager of the Ministry of Agriculture and Fisheries' local machinery depot], agreement, to dismantle the electric light plant and store it. This should, of course, be done carefully, and the committee must hold you responsible for seeing that all the parts are there so that if necessary the plant may be re-erected again at the expiration of the requisition.

The judge, in dealing with the claim for damages relating to the engine and the batteries, said :

- F The electric light plant was in one of the sheds requisitioned by the War Agricultural Committee. It was, as I find, a fixture, being attached to the concrete. From what follows it is plain that when the judge says that the plant was a fixture, he is referring to the engine, that being the part of the plant which was attached to the concrete. He goes on :

- G Plaintiff contends that damage to the electric plant was not damage to the land within the meaning of s. 1 (1), but in my view at common law fixtures are part of the land, and by s. 5 " damage " includes " dilapidations " which seems to refer to buildings, and, in my view, would include fixtures attached to the buildings, and " repairing covenant " means a covenant to keep in repair " any premises comprised in a lease." Here again the word " premises " is, in my view, used in the popular sense and would include buildings and fixtures which are part of the buildings. In my view, therefore, plaintiff cannot, at present at any rate, claim damages for the deterioration of and damage to the fixed plant attached to the sheds which were and still are requisitioned. Neither of the parties before us has any quarrel with that portion of the judge's
- H judgment, which covers para. (h) of the particulars of damage. The judge continues :

... but the batteries were not, in my view, fixtures and were not part of the land of which possession was taken by the War Agricultural Committee.

Counsel for the plaintiff has invited us to treat that as two findings of fact which we cannot disturb—(1) a finding that the batteries were not fixtures, and (2) a finding that they were not part of the land of which possession was taken by the War Agricultural Executive Committee. I cannot so read the passage. I think the judge is expressing his view on the question whether,

having regard to the evidence before him and on the true construction of s. 1 of the Act of 1944, the batteries were "land" of which possession was taken on behalf of His Majesty. I do, however, attach great importance to that passage in the judgment because the judge, after hearing all the evidence that was given in regard to this generating plant, has formed the view which I have already quoted. There was, in my view, evidence on which he could fairly draw a distinction between these batteries and the engine which supplied power to them.

The plaintiff's wife, Mrs. May Jordan, said: "The electric light plant was all new. I used to run it. Tungsten batteries, Crossley engine, set out on a table in engine shed, and instrument board." That, I think, means that the batteries were set out on a table in the engine shed. In cross-examination, she said: "Engine was in engine shed, was on a concrete base, bolted to concrete." The defendant said: "Batteries were taken off the stands and laid on one side of the wall." To determine whether the batteries were requisitioned the relevant question is: What was the state of affairs at the time when the requisitioning took place, but it would appear that the batteries were at some time on stands. A surveyor, giving evidence, said: "Electricity plant is in the shed. Dilapidated. Generating motor is rusty, cooling system drained, storage batteries are on the floor and several are broken. General air of neglect and dilapidation. Floor of shed is concrete and motor is bolted in. I would regard it as a fixture." We were invited to treat that statement as an expression of opinion that the whole of the plant, including the batteries, was properly described as a fixture. I do not so read it. The most natural construction of it is that he would regard as a fixture the motor which was bolted in. I think there was evidence on which the judge could form that conclusion.

In one of the cases cited to us, *Pole-Carew v. Western Counties & General Manure Co. (1)*, LORD STERNDAL, M.R., said ([1920] 2 Ch. at p. 116):

Many cases were cited to us, and it is not from any disrespect to the authorities, or to the arguments of counsel, that I refrain from examining them in detail, but because I agree with the statement in FOA ON LANDLORD AND TENANT, 5th ed., at p. 680, that "inasmuch as the whole question is in each case one of fact depending on its own circumstances, the decision in one case can seldom be a guide to a solution in another."

I respectfully accept and adopt that statement for the purposes of the present case. Our attention was called to a passage from the judgment of BLACKBURN, J., delivering the judgment of the court in *Holland v. Hodgson (2)*, ([1872] L.R. 7 C.P. at p. 335):

Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel.

Counsel for the defendants submitted that in the present case there was evidence from which the court should infer that at the time of the requisitioning these batteries were connected in some way with the engine which supplied the power, and, that being so, the onus was on the plaintiff to show that the batteries were "intended all along to continue a chattel." I think that may well be a fair inference to draw from the evidence, and I am prepared to decide the case on the footing that the onus was on the plaintiff to establish that the batteries were chattels. Even so, it seems to me that the judge plainly thought that onus was discharged, and after careful consideration of the whole matter I am not satisfied that he was wrong in his conclusion, on the facts of this particular case. So far as the county court judge awarded the plaintiff the sum of £110 in respect of damage to these batteries, I think his decision must stand.

BUCKNILL, L.J.: I agree. Having regard to the very careful, and, indeed, persuasive argument put forward by counsel on behalf of the defendants, I will add a few words to indicate my reasons for coming to that conclusion. It seems to me that the crucial question for this court to decide is whether

the storage batteries were part of the "brick and corrugated iron shed" requisitioned by the government on Apr. 2, 1943. The batteries were part of the shed if they were fixtures. The case before the judge was argued by the plaintiff's counsel to the effect that the whole electrical plant in the shed was not a "fixture." The defendants argued that the whole of the plant was a fixture. The judge took the view, after hearing all the evidence, that he could divide the electric plant into two categories; that the machine, which was bolted down to a concrete bed, could properly be described as a "fixture"; and that the batteries were not "fixtures." One may point out that this was reserved and a written judgment, and we are told by counsel that in the course of the trial the judge specifically directed his mind to the question what was the legal character of the batteries, whether they were fixtures or not. Unfortunately there is very little evidence on the note about the precise location of these batteries in the shed. They certainly were not attached to the ground in any way. It is not suggested that they were, directly, but it is said they were attached by wires to the engine which was itself attached to the ground and which the judge held to be a fixture. I suppose that in that case this court is entitled to take some judicial notice of the function of these batteries. They are described as "storage batteries," and they must have been attached to the engine by wires and attached by other wires to the wiring which led to the house and so to the electric light points.

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- It seems to me that the question which we have to decide is: Were these batteries an essential part of the engine, which was a fixture? Were they a necessary and integral part of the engine, to quote the language of the Lords Justices in *Pole-Carew v. Western Counties & General Manure Co.* (1) to which my Lord has referred. The judge has said in effect that they were not, and I myself do not see how this court can say, on the evidence, that he was wrong.
- It seems to me that this plant would have worked just as well if the batteries had been housed in another shed and attached by wires to the engine. It is true that they were part of the plant, and were, no doubt, necessary to make the electric light effective, but so also was the oil which drove the engine which worked the dynamo which created the current. They were not in any way necessary to make the engine work. They were merely necessary as part of the whole scheme.
- For these reasons I do not see how it is possible to say that this finding of the judge that the batteries were not fixtures (which seems to me to be largely a question of fact) is wrong, and, therefore, I agree that the appeal should be dismissed.

ASQUITH, L.J.: I also agree. Many authorities have been cited to us which purport to lay down criteria for determining what is and what is not a "fixture."

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- Those criteria are not always easy to harmonise, but what practically all the cases emphasise is that each case ought to be decided with a close regard to its own facts. The facts were far more fully available to the county court judge than they were to us, and this should make us slow to disturb his conclusion, unless he obviously applied a wrong principle of law. As regards the law, a criterion laid down in some recent cases which seems to have been accepted by both parties to the argument is that the test is whether the article in question is an integral or essential part of a machine which is itself admittedly a fixture. To me, these batteries seem not so much an essential or integral part of the engine, or, indeed, a part of it at all, as a convenient accessory, a receptacle attached to the engine which supplies current in which that current is stored and through which it is transmitted to the wiring system of the house. If so, the case seems, on the facts, though not exactly on all fours with any that have been cited, more nearly analogous to *Northern Press & Engineering Co. v. Shepherd* (3), *Hulme v. Brigham* (4), and *British Economical Lamp Co., Ltd. v. Empire, Mile End, Ltd.* (5), than to any of the cases cited by counsel for the defendants. I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: Doyle Devonshire & Co. agents for Dennis Berry & Co., Reading, for the defendants; Simon, Haynes, Barlas & Cassels for the plaintiff.

[Reported by RONALD ZIAR, ESQ., Barrister-at-Law.]

FURBY v. HOEY.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Lewis, JJ.),
January 15, 21, 1947.]

Intoxicating Liquors—Offences—Sale of liquor by retail without licence—Place of sale—Order at licensed premises—Delivery postponed pending instructions—Liquor collected and delivered to and paid for at unlicensed club after permitted hours—Appropriation—Finance (1909-10) Act, 1910 (c. 8), s. 50 (3).

The respondent, an excise officer, filled in and sent to the appellant at his licensed premises a form of order purporting to order a variety of liquors, stating that delivery instructions would follow. Subsequently, after licensing hours and at an unlicensed club, the respondent filled up a form of delivery for one bottle of gin, which was taken by a messenger to the appellant's premises, and the gin was brought back to and paid for by the respondent at the club. The appellant was convicted at quarter sessions of selling by retail a bottle of gin at the club without having taken out a licence, contrary to s. 50 (3) of the Finance (1909-10) Act, 1910.

HELD: appropriation, which completed the contract, took place at the licensed premises of the appellant and not at the club, and, accordingly, though guilty of the offence of selling liquor out of permitted hours, the appellant was not guilty of selling liquor on unlicensed premises as charged.

Mizen v. Old Florida, Ltd. (2) followed.

[AS TO PLACE OF SALE OF INTOXICATING LIQUORS, see HALSBURY, Hailsham Edn., Vol. 19, p. 126, para. 297; and FOR CASES, see DIGEST, Vol. 30, pp. 78-81, Nos. 617-627.]

Cases referred to:

- (1) *Lloyd v. Grace, Smith & Co.*, [1912] A.C. 716; 81 L.J.K.B. 1140; 107 L.T. 531; 34 Digest 129, 991.
- (2) *Mizen v. Old Florida, Ltd.*, *Egan v. Mizen* (1934), 50 T.L.R. 349; 78 Sol. Jo. 298; Digest Supp.
- (3) *Pletts v. Beattie*, [1896] 1 B.Q. 519; 65 L.J.M.C. 86; 74 L.T. 148; 60 J.P. 185; 30 Digest 79, 618.
- (4) *Pasquier v. Neale*, [1902] 2 K.B. 287; 71 L.J.K.B. 835; 87 L.T. 230; 67 J.P. 49; 30 Digest 80, 626.
- (5) *Fitzpatrick v. Bate*, *Mitchell v. Page* (1934), 151 L.T. 17; 98 J.P. 215; Digest Supp.
- (6) *Hotel Regina (Torquay), Ltd. v. Moon*, [1940] 2 All E.R. 495; [1940] 2 K.B. 69; 109 L.J.K.B. 582; 162 L.T. 359; 104 J.P. 275; Digest Supp.

CASE STATED by London Quarter Sessions.

The appellant was a wine merchant carrying on business as Hoey & Co., at 9, Warwick Street, London, W., and another address. He held excise licences in respect of each of these premises authorising the sale of spirits or wine by retail for consumption off the premises. On Apr. 12, 1944, the respondent, an excise officer, filled in and signed in the name of Brockbank a form of order addressed to the appellant. The order read: "Please sell me the undermentioned goods. I will give delivery instructions at a later date." It also provided that the appellant should have a lien on the goods until payment was made for them and was entitled to re-sell them if the payment was not made within a limited time. A variety of liquors were then set out. The order was posted to the appellant and was received by him. Shortly after 11 p.m., on May 2, 1944, the respondent called at the "New Paradise" Club, 189, Regent Street, London, W., and after admission told the head waiter that he had a wine order with the appellant and asked him to obtain a bottle of gin. At the request of the waiter the respondent signed a form which read: "Delivery Instructions. To Hoey, Ltd. Please deliver to me at (blank) the undermentioned goods being part of the order you hold on my behalf:—one gin." The waiter said the price was £3 10s., which the respondent paid. A messenger took the delivery instructions from the "New Paradise" to the appellant's premises at Warwick Street, and returned with a bottle of gin which he handed to the respondent at about 12.55 p.m. On May 18, 1944, the respondent called at the "New Paradise" club about 11.20 p.m., and ordered and paid for a bottle of gin, virtually the same procedure being followed. It was the practice of the appellant or his servants, on receiving an order form, to allocate to it two bottles of whisky and two bottles of gin by attaching to them labels bearing the name of the customer. This was usually done on the day of receiving the printed order, but the practice

was not universally followed. Neither the appellant nor his servants could recollect that this practice was carried out in respect of the respondent's order and there was no evidence of any allocation of gin to the respondent made before the messenger arrived from the "New Paradise" with delivery instructions other than the evidence of such practice. The appellant was charged before the Chief Metropolitan Magistrate at Bow Street Police Court with selling by retail a bottle of gin on the two occasions mentioned without taking out a licence, contrary to s. 50 (3) of the Finance (1909-10) Act, 1910, it being contended that the sale took place at the premises of the club, which were not licensed. The charge was dismissed, and the respondent appealed to the County of London Sessions who allowed the appeal and convicted the appellant, fining him £50 on each information. The appellant now appealed from the decision of quarter sessions.

A *G. O. Slade, K.C., and Colin Duncan* for the appellant.

B *Sir Valentine Holmes, K.C., and C. N. Shawcross* for the respondent.

Cur. adv. vult.

Jan. 21. The following judgment of the court was read by LORD GODDARD, C.J.: This case has had a remarkably chequered career. The chief magistrate having dismissed the charges out of which it arises, the excise authorities, who were prosecutors, gave notice of appeal to the London Sessions. That led to proceedings before this court on the present appellant's contention that no appeal lay ([1945] 2 All E.R. 298). It having been decided that an appeal did lie, the appellant appealed against that decision to the Court of Appeal, and was again unsuccessful ([1946] 1 All E.R. 129). Then the appeal came on at the sessions where the magistrate's order was reversed and the appellant to that court was fined £50, subject to a Case being stated. A so-called Case was then stated by the sessions, which consisted of nothing except the shorthand notes of the hearing and the decision of that court. It was sent back with a direction to state the Case properly, i.e., to state the facts which the sessions found were proved. The Case has now been restated, but is still far from satisfactory. We do not stay to inquire whose fault it is, though it is difficult to believe that no more than the very meagre facts which it contains emerged at the hearing, but we are reluctant to send the Case back for further statements, for it is high time it was disposed of. Moreover, neither side asked at the outset for the Case to be remitted, so they must, we think, be taken to have considered that enough is found to enable them to raise their respective contentions. We should, however, like the London Sessions Appeal Committee and their chairman to understand that a minimum of information is likely to cause a maximum amount of trouble.

What does appear from the Case is that the appellant, Hoey, carries on business as a retail wine and spirit merchant at Warwick Street, London, W. The other person charged with him, but who does not appeal, conducts that undesirable class of business known as a bottle party at premises in Regent Street, London, W., known, however inappropriately, as "New Paradise." As is common knowledge, the object of these parties is to enable alcoholics and others to continue drinking after licensing hours, and the way it is done, or supposed to be done, is that orders are placed with a wine and spirit shop during the day and the shopkeeper is supposed to sell there and then and appropriate a bottle or bottles of drink to the particular customer, but postpones delivery till it is asked for, then, when the public houses are closed, the purchaser calls or more probably sends for the whole or a part of his purchase which he then consumes on unlicensed premises. So long as the sale takes place at the shop and not at the bottle party there is no breach of the law, unless, indeed, as in this case actually happened, the sale and delivery at the shop took place out of permitted hours.

In the present case the respondent, an excise officer, filled in a form of order purporting to order a variety of liquors from Hoey, who paid just as much attention to it as one would expect, which was none. Counsel for the appellant has told us that the sessions found that the document constituting the order was colourable only, which in plain language means that the whole process of getting an order in advance and pretending to appropriate goods to it was pure humbug, so that it is clear that in the events which happened Hoey sold liquor about 12.30 a.m. and, had he been prosecuted for that, he would not

have had a shadow of defence. The events which did happen were that at something after 11 p.m. on May 2 the respondent entered the gates of "New Paradise," told the waiter that he had an order with Hoey, and asked him to get a bottle of gin. The waiter thereupon produced a bit of paper dignified by the title of "delivery instructions" and asked the officer to sign it after he, the waiter, had filled in Hoey's name and the liquor required. So it read: "To Hoey, Ltd. Please deliver to me at " (blank) "the undermentioned goods being part of the order you hold on my behalf:—one gin." The waiter told him the price would be £3 10s. 0d., which he paid. This order was taken by a messenger to Hoey's place of business and he brought back the gin about 1 a.m., when it was given to and accepted by the officer.

We have no doubt, and it is conceded by counsel for the appellant, that, though the place of delivery was left blank, it was intended by all parties that the gin should be brought or sent to "New Paradise." We are not told whether the messenger was a servant of Hoey or of the proprietor of the party, nor do we know what became of the money, whether it was sent by the messenger or whether, as we confess we think is far more probable, it was accounted for to Hoey at some later date, but we do not know that the place or time of payment is very material. A similar performance was gone through a fortnight or so later, and these two transactions led to the appellant being summoned for the retail selling of intoxicating liquor for which he was required to take out a licence without having taken out such a licence contrary to the Finance (1909-10) Act, 1910, s. 50 (3).

It is thus apparent, and, indeed, we think both parties agree, that the only question for decision was: Where did the sale take place? Was the sale at Hoey's shop or was there no sale till the bottle was handed to the officer at the "New Paradise"? The sessions find as a fact that the true nature of what was done was that both appropriation and delivery took place at the "New Paradise" and that the sale took place there, and this court has now to determine whether, on the facts stated, it was open to the sessions to come to that conclusion. Let us say at once that we are not surprised that they took a view unfavourable to the appellant. Apart from the fact that all this bottle party nonsense, is an attempt, albeit it may be a successful attempt, to evade the licensing laws, Hoey, by pretending, as we are told he did, that there had been a *bona fide* sale earlier in the day to the officer, and by relying on the order form, did everything he could to put the court against him. The one and only object of the order form is to make it appear that there had been a *bona fide* sale during permitted hours, and if there be such a thing as a strictly conducted bottle party, and it is possible there is, the order form might record an actual and blameless sale, but as Parliament has not seen fit to legislate against these parties and has left these affairs to be decided on nice points under the Sale of Goods Act as to the passing of property, the court cannot allow itself to be influenced by any considerations other than the dry legal topic: When did the property pass? We must look at it in exactly the same way as a judge taking the Commercial List would, were he trying a case relating to 1,000 gallons of gin, remembering that the same principles may well apply to a single bottle sold to an excise officer at a bottle party.

In our opinion, the sessions did not sufficiently distinguish between appropriation and delivery. Property in unascertained goods passes to the buyer when there is an appropriation of goods to a contract—which need not be a pre-existing contract—by the buyer with the assent, express or implied, of the seller, or by the seller with the assent of the buyer. The appropriation may be, and often is, quite distinct from delivery. If a man enters a shop and, seeing a bottle of gin, points to it and says: "Please sell me that bottle," and the shopman gives it to him, there is then a sale of a specific chattel. If he says—the gin being under the counter, or elsewhere—"Please let me have a bottle," and the shopman takes one out and hands it to him, and he accepts it, there is an appropriation from his stock with the buyer's express consent. If the buyer writes or telephones or sends his servant and says: "Please send me or let me have a bottle," he is leaving it to the shopman to appropriate a bottle out of his stock to the customer, and as soon as the shopman does so the sale is complete. The customer has, by his conduct, impliedly assented to the appropriation.

Counsel for the respondent argued that until the bottle was actually handed to the purchaser at the club there was no acceptance of the order communicated to the purchaser. An offer can be accepted by conduct, and what does it matter to a purchaser who asks for delivery at a club or elsewhere how the seller sends it to him? The excise officer in this case knew quite well that when he asked for a bottle of gin it was going to be obtained from Hoey and brought or sent to the club. His order had to be taken to Hoey's place of business.

- A It mattered not to the officer whether one bottle rather than another was sent so long as it was gin. He left it to Hoey to select a bottle, and to choose how it was sent, and as soon as Hoey handed it to the messenger it became the property of the officer. He impliedly assented to the appropriation. On the facts stated by the sessions we can see no difference whatever between this case and one in which a man dining at an unlicensed restaurant gives the waiter money and asks him to send out to a neighbouring public house and get him a bottle of beer. Counsel for the respondent concedes that that is a perfectly lawful transaction. What difference can it make that the so-called delivery order in this case calls for delivery at the club? In the illustration we have given, the buyer certainly calls for delivery at the restaurant and the publican, who will probably be quite well acquainted with the messenger, knows that is what is expected. If the messenger should unhappily yield to temptation and drink the beer *en route*, the loss will not fall on the publican.
- C The customer will have a right of action against the restaurant proprietor, because his servant, acting in the scope of his employment, has converted the customer's beer, and, if this resulted in a county court action, no doubt LORD MACNAGHTEN'S judgment in *Lloyd v. Grace, Smith & Co.* (1) would be cited by an industrious advocate. Were we to give effect to the argument of the respondent, it would follow that, whenever a customer wrote or telephoned to the stores or his wine merchant for a bottle of liquor and it was delivered by the seller's own servant, then, unless the seller had previously in some way communicated with his customer and told him he was accepting the order, an offence was committed, because it would follow that the sale took place at the customer's premises.

- D On the facts stated we have no doubt but that the bottle of gin was sold at Warwick Street and this is in accordance with the decision of this court in *Mizen v. Old Florida* (2), which, on this point, is, in our opinion, indistinguishable from the present case. Hoey committed an offence against the licensing laws, but not the offence with which he was charged, and the result, therefore, is that the appeal is allowed and the conviction is quashed, with costs.

Appeal allowed.

Solicitors: *Philip Conway, Thomas & Co.* (for the appellant); *Solicitor of Customs and Excise* (for the respondent).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

Chief. FIRST NATIONAL HOUSING
ST. LTD. v. CHESTERFIELD R.D.C.
[3] 2 All E.R. 658.

CROYDON CORPORATION v. THOMAS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Lewis, JJ.), January 17, 1947.]

- G *Public Health—Dustbin—Provision—Owner of building required by local authority to provide—Right of appeal to justices—Public Health Act, 1936 (c. 49), s. 75.*

The owner of a building may appeal against a requirement of a local authority that he shall provide a dustbin under s. 75 of the Public Health Act, 1936, on the ground that the burden of providing the dustbin should be thrown on the tenant and not on the owner, and the justices have an unrestricted discretion in dealing with such an appeal.

- H [FOR THE PUBLIC HEALTH ACT, 1936, s. 75, see HALSBURY'S STATUTES, Hailsham Edn., Vol. 29, p. 384.]

SPECIAL CASE stated for the opinion of the King's Bench Division of the High Court by the justices of the county borough of Croydon on an appeal against a requirement of the Croydon County Borough Council that the appellant, the owner of a building in the county borough of Croydon, should provide a dustbin for the premises under s. 75 of the Public Health Act, 1936. The facts appear sufficiently from the judgment of the Lord Chief Justice.

Michael E. Rowe, K.C., and G. D. Squibb for the appellants.

G. H. Crispin and M. Flitt for the respondent.

LORD GODDARD, C.J.: This is a case stated by Croydon justices which raises a point which is not free from difficulty, but, in my opinion, the justices came to a correct decision.

Section 75 of the Public Health Act, 1936, provides :

A local authority who, as respects their district or any part thereof, have undertaken the removal of house refuse may by notice require the owner or occupier of any building within the district, or, as the case may be, within that part of the district, to provide such number of covered dustbins for the reception of house refuse of such material, size and construction as the authority may approve. Provided that this sub-section shall not entitle an authority to require the replacement of any dustbin in use at the commencement of this Act so long as it is of suitable material, size and construction and properly covered and in proper condition.

I leave out the next part of the sub-section for the moment, although it contains the words on which the whole question depends. Sub-section 2 in substance, provides that, if a person fails to comply with the notice, the authority may provide the dustbin and recover the cost from the person in default, and the person who fails to comply becomes liable to a penalty. I do not think sub-s. 3 is of assistance. It provides that the authority may, in lieu of requiring the owner or occupier to provide the dustbin, provide one themselves and put an addition on the rates for having done so.

The words which we have to construe in this case are to be found in sub-s. 1. That provides :

Any person aggrieved by a requirement of the local authority under this sub-section may appeal to a court of summary jurisdiction.

If you take the first part of sub-s. 1 alone, it appears to put the widest possible discretion into the hands of the local authority. It appears to enable them by administrative action to require either the owner or the occupier to provide the dustbin. Accordingly, if the section remained without the addition of the words to which I have referred about an appeal, it would seem reasonably clear that that was an administrative discretion given to an elected body, the local authority with which no one could interfere—not a discretion which requires to be exercised judicially, but an administrative discretion. When, however, you find that any person aggrieved by a requirement of the local authority may appeal to a court of summary jurisdiction, it is obvious that Parliament intends the discretion which has been exercised by the local authority to be subject to an appeal, and the final determination, if a person does appeal, is left to the justices and not to the local authority.

The facts in the present case are that the owner of certain premises brought an appeal before the local authority, in the first place, under another section of the Act, namely, s. 290 (3). It is largely the provisions of that section and the machinery which is provided under it which form the substance of the argument of counsel for the appellants that the justices had no jurisdiction to hear the complaint on the only ground which was submitted, namely, that it was not right that the burden of providing this dustbin should be thrown on the owner and not on the tenant. Section 290 applies only to matters which are contained in part XII of the Public Health Act, except that there are certain sections in other parts of the Act (and s. 75 is not one of those) to which the provisions of s. 290 are specifically applied. Section 290 provides that a person served with a notice under that part of the Act "may appeal to a court of summary jurisdiction on any of the following grounds," and then it sets out the grounds on which he can appeal. One of the grounds on which he can appeal is :

(e) that the notice might lawfully have been served on the occupier of the premises in question instead of on the owner, or on the owner instead of on the occupier, and that it would have been equitable for it to have been so served.

There you get a section which says that where a notice under one part of the Act may be served either on an owner or occupier, either the owner or the occupier, according to which is served, can go to the court and say: "I ought not to have been served. It ought to have been served on the other person." If the owner goes, he or she can say the notice should be served on

the occupier, and, on the other hand, the occupier can say it should be served on the owner. Because Parliament probably recognised in passing that section that that would involve the respective rights of owner and occupier, provision is made in the section for bringing in the other person who might be affected thereby, that is to say, if the owner says the notice ought to have been served on the occupier, provision is made for bringing the occupier before the court, and then the justices who form the court of appeal can decide as between the owner and the occupier which is the proper person to serve. It is to be remarked that in s. 45 which is also in part II of the Act, and deals with a matter somewhat akin to that with which s. 75 is concerned—s. 75 deals with dustbins and s. 45 with defective closets—there is a provision that, in considering whether an owner or an occupier is to be required to repair a defective closet, the provisions of part XII, which includes s. 290, are to be applied. Therefore, if the question arises under s. 45 whether it is the owner or the occupier who should be served, the justices can decide the matter. One would rather expect that some sort of similar provision would have been put in s. 75, but it has not been.

Counsel for the appellants has argued forcibly that that shows that in a case under s. 75 the question who is to be served is to be left entirely to the local authority and it is not a question which the justices have power to decide. The only thing the justices can decide, it is said, is whether or not a dustbin is required and whether or not the dimensions of the dustbin which one or other of these persons is required to provide is larger than is needed. There is a great deal to be said for the fact that, unless Parliament meant that, one would have expected to find similar provisions to s. 290 incorporated in s. 75. We have, however, to read the section as it stands, and, as it stands, it is clear that it gives an unrestricted right of appeal. It provides that any person aggrieved by a requirement of a local authority may appeal to a court of summary jurisdiction. The principal way in which a person can be aggrieved is by being called on to provide this receptacle, and if an owner is called on to do it and thinks that, for instance, under the terms of the lease between himself and the occupier, the burden is thrown on the occupier, one cannot imagine any greater grievance.

One thing which appeals to one is that the section does not purport in any way to vary the terms of the contract of tenancy between the landlord and the tenant, and yet, if the local authority can, at their discretion, throw the burden on one or the other without regard to anything more than the fact that they think it better to put it on one rather than on the other, they may be very materially interfering with the contract of tenancy. If, under the contract of tenancy there was an obligation to keep a dustbin in repair (because it need not be a movable dustbin; it could be a receptacle which is part of the outside structure of the house), and if it were found to be out of repair, the burden would fall on the tenant.

My reason for coming to the conclusion to which I have come is that a right of appeal in terms entirely unrestricted is given. It is given to "any person aggrieved," and any person is aggrieved if he is ordered to do some work or provide some receptacle which ought to be done or supplied by another. The justices set out their reasons in the Case. Having read the facts they find, I am satisfied that, if it was open to the justices to come to this conclusion, no possible fault could be found with their decision. They have given as one of their reasons that they were not satisfied that there had been a proper exercise by the local authority of the discretion imposed by s. 75. I do not think we need go into the question whether, if the local authority give a general direction, that is either necessarily a proper or necessarily an improper exercise of discretion. As they are given a discretion under the Act to impose this burden on the owner or occupier, and as in accordance with what we are now holding there is a right of appeal given to the occupier against the order, it follows that the justices can certainly differ from the discretion which is given to the local authority. The whole argument of counsel for the appellants was that that part of the decision could not be considered by the justices. I have come to the conclusion that the words of the statute are too wide for that contention to prevail.

Accordingly, I think it was open to the justices to come to the conclusion they did. What the possible consequences of that decision may be and how it will work out in the end is something with which we are not concerned. In

the circumstances this appeal fails and must be dismissed with costs.

HUMPHREYS, J. : I am of the same opinion, the justices state that the ground on which they allowed the appeal was that the appellant was justly aggrieved by the requirement of the local authority. Looking at the appeal section, as my Lord has said, it is about as wide and general as an appeal section can possibly be. There is no restriction of any sort to prevent the appeal court from considering this question : Was the requirement of the local authority a proper one in the circumstances ? In my view, they may consider any matter which is relevant which will enable them to decide that question. Obviously, one of the matters, probably the only matter, which resulted in the appeal, was that the appellant was saying that he ought not to have been required to provide the dustbin. I cannot see that there could have been any argument addressed to the court limiting the discretion of the appellate court except that in certain other matters the Act has provided in terms that the justices shall consider such questions and shall bring or may bring before them, or before the court of appeal, the other party. I do not think that is strong enough to prevent this court holding—and in this I agree with my Lord—that here is a case of a wide and unfettered discretion, and, in my opinion, the appeal court was authorized to consider, and was only doing its duty in considering, whether the right person had been required to provide the dustbin. I agree, therefore, that the appeal should be dismissed.

LEWIS, J. : I agree with the decision arrived at by the LORD CHIEF JUSTICE and HUMPHREYS, J., and for the reasons given by them.

Appeal dismissed with costs.

Solicitors : *Sharpe, Pritchard & Co.*, agents for the Town Clerk of Croydon (for the appellants) ; *A. Rawlence* (for the respondent).

[Reported by F. A. AMIES, Esq., *Barrister-at-Law.*]

CLARK AND WIFE v. BRIMS

[KING'S BENCH DIVISION (Morris, J.) October 21, 22, 23, 1946, January 17, 1947.]

Negligence—Breach of statutory duty—Duty imposed under sanction of penalty—Failure to carry rear light on car during hours of darkness—Whether separate remedy available to person aggrieved—Road Transport Lighting Act, 1927 (c. 37), ss. 1, 10.

A car, driven at night by the plaintiff, ran into the back of the defendant's car, which was stationary and without a rear light at and immediately before the moment of impact. The question for decision, *inter alia*, was whether the plaintiff, who was injured in the collision, could recover damages on the ground that there was a breach by the defendant of his statutory obligations under the Road Transport Lighting Act, 1927, s. 1, to carry, during the hours of darkness, one lamp showing to the rear a red light visible from a reasonable distance, the penalty for breach of which, by way of a fine, was provided by s. 10 of the Act :—

HELD : the imposed duties were public duties only and did not impose duties enforceable by any individuals aggrieved, and, consequently, the plaintiff could not found a cause of action against the defendant on the ground of breach of his statutory obligation.

[AS TO NEGLIGENCE OR NEGLIGENCE IN PERFORMING STATUTORY DUTY, see HALSBURY, *Hailsham Edn.*, Vol. 23, pp. 651-655, paras. 917-924 ; and FOR CASES, see DIGEST, Vol. 42, pp. 749-753, Nos. 1734-1772 ; and FOR THE ROAD TRANSPORT LIGHTING ACT, 1927, ss. 1, 10, see HALSBURY'S STATUTES, Vol. 19, pp. 100-104.]

Cases referred to :

- (1) *Maitland v. Raisbeck & Hewitt (R.T. & J.), Ltd.*, [1944] 2 All E.R. 272 ; [1944] 1 K.B. 689 ; 113 L.J.K.B. 549 ; 171 L.T. 118 ; Digest Supp.
- (2) *Phillips v. Britannia Hygienic Laundry Co., Ltd.*, [1923] 2 K.B. 832 ; 93 L.J.K.B. 5 ; 129 L.T. 777 ; 42 Digest 870, 197.
- (3) *Dawson & Co. v. Bingley Urban Council*, [1911] 2 K.B. 149 ; 80 L.J.K.B. 842 ; 104 L.T. 659 ; 75 J.P. 289 ; 42 Digest, 753, 1772.

- (4) *Pasmore v. Oswaldtwistle Urban Council*, [1898] A.C. 387; 67 L.J.Q.B. 635; 78 L.T. 569; 62 J.P. 628; 42 Digest 752, 1758; H.L. affg. *S.C. sub nom. Peebles v. Oswaldtwistle Urban District Council*, [1897] 1 Q.B. 625, C.A.
- (5) *Doe d. Rochester (Bp.) v. Bridges* (1831), 1 B. and Ad. 847; 9 L.J.O.S.K.B. 113; 42 Digest 750, 1737.
- (6) *Groves v. Wimborne (Lord)*, [1898] 2 Q.B. 402; 67 L.J.Q.B. 862; 79 L.T. 284; 42 Digest 760, 1858.
- (7) *Britannic Merthyr Coal Co. v. David*, [1910] A.C. 74; 79 L.J.K.B. 153; 101 L.T. 833; 34 Digest 740, 1168; H.L. affg. *S.C. sub nom. David v. Britannic Merthyr Coal Co.*, [1909] 2 K.B. 146, C.A.
- (8) *Monk v. Warbey*, [1935] 1 K.B. 75; 104 L.J.K.B. 153; 152 L.T. 194; Digest Supp.
- (9) *Badham v. Lambs, Ltd.*, [1945] 2 All E.R. 295; [1946] 1 K.B. 45; 115 L.J.K.B. 180; 173 L.T. 139.
- (10) *Goldsmith v. Deacon* (1933), 150 L.T. 157; 98 J.P. 4; Digest Supp.
- (11) *McLeod (or Houston) v. Buchanan*, [1940] 2 All E.R. 179; Digest Supp.

ACTION to recover damages for injuries sustained in a collision with a car which, contrary to the Road Transport Lighting Act, 1927, s. 1, did not carry, during the hours of darkness, a lamp showing to the rear a red light visible from a reasonable distance. The facts appear in the judgment.

N. R. Fox-Andrews, K.C., and *G. R. Mitchison, K.C.* for the plaintiffs.

B. L. A. O'Malley for the defendant.

Cur. adv. vult.

Jan. 17. MORRIS, J. read the following judgment: On the night of Oct. 14, 1944, the first-named plaintiff was driving his motor car along the Colnbrook bye-pass when he ran into the back of the defendant's car, which was stationary by the side of the road, and he and his wife, the second plaintiff, and also the defendant suffered personal injury. Immediately before the impact, the defendant, who was returning to London from Reading, was stooping in front of the near side front wheel of his car, being engaged in changing that wheel in consequence of tyre trouble. His car was caused to lurch forward so that it knocked him over and pushed him to some extent along the ground. The occurrence took place at about 9.30 p.m. It was a very dark night, black-out restrictions were in operation and the surface of the road was wet. The plaintiffs assert that the defendant had no light of any kind at the rear of his stationary car, and maintain that this brought about the accident. They allege that the defendant was negligent in failing to have a rear light. They also allege that the defendant was in breach of his statutory obligations under the Road Transport Lighting Act, 1927, in circumstances enabling and entitling the plaintiffs to found a cause of action against him. The defendant insists that his car was appropriately lighted at the rear, and maintains that, in any event the blame for the collision must lie with the first-named plaintiff.

One of the chief issues of fact is whether or not at and immediately before the moment of the impact the defendant's car was lighted at the rear. [His Lordship reviewed the evidence and continued:] I accept the evidence of the plaintiffs that at the time immediately before the impact the rear lights of the defendant's car were not lit. I consider, however, that the defendant believed that they were lit and was not unreasonably of that belief. It follows that the fact that the rear lights were not lit cannot be imputed to the defendant as negligence, nor do the facts warrant any conclusion that the defendant is liable on the basis of causing a nuisance: see *Maitland v. Raisbeck & R.T. & J. Hewitt, Ltd.* (1).

The next matter to be considered is whether the first plaintiff was guilty of negligence in running into the rear of the defendant's car, and I have come to the conclusion that the plaintiff was not negligent in his driving and that his speed need not be regarded as having been excessive.

Apart from the issue which I now have to consider, the consequence of the conclusions which I have stated would be that the claims of the plaintiffs and the counterclaim of the defendant would fail.

The plaintiffs put forward two submissions which become applicable if it is found that at the material moment the defendant had no rear light. They point to the provisions of the Road Transport Lighting Act, 1927, and claim that the defendant is liable in damages to the plaintiffs because, they say,

he was guilty of a breach of statutory duty. They further submit that, if the defendant was in breach of a statutory duty, then a *prima facie* case of negligence is raised against him, and they submit that the burden of proof shifts so as to require the defendant to show that he was not negligent. They submit that the defendant should be regarded as having failed so to do.

In regard to this last-mentioned submission, it is doubtless correct to say that a breach of a statutory obligation may, in some circumstances, be relied on as forming evidence of negligence, but questions as to the onus of proof are not of equal consequence in cases where both sides have given and called evidence as in cases where evidence has only been forthcoming from one side. In the present case, both the plaintiffs and the defendant gave evidence, and I am of opinion, on the evidence in this case, that the absence of a rear light ought not to be regarded as amounting to negligence in the defendant. If it is necessary so to state the matter, I consider that the defendant has by his evidence displaced any *prima facie* case of negligence which the prior evidence in the action may have raised. This is apart from the question which I now pass to consider—whether the plaintiffs can recover damages if the defendant were in breach of a statutory obligation.

The Road Transport Lighting Act, 1927, s. 1 (1), provides as follows :

Subject to the provisions of this Act and of any regulations made thereunder by the Minister of Transport (in this Act referred to as "the Minister"), every vehicle on any road shall during the hours of darkness carry—(a) two lamps, each showing to the front a white light visible from a reasonable distance ; (b) one lamp showing to the rear a red light visible from a reasonable distance ; and every such lamp shall, while the vehicle is on any road during such hours as aforesaid, be kept properly trimmed, lighted, and in efficient condition, and shall be attached to the vehicle in such position and manner as the Minister may by regulations prescribe. It shall be the duty of any person who causes or permits a vehicle to be on any road during the hours of darkness to provide the vehicle with lamps in accordance with the requirements of this Act and of any regulations made thereunder.

I do not think it necessary for the purpose of this judgment to refer to the regulations relating to war-time lighting restrictions and specifying the amount of light that might be emitted. Section 2 of the Act deals with the restriction on the number and nature of lamps to be carried. Succeeding sections deal with the following topics ; s. 3 deals with conditions regulating the use of lamps on vehicles ; s. 4 with restrictions on the movement of lamps ; in s. 5 there are special provisions as to bicycles and triicycles ; s. 6 deals with horse-drawn vehicles ; s. 7 is concerned with vehicles carrying overhanging or projecting loads ; s. 8 contains special provisions as to vehicles towing and being towed ; and s. 9 deals with reflectors. Section 10, dealing with penalties, is as follows :

If any person causes or permits any vehicle to be on any road in contravention of any of the provisions of this Act or of regulations made thereunder, or otherwise fails to comply with any such provisions, he shall be guilty of an offence and shall be liable on conviction by a court of summary jurisdiction for each such offence to a fine not exceeding five pounds, or in the case of a second or subsequent offence to a fine not exceeding twenty pounds : Provided that, if a person driving or being in charge of a vehicle is charged with such an offence, he shall not be convicted thereof if he proves to the satisfaction of the court that such offence arose through the negligence or default of some other person whose duty it was to provide the vehicle with a lamp or lamps.

Counsel appearing before me were not aware of any case in which a claim for damages based on a breach of duty under this statute had been advanced. In *Phillips v. Britannia Hygienic Laundry Co., Ltd.* (2), it was held that it was not intended by the Locomotives on Highways Act, 1896, that everyone injured through a breach of an Order made under the Act should have a right of action for damages, but that the duty imposed by the Order was a public duty, only to be enforced by the penalty imposed for a breach of it and not otherwise. The particular clause in issue of the Order in question provided for a motor car being in such a condition as not to cause or to be likely to cause danger to any person in the motor car or on any highway. In his judgment *BANKES, L.J.*, said ([1923] 2 K.B. 832, at pp. 837, 838) :

The only point of substance argued for the appellant was that the Motor Cars (Use and Construction) Order, 1904, conferred on him a statutory right of action for breach of its conditions. Two well known rules relate to this question ; the first is stated by

KENNEDY, L.J., in *Dawson & Co. v. Bingley Urban Council* (3) in these words: "Now, the general law as to the remedy of a person who has been injured by the infringement of a statutory right or the breach of a statutory obligation for his benefit is clear. Where the statute has not in express terms given a remedy, the remedy which by law is properly applicable to the right or the obligation follows as an incident. The law is, I think, correctly stated in Addison on Torts, 8th ed., p. 104, referring to Comyn's Digest: 'In every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law' . . . Accordingly, where the statute is silent as to the remedy, the legislature is to be taken as intending the ordinary result; and the proper remedy for breach of the statute is an action for damages and, in a proper case, for an injunction."

That is the end of the Lord Justice's quotation from KENNEDY, L.J., and the Lord Justice continues:

- B In these cases it may be material to consider whether the right conferred or the act prohibited is for the benefit of a particular class of persons or of the public generally. The second rule is thus stated by LORD HALSBURY in *Pasmore v. Oswaldtwistle Urban Council* (4): "The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law. I think LORD TENTERDEN accurately states that principle in the case of *Doe v. Bridges* (5). He says: 'Where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.'"

The observations of BANKES, L.J., at the foot of p. 839 and at the top of p. 840 are partly directed to a submission then made to the court that a mere breach of statutory duty would give rise to a claim even though the breach had in no way been responsible for the injury suffered, but, in dealing with this matter, the Lord Justice appears to be classing a provision in regard to exhibiting a rear light as one passed for the benefit of the public generally. In his judgment in the same case, ATKIN, L.J., at pp. 840, 841, said this:

- E In my opinion, when an Act imposes a duty of commission or omission, the question whether a person aggrieved by a breach of the duty has a right of action depends on the intention of the Act. Was it intended to make the duty one which was owed to the party aggrieved as well as to the State, or was it a public duty only? That depends on the construction of the Act and the circumstances in which it was made and to which it relates. One question to be considered is, does the Act contain reference to a remedy for breach of it? *Prima facie* if it does that is the only remedy. But that is not conclusive. The intention as disclosed by its scope and wording must still be regarded, and it may still be that, though the statute creates the duty and provides a penalty, the duty is nevertheless owed to individuals. Instances of this are *Groves v. Lord Wimborne* (6) and *Britannic Merthyr Coal Co. v. David* (7).
- F There is one further passage in the judgment of ATKIN, L.J., which is very material in regard to the general principle, and that is at p. 842 where he said:

- G Therefore the question is whether these regulations, viewed in the circumstances in which they were made and to which they relate, were intended to impose a duty which is a public duty only or whether they were intended, in addition to the public duty, to impose a duty enforceable by an individual aggrieved. I have come to the conclusion that the duty they were intended to impose was not a duty enforceable by individuals injured, but a public duty only, the sole remedy for which is the remedy provided by way of a fine. They impose obligations of various kinds, some are concerned more with the maintenance of the highway than with the safety of passengers; and they are of varying degrees of importance; yet for breach of any regulation a fine not exceeding £10 is the penalty. It is not likely that the legislature, in empowering a department to make regulations for the use and construction of motor cars, permitted the department to impose new duties in favour of individuals and new causes of action for breach of them in addition to the obligations already well provided for and regulated by the common law of those who bring vehicles upon highways. In particular it is not likely that the legislature intended by these means to impose on the owners of vehicles an absolute obligation to have them roadworthy in all events even in the absence of negligence.

The test is, therefore, whether the intention of the Act was to make the duty a public duty only, or whether the intention was to make the duty one owed as well to the party aggrieved. As this is so largely a question of construction and of the circumstances concerning the making of the Act and of the circumstances to which it relates, it follows that authorities concerning

different Acts can only assist in so far as guidance on principle is given. In *Monk v. Warbey* (8), it was held that the object and purview of the Road Traffic Act, 1930, showed that the penalties prescribed by s. 35 were not intended to be the sole remedy where an owner of a car, in breach of statutory duty, permitted his car to be used by a person who was not insured against third party risks. The principles laid down by this and other cases are conveniently summarized by PROFESSOR WINFIELD ON THE LAW OF TORTS, 2nd ed., pp. 170-175. In *Badham v. Lambs, Ltd.* (9), [1946] 1 K.B., 45, the headnote is as follows: A

By s. 8, sub-s. (1), of the Road Traffic Act, 1934, it is unlawful to sell a motor vehicle for delivery in such condition that its use on a road in that condition would be unlawful, and a penalty is imposed for breach of the sub-section. The defendants sold a car to the plaintiff which was in such condition, by reason of having defective brakes. The plaintiff brought an action for damages, based on the above breach of statutory duty:—*Held*, that the main object of the legislature was the punishment of offenders and there was nothing in the Act of 1934 to show that it was the intention of Parliament to protect the purchaser and to give him a right of action. B

DU PARCQ, L.J., there held that no right of action was given to a purchaser who became involved in an accident which resulted from a defect in the braking system of the car which he bought.

The conclusion at which I have arrived is that this Act imposes duties which were public duties only and did not in addition impose duties enforceable by any individuals aggrieved. The duties seem to be similar to and comparable with those which were under consideration in *Phillips v. Britannia Hygienic Laundry Co., Ltd.* (2) and in *Badham v. Lambs, Ltd.* (9). Furthermore, this Act contains reference to a remedy for certain breaches of it. I have referred already to s. 10 of the Act. Submissions were made to me in regard to the construction of that section. C

The question presents itself on the facts as I have found them: Could it really be said that the defendant had caused or permitted his vehicle to be on the road in contravention of the provisions of the Act? In this connection, the observations of LAWRENCE, J., in *Goldsmith v. Deakin* (10), (150 L.T. 157, at p. 158), and of LORD WRIGHT in his speech in the House of Lords in *McLeod v. Buchanan* (11) ([1940] 2 All E.R., 179, at pp. 187 and 188), are very material. I do not, however, think it necessary that I should decide this matter. The question is not whether this defendant would be liable under the penalty section of the Act of 1927, but, on the assumption that he was in breach of an obligation laid down by that Act, whether he becomes liable to be sued at the instance of any persons aggrieved or consequentially injured. Applying the tests which have been laid down, my view is that the Act imposes public duties only. For the reasons which I have given, it follows that the claims of the plaintiffs and the counterclaim of the defendant fail, and I make no order as to costs. D

Claim and counterclaim dismissed.

Solicitors: *A. F. & R. W. Tweedie* (for the plaintiffs); *William Easton & Sons* (for the defendant). E

[Reported by B. ASHKENAZI, Esq., Barrister-at-Law.] F

W. DAVIS (SPITALFIELDS), LTD *v.* HUNTLEY AND OTHERS
[KING'S BENCH DIVISION (Henn Collins, J.), January 13, 1947.] G

Landlord and Tenant—Notice to quit—Date from which notice runs—Lease determinable by 3 months' notice at any time—No date for possession specified in notice.

Landlord and Tenant—Right to new lease—Claim by tenant seeking new lease that old lease still subsisting—Landlord and Tenant Act, 1927 (c. 36), ss. 4 (1) (i), 5 (1). H

A lease was determinable by three calendar months' notice at any time, and the landlords gave the tenants a notice to quit in the following form: "We must give three months' notice to terminate the lease," without specifying the date on which possession is to be given.

HELD: (i) the notice to quit was valid and the period of three months commenced to run from the date of its receipt by the tenants.

(ii) A tenant who asks for a new tenancy under the Landlord and Tenant Act, 1927, s. 5 (1), cannot be heard to say that the old tenancy is still subsisting, even if he fails to obtain a new tenancy and eventually claims compensation.

Semble : A tenant when claiming compensation only, under s. 4 (1) (i) of the Act of 1927, is not bound to affirm that the notice to quit determining the tenancy is valid.

- A [AS TO FORM OF NOTICE TO QUIT, see HALSBURY, Hailsham Edn., Vol. 20, pp 135-137, para. 145; and FOR CASES, see DIGEST, Vol. 31, pp. 445-448, Nos. 5919-5948.

AS TO COMPENSATION FOR GOODWILL AND RIGHT TO A NEW LEASE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 294-301, paras. 333-345; and FOR CASES, see DIGEST, Supplement, Landlord and Tenant, Nos. 2306a-2306u.]

Cases referred to :

- B (1) *Cooper v. Jax Stores, Ltd.*, [1941] 1 All E.R. 502; [1941] 1 K.B. 577; 110 L.J.K.B. 416; 165 L.T. 1; Digest Supp.
 (2) *Goode v. Howells* (1838), 4 M. & W. 198; 1 Horn. & H. 199; 7 L.J.Ex. 312; 3 J.P. 513; 31 Digest 447, 5943.
 (3) *Davies v. Bristow, Penrhos College v. Butler*, [1920] 3 K.B. 428; 90 L.J.K.B. 164; 123 L.T. 655; 31 Digest 459, 6065.
 (4) *Maconochie Bros., Ltd. v. Brand*, [1946] 2 All E.R. 778.

- C ACTION for possession of a foundry.

A lease made on May 14, 1935, was determinable by 3 calendar months' notice at any time. By a written notice, dated Apr. 21, 1945, and delivered by post on Apr. 23, 1945, the landlords gave to the tenants 3 months' notice terminating the lease, but without specifying the date on which possession was to be given. The tenants served a notice on the landlords under the Landlord and Tenant Act, 1927, s. 5 (1), requiring a new lease of the premises in lieu of compensation. At the same time they claimed that the notice to quit was not a valid notice and that the lease of 1935 was still subsisting.

Sydney Pocock and G. D. Squibb for the landlords (the plaintiffs).

Ronald Hopkins for the tenants (the defendants).

- E HENN COLLINS, J. : The question is, first, whether a lease made on May 14, 1935, still subsists. If it does subsist, it can be terminated by three calendar months' notice at any time, and, therefore, if appropriate steps are taken, in another three months the plaintiffs, in any event, would be entitled to possession.

This first question in its turn, depends on whether a notice given by the plaintiffs to the defendants which was posted by registered post and dated Apr. 21, 1945, was a sufficient notice to terminate the tenancy.

The notice is in these terms :

- F With reference to our meeting with Mr. W. H. Huntley on Apr. 11, we regret that we must give you 3 months' notice to terminate the lease dated May 14, 1935. Under the conditions set out therein, you are entitled to receive a sum of £25 when vacant possession is given.

- G It is said that that is a bad notice according to the terms of the lease because it does not specify the date on which possession is to be given in that it does not state the date from which the three months are to run. Suppose that a notice is served by hand, undated, on a tenant : "I, so-and-so, the landlord, hereby give you three months' notice in accordance with the tenancy to deliver up possession" or "to terminate the lease." Does not the tenant know perfectly well when that notice expires, namely, in three months from the moment that it meets his eye ? Assuming that the landlord is in a position to prove on what date that was, there is no uncertainty about the matter at all. So here, H one would assume, that this notice was received in the course of post—I have heard nothing to the contrary—and, therefore, would operate at the expiration of three months from the defendants' sight of the notice on Apr. 23—Apr. 21, when it was posted, being a Saturday.

If, however, that is not the right view in law, one has to consider the contention of the tenants that under the Landlord and Tenant Act, 1927, s. 5 (1), though they can claim compensation for their goodwill, that would be no recompense and they are entitled to a new lease. It has been said, with some force on behalf of the defendants that, if a tenant is desirous of getting

compensation, it is extremely hard to require him, within a month of receiving a notice purporting to terminate the tenancy and during its currency, to bring his proceedings under the Act if thereby he necessarily affirms the validity of the notice. I think there is some force in the argument of counsel for the defendants that s. 4 (1) (i) of the Act of 1927, when it uses the phrase "terminated by notice", means "terminable by notice," and that where a tenant is asking for compensation, it is not necessary for him to affirm at that stage that the notice is a good notice. Where, however, the tenant is asking for a new tenancy (under s. 5 (1) of the Act), the matter is completely different. He cannot have both the old tenancy and a new one. If he affirms the position that he wants a new tenancy, he can only do so on the footing that the old one is at an end. If and in so far as the tenant claims a new tenancy, he is not thereafter entitled to say that the old one is still subsisting, and he certainly is not entitled to do so any the more if he fails to obtain the new tenancy and eventually claims compensation. In my judgment, that is enough to dispose of the case, and there must be judgment for the plaintiffs for possession.

Judgment for the landlords for possession and mesne profits, with costs.

Solicitors: *Lucien A. Isaacs* (for the plaintiffs); *James H. Fellowes* (for the defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

ATTORNEY-GENERAL v. WEST MONMOUTHSHIRE OMNIBUS BOARD

[CHANCERY DIVISION (Romer, J.), December 4, 5, 20, 1946.]

Street and Aerial Traffic—Omnibus undertaking—Local authority operating omnibus undertaking under local Act—Revenue to be applied "in maintaining" omnibuses, garages, etc.—New omnibuses required for replacement or as additions—Purchase out of capital or revenue—Mynyddislwyn Urban District Council Act, 1926 (c. lxxv), ss. 90, 91.

An omnibus board was established under the Mynyddislwyn Urban District Council Act, 1926, to provide, maintain and run omnibuses on routes within certain specified areas, and by virtue of agreements confirmed by the Act, acquired certain omnibus undertakings which had been operating in the areas concerned. It was provided by s. 91 of the Act that the board should apply "all money from time to time received by them in respect of their undertaking except money received on capital account," *inter alia*, "in maintaining the omnibuses garages and other buildings and plant and appliances belonging to or leased by the board." :—

HELD: the word "maintaining," when used in relation to a fleet of omnibuses, means maintaining not merely in quality or efficiency but in numbers, but it did not include the conception of increase and extend to additions to the fleet. Accordingly the board might properly apply the revenue of its undertaking in maintaining and replacing its existing omnibuses, garages and other buildings and plant, but it had no power to apply the revenue to adding to the numbers of its omnibuses or in purchasing garages and other buildings or plant rendered necessary by the acquisition of such additional omnibuses.

[EDITORIAL NOTE. This is a decision on a private Act, but a large number of other local statutes are in the same terms as the one which is here under discussion, and this decision, therefore, is likely to affect the conduct of omnibus undertakings by a large number of local authorities.]

AS TO EXPENSES OF LOCAL AUTHORITIES OPERATING PUBLIC SERVICE VEHICLES, see HALSBURY, Hailsham Edn., Vol. 31, p. 760, para. 1177.]

ACTION by the Attorney-General for a declaration that the defendants had acted in breach of their statutory duty in paying for capital assets out of revenue.

Sutton, K.C., and *D. L. Powell* for the plaintiff.

Willink, K.C., and *J. H. Stamp* for the defendants.

Cur. adv. vult.

Dec. 20. ROMER, J., read the following judgment. The defendant board was brought into being by the Mynyddislwyn Urban District Council Act, 1926, s. 22. Their function in general, by virtue of the Act, was, and is, to provide and maintain omnibuses and run them on routes within certain specified areas, and the powers and duties of the board are provided for and laid down in detail in the sequence of sections which constitutes pt. VIII of the Act. By virtue of two separate agreements which are set out in sched. II to the Act, and which the Act, by s. 81, confirmed, the board (which consists of representatives of the Bedwellty Council and the Mynyddislwyn Urban District Council) acquired certain omnibus undertakings which had been operating in the areas concerned. Among the assets of those undertakings were 19 omnibuses, of which, I was told in evidence, 6 had to be immediately scrapped as unserviceable. The board then purchased 8 second-hand omnibuses, and this, by 1927, brought their efficient fleet up to 21. Between 1927 and 1938 the number of omnibuses fluctuated, and in 1938 or 1939 the board owned 20. The original omnibuses, garages and necessary equipment were paid for by moneys raised on loan, and it was the policy of the board between 1926 and 1938 to pay also for all new omnibuses required for purposes of replacement out of borrowed moneys and not out of revenue. From 1938 onwards it has been the policy of the board to pay for all replacement omnibuses, as well as new additional omnibuses which, in their judgment, the good management of their undertaking has required, from revenue without resort to borrowing. It is this more recent policy which is impeached in the present action, the plaintiff contending that new omnibuses, whether required for replacement or as additions to the fleet, are capital assets and cannot properly be purchased by the board out of the revenue of the undertaking.

Mr. R. T. Brown, who, except for two years with the Ministry of Transport, has been associated with the board from the time when it was formed, told me in evidence that the number of omnibuses owned by the board at the end of 1945 was 28. The increase on those which the board had in 1939 was due to the retention, when new omnibuses were purchased, of old omnibuses (which would in the normal course have been scrapped) in order to meet the special war-time requirements of the Ministry of Transport. But, in addition, at least two new omnibuses, which could not, I understand, in any sense be regarded as replacements, but which were in the strict sense additional omnibuses, were also acquired by the board. Mr. Brown also told me that the board were advised some years ago by the Ministry of Transport that they should purchase all replacement omnibuses out of revenue so soon as they were in a position to do so. In cross-examination Mr. Brown said that there is a definite rate of replacement of a fleet of omnibuses, and stated the policy of the board by saying that the board would endeavour, as far as possible, to keep the replacements going out of revenue and maintain the fleet at the number required to carry on the undertaking. He agreed that (apart from the two new omnibuses to which I have already referred) some additional, as distinct from replacement, vehicles had been acquired by the board, but said that the position was due to the fact that it had not been possible to shed the old vehicles owing to war pressure.

Mr. Arthur Collins, who has had a long and extensive experience as a financial adviser to local authorities and public utility undertakings, also gave evidence. He told me that the distinguishing feature between an omnibus undertaking and the ordinary range of activities of a local authority lies in the fact that probably the shortest lived asset for which borrowing powers are provided by statute is an omnibus which has a life of only 8 years. Its economic life, he said, is exhausted at the end of that time. He was asked to consider whether, as a matter of prudent management, it is preferable to borrow money for the purpose of acquiring replacement buses than to pay for them out of revenue, and his answer was: "There can be no doubt about it, and I think it is simple arithmetic that, if you are to borrow instead of paying cash at once out of your revenue, all that you are doing is to add the cost of the interest to the burden either on the consumer or the travelling public, or, in the ultimate result, the ratepayers." From the point of view of good management, he would apply the same principle also to the acquisition of new omnibuses, as distinct from replacement omnibuses, if it becomes reasonably necessary to add to the

fleet for the purpose of maintaining an adequate and satisfactory service. In Mr. Collins' view the borrowing powers conferred by Acts, such as the Act of 1926, are in general regarded by local authorities as being discretionary, the authorities exercising such discretion in the light of prudent business management and experience. He deprecated, however, the application of revenue to the acquisition of any capital asset in a year in which it becomes necessary to levy a precept. No attack is made in these proceedings on the *bona fides* of the board, and, in the light of Mr. Collins' evidence, the policy which they have adopted since 1938 obviously has much to commend it. The board, however, are a statutory undertaking with powers defined and circumscribed by the Act of 1926, and the question for me is not so much whether their policy (which they propose to continue in the future if they properly can) is to be recommended from the view of prudent management, but whether it is to any extent *ultra vires*.

I must, accordingly, refer now to the relevant provisions of the Act of 1926. The preamble recited, among other things :

And whereas it is expedient to constitute and incorporate a board as by this Act provided representing the council and the Bedwellty Urban District Council and to authorise the board to provide and run omnibuses and exercise the other powers by this Act conferred on them : And whereas estimates have been prepared by the council and the Bedwellty Urban District Council for the purposes hereinafter mentioned and such estimates are as follows : For the provision and equipment of omnibuses, £20,000; for the purchase of lands for the purpose of the said board's undertaking, £1,000 ; for laying out those lands for garages and buildings, £1,000 ; for the provision of garages and buildings, £2,500 ; And whereas the several works included in those estimates are permanent works and it is expedient that the cost thereof should be spread over a term of years . . .

The first section in pt. VIII of the Act to which I need refer is s. 61, which is the definition section. It defines "constituent authority" as meaning "a local authority for the time being authorised to appoint a member or members of the board." It then defines "statutory borrowing power." It defines the "revenues of the board" as including "the revenues of the board from time to time arising from their undertaking or from any land or other property for the time being belonging to the board and the money receivable by them from the constituent authorities under the provisions of this part of this Act."

By s. 62 (1) :

A board (to be called "the West Monmouthshire Omnibus Board") shall be established for the purpose of providing and running omnibuses and of exercising and enjoying and carrying into execution the rights powers authorities and privileges conferred on the board by this part of this Act.

Section 64 :

(1) Subject to the provisions of this Act the board may provide and maintain (but shall not manufacture) and may run omnibuses (a) within the districts of the constituent authorities of the board and (b) with the consent of the Minister of Transport and of the local authority of the district along any road . . . (3) The board may purchase by agreement take on lease and hold lands and buildings (including an office) and may erect on any lands acquired by them omnibus carriage and motor houses buildings and sheds and may provide such plant appliances and conveniences as may be requisite or expedient for the establishment running equipment maintenance and repair of omnibuses but the board shall not create or permit any nuisance on any lands upon which they erect any such houses buildings or sheds.

Section 67 :

(1) The board and any local authority empowered to run omnibuses in any district adjacent to the Mynyddislwyn Urban District or in the Caerphilly Urban District or in the Rhymney Urban District may enter into and carry into effect agreements for the working user management and maintenance of all or any of the omnibus services which the contracting parties are empowered to provide subject to the provisions of the respective Acts under which such omnibus services are authorised. (2) The board and any company body or person may enter into and carry into effect agreements for the working user management and maintenance subject to the provisions of this Act of any omnibus services which the board are for the time being empowered to provide. (3) The board and any such local authority company body or person as aforesaid may also enter into and carry into effect agreements for all or any of the following purposes (that is to say) : (a) The working user management and maintenance of any omnibuses lands depots buildings sheds and property provided in connection with any such omnibus services as aforesaid by either of the contracting parties and the

right to provide and use the same and to demand and take the fares and charges authorised in respect of such services . . .

Section 82 :

(1) The board may from time to time borrow at interest for the purposes mentioned in the first column of the following table the respective sums mentioned in the second column thereof and they shall pay off all moneys so borrowed within the respective periods mentioned in the third column of the said table . . .

A and then follows a repetition, in effect, of the part of the preamble which I have read, but it also lays down the period within which the respective sums so to be borrowed are to be repaid. There are two additional items inserted, namely: "For the provision of working capital for the purpose of the board's undertaking, £1,000," and the period for repayment is 10 years from the date or dates of borrowing and "For paying the costs charges and expenses payable by the board under the final section of this Act the sum requisite" and the period of repayments is 5 years from the passing of the Act. The section then goes on:

B (2) (a) The board may also with the consent of the Minister of Transport borrow such further money as may be necessary for any of the purposes of this part of this Act including any of the purposes of the agreements set forth in the second schedule to this Act. (b) Any moneys borrowed under this subsection shall be repaid within such period as may be authorised by the Minister of Transport. (3) In order to secure the repayment of moneys borrowed or re-borrowed under this part of this Act and the payment of the interest thereon the board may mortgage or charge the revenues of the board.

Section 87 :

All moneys borrowed by the board under the powers of this part of this Act shall be applied only to the purposes for which they are authorised to be borrowed and (except in the case of money borrowed for working capital) to which capital is properly applicable.

D Section 90 :

All expenses incurred by the board in carrying into execution the provisions of this part of this Act except such of those expenses as are to be paid out of borrowed moneys or are otherwise provided for shall be paid out of the revenues of the board.

Section 91 :

E The board shall apply all money from time to time received by them in respect of their undertaking except money received on capital account as follows (that is to say) : Firstly, in maintaining the omnibuses garages and other buildings and plant and appliances belonging to or leased by the board : Secondly, in paying all working and other expenses properly chargeable to revenue : Thirdly, in paying the interest on moneys borrowed and applied by the board for the purposes of or connected with their undertaking : Fourthly, in making the requisite appropriations instalments or sinking fund payments in respect of moneys borrowed and applied for the purposes of their undertaking : Fifthly, in providing a reserve fund (if they think fit) by setting aside such money as they from time to time think reasonable and investing the same and the resulting income thereof in statutory securities and accumulating the same at compound interest until the fund so formed amounts to two thousand pounds which fund shall be applicable from time to time to meet any deficiency at any time happening in the income of the board from their undertaking or any extraordinary claim or demand at any time arising against the board and so that if that fund is at any time reduced it may thereafter be again restored to the sum of two thousand pounds and so from time to time as often as such reduction happens : Lastly, the surplus (if any) including the interest on the reserve fund when such fund amounts to two thousand pounds shall (subject to the provisions of the section of this part of this Act of which the marginal note is "Quinquennial adjustments of profits and losses") from time to time be apportioned between and paid to the constituent authorities in proportion to the respective rateable values of their respective districts and any money so paid to a constituent authority shall be carried by them to the credit of the district fund of their district Provided that the board may retain at the close of any financial year so much of the surplus as they think necessary for the purpose of carrying on their undertaking and paying the current expenses connected therewith.

Section 92 :

H (1) If in any year the revenue of the board (exclusive of moneys receivable from the constituent authorities under this and the next succeeding section of this Act) shall be insufficient to meet the charges set out under the headings Firstly Secondly Thirdly and Fourthly in the immediately preceding section of this Act the board are hereby authorised and required forthwith to ascertain and determine the amount of such deficiency and to apportion the same (subject to the provisions of the next succeeding

section of this Act) between the constituent authorities in proportion to the respective rateable values of their respective districts except in so far as such deficiency may be met from the reserve fund authorised by this part of this Act. (2) The board shall issue precepts to the constituent authorities for the amounts so respectively apportioned and the constituent authorities shall within the time limited in the precepts pay to the board the amounts apportioned as aforesaid respectively.

I do not think that for present purposes I need read any more of s. 92.

The application of the revenues of the board is provided for by ss. 90 and 91 which (subject to an immaterial exception in s. 97 (2)) appear to be exhaustive of the matter. The board are bound to apply their revenue to the objects defined by those sections and cannot apply it in any other manner. Accordingly, expenditure out of revenue of the character which is challenged in this action can only be justified if it falls, expressly or by reasonable implication, within one or more of the objects designated by ss. 90 or 91. The respective provisions of these two sections make it difficult, I think, to arrive at the conclusion that the expenditure in question can properly be regarded as forming part of the expenses of the board incurred in carrying into execution the provisions of pt. VIII of the Act. Section 90 is rather directed, in my view, to expenses of a preliminary and administrative character. It is necessary, therefore, I think to look principally, if not exclusively, to the provisions of s. 91. As already indicated, two classes of omnibuses fall, for immediate purposes, to be considered. The first class consists of omnibuses which are purchased in the place of those which, through accident or old age, are no longer serviceable. The second class consists of omnibuses which cannot be regarded as substituted or replacement omnibuses, but which are purchased as additions to the existing fleet in order to extend the scope of the board's operations. I will refer to the second category as "additional omnibuses" and will consider their case first.

The question then which falls for decision is this: Are the board authorised by s. 91 of this Act to apply revenue of the undertaking in the purchase of additional omnibuses? Counsel for the board contend that the word "maintaining" in the sub-head "Firstly" should be construed in a broad sense. The word, they say, must be related to the statutory duty of the board to provide an efficient service, and, if the acquisition of additional omnibuses is reasonably necessary for the adequate carrying on of the undertaking, then that acquisition is in effect maintenance, and, as such, authorised by the sub-head. In support of this contention they point to the sub-head "Secondly," which is directed to ordinary working expenses, and they invite the inference that "Firstly" must be regarded as directed to expenditure of a different and more important character. In further support they refer to the proviso to the sub-head "Lastly" as constituting a sort of interpretation clause. By the words "for the purpose of carrying on their undertaking," the legislature, according to the argument, is summarising what is meant by "Firstly," while "Secondly" is echoed by the words "paying the current expenses connected therewith."

I am unable to accept the view that s. 91 empowers the board to purchase additional omnibuses out of the revenue of the undertaking. To add to the fleet of omnibuses owned by the board seems to me to be a very different thing from maintaining the omnibuses owned by the board, even assuming that "maintaining" can be related to numbers and is not to be confined in its application to the field of repairs and operating efficiency. A hire company which owned, say, 10 cars, 5 years ago and still owns 10 (either the same or of a similar character) may be said to have maintained its fleet of cars, but if it now owns 20 cars, while it would certainly be true to say that it had maintained its fleet, it had plainly done something else as well, namely, it had added to the fleet. In my judgment, by no reasonable interpretation of the word "maintain," when used in relation to omnibuses, can it include the conception of increase. No sufficient context for such an artificial construction is afforded, in my opinion, either by a comparison between "Firstly" and "Secondly" in s. 91, nor in the language of the proviso or the sub-head "Lastly." As to the latter, it is in any case to be observed that the words used are "for the purpose of carrying on their undertaking," not "carrying on or extending." Even had the Act contained any provisions enabling the board to obtain funds for the purchase of additional omnibuses, I doubt whether the suggested violence

to the language of s. 91, as I construe it, would have been justified, but such, of course, is not the case. Resort may be had in a proper case to the borrowing powers conferred by s. 82.

A The next question is whether the board may apply revenue of the under-
taking to the purchase of the first of the two classes of omnibuses to which
I have referred, and which I will call "replacement omnibuses." Counsel for
the plaintiff contends that this matter is comprehensively covered by the
B borrowing provisions of s. 82, and that the board have no power to apply
revenue to the purpose which I am now considering. The words "from time
to time" in sub-s. (1), read in conjunction with the rest of s. 82, show, he says,
that the board may, in their discretion, borrow any sums not exceeding at any
one time £20,000 for the provision and equipment of omnibuses. So long as
not more than £20,000 is at any one time outstanding on loan the board may
C borrow for this purpose on their own authority. If they wish to exceed this
amount, then the consent of the Minister is required, but whether on their
own authority, or with the Minister's consent, the only source of money for
the purchase and equipment of replacement omnibuses is loan, and revenue
is not, under s. 91, available for the purpose. I rather doubt myself whether
the true reading of s. 82 is that it establishes what, according to counsel's argu-
ment, is a kind of revolving credit. I think on the whole that sub-s. (1) is
providing for the initial expenditure which had to be incurred at the outset
D of the enterprise, and that the words "from time to time" merely mean that
the board need not raise the whole of the scheduled amounts at one and the same
time. Inasmuch, however, as the section is not directory but permissive
("the board may borrow"), it is difficult to see why they should be compelled
to resort to borrowing if they in fact have power to resort to revenue instead
and good management suggests the adoption of that course.

D It is again necessary, therefore, to enquire into their powers under s. 91 to
ascertain whether the purchase of replacement buses is among the objects
of revenue expenditure thereby authorised. The question is, I think, one of
some difficulty. I have been unable to accept the defendants' arguments to
the extent of holding that the language of s. 91 is wide enough to enable the
board to purchase additional omnibuses out of revenue. The board's conten-
E tions (to which I need not refer again in detail) do, however, in my judgment,
justify the reading of the word "maintaining" in sub-head "Firstly" to s. 91
in a somewhat wider sense than that which it would normally bear. It does
not, I think, merely mean keeping the omnibuses in good running order and
in an efficient state of repair, for expenditure under such headings as these
would appear to be included in the sub-head "Secondly." It seems to me that
the word "maintaining," when used in relation to a fleet of omnibuses, well
F may mean, and does mean in sub-head "Firstly," maintaining, not merely
in quality or efficiency, but also maintaining in numbers. The result of so
construing the word would be that the board are authorised and, indeed, bound
to apply revenue to the purpose of replacing omnibuses which, by reason of
old age or accident, ceased to be available for efficient service. If this result is
justified by the language of the Act (as, in my judgment, it is) it certainly does
not clash with ordinary ideas of good management, for in an omnibus under-
G taking of a purely commercial nature no prudent managers would distribute
profits without providing for the replacement in due course of the short-lived
capital assets which earned them.

I have arrived at the conclusion, accordingly, that the board has no power
to apply the revenue of its undertaking to adding to the number of its omni-
buses or (for analogous reasoning applies) in purchasing garages and other
buildings or plant rendered necessary by the acquisition of such additional
H omnibuses, but that it properly may apply its revenue in maintaining and
replacing its existing omnibuses, garages or other buildings and plant.

There should, I think, be no difficulty in applying these principles so far as
the future is concerned. It may not, however, be easy to apply them to the
expenditure which was incurred during the war years to meet the very special
requirements which then arose. Some of the omnibuses then purchased were
acknowledgedly additional vehicles, and those, in my view, ought to have
been bought out of moneys obtained by borrowing. For the rest, I have not
sufficient material to enable me to deal with the transactions in detail, and, as

the case was rightly argued on broad lines and a decision on principle sought. I do not gather that I am asked to do so. If necessary there will be liberty to apply as to the various individual transactions involved.

A further point was raised in these proceedings with regard to the board's obligation to apportion quinquennially the profits or deficiencies of the undertaking between the constituent authorities. That obligation is imposed by s. 93 of the Act which is as follows :

(1) As soon as practicable after March 31, 1931, and in every subsequent fifth year a calculation shall be made of (i) the total amount of the revenue and the total amount of the expenditure of the board on revenue account during the preceding five years ; and (ii) the average rateable values of the respective districts of the constituent authorities during the same five years : and the difference (whether a surplus or deficit) between such total amounts shall be apportioned between the constituent authorities in proportion to such average rateable values. (2) On the making of any apportionment in respect of the first or any subsequent quinquennial period under subsection (1) of this section there shall then be taken into account with respect to each constituent authority (a) the payments (if any) made by or due from that constituent authority to the board in respect of each of the first four years of the same quinquennial period under the section of this Act of which the marginal note is " Deficiency in revenue of board to be made good by the constituent authorities " and (b) the payments made by the board to the same constituent authority in respect of each of the said four years under the final paragraph of the section of this Act of which the marginal note is " Application of revenue of board " and the net sum thus ascertained shall be payable to or due from the constituent authority (as the case may require) the intention being that the constituent authorities shall be entitled or required to share in the net surplus or deficit on revenue account of the board's undertaking in respect of every quinquennial period in proportion to the average rateable value of their respective districts during the quinquennial period instead of sharing in the surplus or deficit on revenue account of the board's undertaking in each separate year of the period in proportion to the respective rateable values of the districts of the constituent authorities during such year. (3) If the net sum ascertained with respect to any constituent authority under subsection (2) of this section is an amount due to the board from the constituent authority the board shall issue a precept therefor and the provisions of the said section of this Act of which the marginal note is " Deficiency in revenue of board to be made good by the constituent authorities " shall apply to such sum.

The plaintiff says, and it is the fact, that since Mar. 31, 1936, no quinquennial valuation has been made, or, if made, no net profits have been calculated and apportioned between the constituent authorities in accordance with s. 93. In the district auditor's report to the board dated June 27, 1941, he said :

Replacement of buses is behind the peace-time schedule programme of the management, and heavy commitments on this purpose must be anticipated in the future for which provision should prudently be arranged now from present resources. In particular the liability to excess profits tax, not yet finally settled, is likely to be very heavy, and it is expected to be not less than £3,000 for the year 1940-41. Satisfactory as the position is, therefore, the need for conserving the resources of the undertaking in the light of future requirements is not to be lightly disregarded. Quinquennial adjustment : Mar. 31, 1941, marks the end of one of the periods of quinquennial adjustment to which reference is made in ss. 91 and 93 of the Mynyddislwyn Urban District Council Act, 1926. In view of the considerations outlined above the board may consider that there is not any surplus available for distribution over and above that which is necessary for the working expenses of the undertaking.

Mr. R. T. Brown told me in his evidence that he discussed this report with the district auditor, who advised him that the board could not do anything at that stage. Mr. Brown then informed me that the board will be in a position in the course of this year to deal with the 1941 and the 1946 quinquennial valuations. Mr. Collins told me that in his view, which he supported with considered reasons, the policy which the board adopted in this matter was prudent. As, therefore, the board does not dispute its obligations under s. 93 of the Act, and is intending shortly to perform them, I do not propose to make the declarations on this matter which the plaintiff originally sought, and counsel did not press me to do so. It may be—and the possibility was indicated in argument—that certain questions may arise when the board has made its calculations under s. 93, but, as they have not arisen yet and are not in issue in these proceedings, I will say no more about them. I think the most convenient form of order to make would be to declare that the board are entitled

under the Act to provide out of the revenue of their omnibus undertaking (a) the expenses of maintaining and replacing their existing omnibuses, garages and other buildings and plant, but not (b) the expenses of adding thereto.

Declaration accordingly.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Norman Morgan & Davies*, Cardiff (for the plaintiff). *Gibson & Weldon*, agents for *Trevor C. Griffiths*, Blackwood (for the defendants).

[Reported by B. ASHKENAZI, Esq., Barrister-at-Law.]

Re MAIN (deceased), OFFICIAL SOLICITOR v. MAIN

[CHANCERY DIVISION (Roxburgh, J.), January 15, 1947.]

Wills—Construction—Gift dependant on one of two events—Express mention of only one event—Effect given to testator's intention.

Testator, by a will dated Feb. 2, 1904, directed his trustees to pay the income of his residuary trust property to his wife during her widowhood, and after her remarriage or death (subject to a discretionary power as to the upkeep of the estate as a home) to pay the income towards the maintenance, education, and necessary expenses of such of his children as being a son or sons should be under 21 years old or being a daughter or daughters should for the time being be a spinster or spinsters, and “after the death or marriage of the last surviving daughter” on trust to pay and divide the trust property unto and equally between all or any of his children living at the death of such last surviving daughter and the children then living of any then deceased child of the testator who being a son attained 21 years of age or being a daughter attained that age or married in equal shares *per stirpes*. Testator, who died on April 7, 1904, left him surviving his widow, one son, T., and two daughters, D., and L. No question arose regarding T., who attained 21 years of age and still survived. D., died a spinster on Sept. 15, 1927. L., married on Apr. 19, 1928. On Jan. 31, 1945, the testator's widow died. When L., the last surviving daughter, married on Apr. 19, 1928, the estate was not then distributable as the widow was still alive, and on the death of the widow on Jan. 31, 1945, L.'s marriage had already taken place. The gift, however, to the children was to children who were “living at the death of such last surviving daughter,” and L., being still alive, the question arose whether a gift could be implied to those children not only if they were living at the death but also at the marriage of the last surviving daughter.

Held: the express mention in relation to the gift of only one of the two relevant events being due to slovenliness or carelessness and it being possible to spell out of the express gift a corresponding gift in the other event and effectuated by way of implication, effect would be given to the clearly indicated, though not precisely expressed, intention of the testator, and the children living at the time of the marriage of the last surviving daughter took under the will.

Re Warner, Walter v. Silvey (1) applied.

[EDITORIAL NOTE.] Here the court was faced with an ambiguity. In the will the trustees were directed, after the *death or marriage* of the testator's last surviving daughter, to divide the residuary estate among children or grandchildren living at the *death* of the last surviving daughter. The testator's last surviving daughter married on April 19, 1928, but she still survives. The judge expresses no doubt that the testator intended both the time at which the division was to take place and the ascertainment of the individuals among whom it was to take place to relate to the *death or marriage* of the last surviving daughter, although in the will only *death* is mentioned with regard to the ascertainment of the beneficiaries. Holding that the inconsistency in the will is due to “slovenliness or carelessness” in drafting, he gives effect to the testator's intention.

AS TO GIFT OVER ON MARRIAGE OR DEATH INTERCHANGEABLY, see HALSBURY, Hailsham Edn., Vol. 34, p. 384, para. 428; and FOR CASES, see DIGEST, Vol. 44, pp. 783, 784, Nos. 6409-6413.]

Cases referred to :

- (1) *Re Warner, Watts v. Silvey*, [1918] 1 Ch. 368 ; 87 L.J.Ch. 234 ; 118 L.T. 353 44 Digest 784, 6413.
- (2) *Bainbridge v. Cream* (1852), 16 Beav. 25 ; 44 Digest 783, 6409.
- (3) *Stanford v. Stanford* (1886), 34 Ch.D. 362 ; 44 Digest 1174, 10160.
- (3) *In re Tucker, Bowchier v. Gordon* (1887), 56 L.J.Ch. 449 ; 56 L.T. 118 ; 44 Digest 784, 6411.

ADJOURNED SUMMONS to determine whether, on the true construction of a will and in the event which had happened, the residuary estate became distributable on the death of the widow of the testator or at the date of the death of the last surviving daughter of the testator. The facts are set out in the judgment.

W. F. Waite for Official Solicitor.

G. M. Parbury for daughter and son of testator.

R. W. Goff for infant children.

ROXBURGH, J. : This testator, John Main, made his will on Feb. 2, 1904, and died on Apr. 7, 1904. He left surviving him his widow, who died on Jan. 31, 1945, a son, and two daughters. The son is the defendant, Thomas Main ; one of the daughters is Mrs. Lear, the second defendant who married on Apr. 19, 1928 ; the other daughter, Dorothy Main, died on Sept. 15, 1927. The defendant, John Charles Main, an infant, is the only child of the son, Thomas Main, and the defendant, Arthur John Corry Lear, an infant, is the only child of Mrs. Lear. Miss Main died a spinster.

By his will the testator devised and bequeathed his residuary estate upon trust for sale and to stand possessed of the net proceeds of sale on trust to pay the income to his wife during her widowhood with certain obligations, and, on his wife marrying again or on her decease, the testator directed his trustees :

To stand possessed of my said residuary trust property upon trust to pay and apply the income arising therefrom in or towards the upkeep and maintenance of my said trust property for such period as in the exercise of the discretionary power in that behalf hereinbefore given to my trustees they shall decide to keep up and maintain the same as hereinbefore mentioned and in providing for the maintenance education and necessary expenses of such of my said children as being a son or sons shall be under the age of 21 years or being a daughter or daughters shall for the time being be a spinster or spinsters and in the event of my trustees determining (under the discretionary power in that behalf so vested in them as aforesaid) that it is unnecessary and inadvisable to keep up and maintain my said trust property as a home for my said children as aforesaid I hereby declare that my trustees shall stand possessed of the income arising from my said residuary trust property upon trust to pay and apply the same in or towards the maintenance education and necessary expenses of such of my children as being a son or sons shall be under the age of 21 years or being a daughter or daughters shall for the time being be a spinster or spinsters and after the death or marriage of the last surviving daughter of mine I direct my trustees to stand possessed of my said residuary trust property upon trust (both as regards capital and income and any accumulations or apportionments of income) to pay and divide the same unto and equally between all or any of my children or child living at the death of such last surviving daughter of mine and the children or child then living of any then deceased child of mine who being a son or sons attain the age of 21 years or being a daughter or daughters attain that age or marry if more than one in equal shares but so that the children of any deceased child of mine shall take equally between them only the share which their parent would have taken had he or she survived me and attained a vested interest provided always that if any daughter of mine shall marry after my decease without having first obtained the consent in writing of my trustees then and in such case I authorise and direct my trustees (if in their absolute discretion they shall think fit) to settle the share to which any such daughter shall then be entitled whether in possession reversion remainder or expectancy upon such trusts as my trustees in their absolute discretion shall think fit for the benefit of such daughter.

Mr. Thomas Main has attained 21 and is alive and, therefore, no question arises as regards him. When Miss Main died on Sept. 15, 1927, Mrs. Lear was still a spinster—she did not marry until Apr. 19, 1928—and, accordingly, the event indicated, that is, the death or marriage of the last surviving daughter, took place on Apr. 19, 1928, though the estate was not then distributable because the widow was still alive. When the widow died on Jan. 31, 1945, the death or marriage of the testator's last surviving daughter had already taken place. On the other hand, the gift which the testator has in terms indicated to take effect in that event is a gift to all or any of his children or

child living at the death of such last surviving daughter of his and that event has not taken place. Mrs. Lear is alive. Accordingly, unless I can apply some principle to remedy the situation, there is a plain gap or hiatus in the will and the law of intestacy will have to be invoked to fill the gap.

Before I look at authority, which seems to me to be important in this matter, I must observe that I feel no doubt what the testator intended in the event which happened of his only son attaining 21. I have no doubt that he intended that, when the widow had died and his last surviving daughter had married, his estate should be distributable. The question is whether I can imply a gift to the beneficiaries named not only if they are living at the death of his last surviving daughter, but also if they are living at the marriage of the last surviving daughter.

Counsel for the children has referred me to *Re Warner, Watts v. Silvey* (1), He practically conceded, and I agree with him, that that case does not cover the present case, but he submitted, and I agree with him in that submission, that it does supply me with both assistance and warning. The head-note in that case is as follows :

Testator gave property to trustees in trust to pay the income to his wife during her widowhood, and, after her "death or remarriage," to hold the property in trust "for all or any my children or child living at the decease of the survivor of myself and my said wife and the children then living of any deceased child of mine," who were to take the parent's share. At the date of the widow's remarriage all the testator's children were living, but in her lifetime one child died leaving children, and there were children of one of the surviving children of the testator :—HELD, following *Bainbridge v. Cream* (2), *Stanford v. Stanford* (3), and *In re Tucker* (4), that the children living at the date of the remarriage then took immediate vested interests to the exclusion of all grand-children.

SARGANT, J., after dealing with *In re Tucker* (4), *Bainbridge v. Cream* (2), and *Stanford v. Stanford* (3), said this ([1918] 1 Ch. 368, at p. 371) :

In each class of case the court seems to have treated the express mention of one only of the two relevant events as due to slovenliness or carelessness, and to have succeeded in spelling out of the express gift, and effectuating by way of implication, a corresponding gift in the other corresponding event. I think that the courts have gone to the extreme limit in so giving effect to testators' intentions, but, in accordance with the decision of STIRLING, J.—one of the most careful judges who have ever sat in these courts—I decide that the cases relied on in *In re Tucker* (4) govern the present case, and I give effect to the sufficiently indicated intention, if not the precise words of the testator, by holding that the persons to take were the children of the testator living at the time of his widow's remarriage.

In the present case, I have no doubt that the express mention of only one of the two relevant events was due to slovenliness or carelessness, and if I am entitled to spell out of the express gift a corresponding gift in the other event and effectuated it by way of implication, I have no doubt that I ought to do so. Counsel for the infant children has contended with some force that, if I had had to consider the minority of the son, I should have been hard put to it to say what the testator intended and I agree with him that it might well have been impossible, but I do not think that I am precluded from giving effect to an intention which seems to me to be perfectly plain in the events which have happened because I might not have been able to say what the intention was in a certain event which did not happen and cannot now happen.

I do not think I should be going beyond the extreme limit in applying the principle referred to in *Re Warner* (1) so as to give effect to what seems to me clearly the testator's intention in the present case. On the contrary, I think that, if I hold, as I am about to hold, that the persons to take are the children of the testator living at the time of the marriage of the last surviving daughter, I shall give effect to an intention which is clearly indicated though not precisely expressed.

Order accordingly.

Solicitors : Official Solicitor ; Robin Hamp & Green, agents for Searle & Burge, Newport, Mon. (for defendants).

[Reported by G. H. D. OSBORNE, Barrister-at-Law.]

WILKIE v. LONDON PASSENGER TRANSPORT BOARD

[COURT OF APPEAL (Lord Greene, M.R., Bucknill and Asquith, L.JJ.), January 21, 22, 1947].

Street and Aerial Traffic—Public service vehicle—Negligence of transport board—Limitation of liability—“Contract for conveyance of passenger”—Free travelling pass granted to employee of board—Condition excluding liability for damage by negligence—Employee injured while boarding omnibus—Road Traffic Act, 1930 (c. 43), s. 97.

The plaintiff was an employee of the defendant board and as such held a pass enabling him to travel free on the board's omnibuses. By cl. 6 of the pass, the pass was stated to be issued and accepted “on condition that neither the [board] nor their servants are to be liable to the holder . . . for loss of life, injury or delay . . . however caused.” Owing to the negligence of the conductress, a servant of the board, the plaintiff was thrown off and injured while attempting to board an omnibus. In an action brought by the plaintiff against the board for negligence, it was argued on his behalf that in the circumstances this condition had no application, and that, in any case, it was excluded by the Road Traffic Act, 1930, s. 97, which provides: “Any contract for the conveyance of a passenger in a public service vehicle shall, so far as it purports to negative or to restrict the liability of any person in respect of any claim which may be made against that person in respect of the death of, or bodily injury to, the passenger while being carried in, entering or alighting from the vehicle . . . be void.”

HELD: (i) the plaintiff, when the injury occurred, was acting in a way which the pass entitled him to and was taking the benefit of a right which the pass gave him, and, therefore, the condition in cl. 6 operated.

(ii) the pass was a mere licence and not a “contract for the conveyance of a passenger” within s. 97, and, therefore, the provisions of that section did not apply.

Decision of LORD GODDARD, C.J. ([1946] 1 All E.R. 650; 110 J.P. 215), affirmed.

[AS TO SPECIAL TERMS EXCLUDING LIABILITY FOR NEGLIGENCE, see HALSBURY' Hailsham Edn., Vol. 4, pp. 71-74, paras. 108-110; and FOR CASES, see DIGEST' Vol. 8, pp. 102, 105, Nos. 680-682, 696, 697.]

APPEAL of the plaintiff from a judgment of LORD GODDARD, C.J., without a jury, dated Mar. 26, 1946. The facts are summarised in the headnote and appear in more detail in the judgment of LORD GREENE, M.R.

Fox-Andrews, K.C., and *Edgedale* for the plaintiff.

Beney, K.C., and *Monier-Williams* for the defendants.

LORD GREENE, M.R.: The plaintiff was the holder of a free pass issued to him as an employee of the defendants, the London Passenger Transport Board. He was thrown off an omnibus which he was attempting to enter because of the negligence of the woman conductor who sounded the bell and thereby gave notice to the driver to proceed without taking due care to see that every intending passenger was safely on the bus. The plaintiff had got hold of the rail and had one foot on the bus, and when it started he was carried along with one foot on the vehicle and one foot in the air. He tried to pull himself on to the platform, but was unable to do so and, eventually, owing to a swerve of the bus, he was thrown off and suffered injury.

Two points have been raised in argument. LORD GODDARD, C.J., decided both against the plaintiff. The first point depended upon the true meaning and effect of the pass itself, and the extent to which, on the facts of the case, a condition freeing the board from liability for injury applied. The pass is described as “A free pass available only on central buses, country buses, trams and trolley buses,” and it remained in force for a year subject to the right of the board at any moment to cancel it if they thought fit. It had not, in fact, been cancelled, and the plaintiff, in attempting to get on this bus, was admittedly intending to use the benefit of the pass. The pass contained the following condition:

No. 6: It is issued and accepted on condition that neither the London Passenger

Transport Board nor their servants are to be liable to the holder or his or her representative for loss of life, injury or delay or other loss of or damage to property however caused.

It is not suggested that that language does not cover a case of negligence by one of the board's servants, but it was contended on behalf of the plaintiff that the condition only comes into operation when the holder of the pass is really enjoying the benefits which the pass purports to confer on him, namely, the right of free conveyance, which means conveyance in the ordinary manner in which passengers are conveyed, either sitting or standing as the case may be, and it was said that, owing to the negligence of the board's servant, the plaintiff was never in a position to obtain those benefits because it was made impossible for him to put himself in a position on the bus in which he could obtain them. The argument on the other side was that he had put himself in a position where he was, in fact, obtaining these benefits, because it was said that he was, at the time when he suffered the injury, "bus-borne," a word with which junior counsel for the board thought it convenient or desirable to enrich the English language. The judge, I think, dealt with this point on that basis, because he laid stress on the fact that the plaintiff, when he suffered the injury, was carried entirely by the bus and was not in contact with the ground.

In my opinion, neither of those two views really provides the real test. It seems to me that cl. 6 of the pass comes into operation at the moment when the holder of the pass begins to enjoy any of the benefits which the pass confers on him. The pass confers on him, no doubt, the benefit of sitting or standing in an appropriate place on the bus and travelling free, but it does more than that. It gives him the right to get on the bus without being a trespasser. At the moment that he begins to get on to the bus with the intention of using his pass, he cannot be regarded as a trespasser because he is doing something which the board tells him impliedly he may do for the purpose of using his pass and getting the full benefit of it. It is only by virtue of his holding of the pass that he is entitled to put his foot on the platform at all. In the case of an ordinary passenger intending to pay his fare, the bus company is clearly inviting him to put himself in a position where the contract of carriage would be made, and nobody, I think, suggests that the contract of carriage in the case of an ordinary passenger is made the moment the passenger puts his foot on the bus.

It is made when he, by conduct, accepts the offer of carriage, and I should agree that this does not take place until he puts himself either on the platform or inside the bus. But, whichever be the true view as to the precise moment when the contract is made in the case of the ordinary fare-paying passenger, there is clearly a certain amount of time and action which takes place before a contract is made. The mere taking hold of the rail and putting his foot on the bus is a thing which the fare-paying passenger does, not by virtue of a contract, because at that moment the contract under which he is carried has not come into existence, but by virtue of the implied licence given by the bus company to the intending fare-paying passenger to get to the position where he will make the contract, just in the same way as a railway company impliedly licenses an intending passenger to walk through the company's premises to the booking office to make a contract of carriage. In the case of a pass-holder, however, the pass entitles him, not merely to enjoy the benefit of free carriage in the ordinary way while seated or standing, as the case may be, but also to take such steps in relation to the bus as will enable him to obtain these benefits, and one of the steps which he has to take to get his free conveyance is to get on the bus, and it is as a pass-holder that he does get on the bus.

In the present case, the plaintiff's intention was to use his pass. That was his justification for attempting to get on to the bus. If he had, to take an absurd case, been sued for damages for trespass for putting his foot on the bus, his defence would have been: "I put my foot on the bus because, as a pass-holder, I intended to use my pass, and, as such, I was by my pass entitled to do what I did." It seems to me, therefore, that, without considering the refinements as to when exactly the benefit of the free travel may be regarded as operating, the true answer to the question: When did the benefit of the pass begin to operate? is that it began the moment he made use of the permission which the pass gave him, namely, to place his foot on the bus. The

fact that he did not enjoy the full benefit of the pass because, before he could take his seat and obtain his free conveyance, he was thrown off the bus by negligence, does not seem to me to alter the fact that, by getting his foot on the bus, he was using the pass and taking the benefit of a right which the pass gave him. That is rather different from the view which, I think, the LORD CHIEF JUSTICE took as to the rights of the parties under this condition, but the result is the same, namely, that the plaintiff was using the pass when he attempted to get on to the bus and put his foot on the bus as a pass-holder, and the condition applied to the whole time during which he enjoyed some right which the pass gave him. Various questions were raised as to what might happen in the case of a pass-holder who had not made up his mind whether he was going to use his pass or not, and a pass-holder who at one moment intended to use his pass and the next moment changed his mind and decided to pay his fare, and things of that kind. I do not find that examination of those hypothetical cases assists me. What we have to deal with is the position of this particular passenger in these particular circumstances, and it seems to me that, on the facts, he was using the pass and claiming and enjoying part of the benefits which the pass conferred on him, and the condition covers that case.

The other point arises under the Road Traffic Act, 1930, s. 97, which provides :

Any contract for the conveyance of a passenger in a public service vehicle shall, so far as it purports to negative or to restrict the liability of any person in respect of any claim which may be made against that person in respect of the death of, or bodily injury to, the passenger while being carried in, entering or alighting from the vehicle, or purports to impose any conditions with respect to the enforcement of any such liability, be void.

The LORD CHIEF JUSTICE dealt quite shortly with the argument that that section applied. He said that there was no contract for the conveyance of the plaintiff, but that he was a mere licensee. I agree that the giving or receiving of this pass cannot be regarded as a contract for the conveyance of a passenger. It was said that the contract for conveyance is to be found in the giving and receiving of the pass, the contract being of this nature: "We, the London Passenger Transport Board, agree to carry you free on our buses on the terms that you agree to give up what would otherwise have been your common law rights." I think the short answer to that is that the question depends on the true construction of the pass and to regard it as having any contractual force is entirely to misinterpret it. There is no contractual animus to be found in relation to it. It is clearly nothing but a licence subject to conditions, a very common form of licence, *e.g.*, a licence to a neighbour to walk over a field, providing he does not go with a dog. You cannot spell such a thing as that as being a contract: "I will let you go across my field in consideration of you, as a contracting party, agreeing not to take your dog." In other words, looking at this document shortly and sensibly, it contains no intention to contract. It is the mere grant of a revocable licence subject to a condition that, while the licence is being enjoyed, certain consequences shall follow. That is not contractual, but is a term or condition of the licence, and if anyone makes use of the licence he can only do so by being bound by the condition. That seems to me to be the short answer to the argument on s. 97. In the result, the appeal, in my opinion, fails, and must be dismissed, with costs.

BUCKNILL, L.J.: I agree that the appeal should be dismissed. The question seems to me to turn mainly on the construction of cl. 6 of the free pass issued by the London Passenger Transport Board to the plaintiff. It is phrased in the widest possible terms and covers all loss of life, injury, or delay or loss or damage to property however caused. There must, I think, obviously, be some limitation placed on that clause, and the interpretation which I think is reasonable is that it should only apply when the pass-holder is using the pass. That view seems to be supported by the last part of the clause, which says that the exemption from liability shall not apply in the case of an employee while using the pass in the course of his or her employment. It is a valuable privilege as it entitles the pass-holder to travel on any central bus, country bus, tram or trolley bus belonging to the board. I see no reason why it should not be interpreted in a liberal way so far as the defendants are concerned. The LORD CHIEF JUSTICE took the view that the plaintiff accepted the

invitation to travel on the bus by starting to board it, and that he did so, not as a fare-paying passenger, but as the holder of a pass, and then he went on to say :

As a matter of common sense, it seems to me that the plaintiff was using his pass when this accident happened, and I must hold that the condition applies.

- A The only other interpretation to be placed on cl. 6 which recommends itself to me is that the clause should come into operation when the pass-holder produces his pass which, I suppose, strictly speaking, he ought to do as soon as he sees the bus conductor, and thereby indicates his intention to travel without paying any fare. That view, I think, on reflection, would lead to great difficulty because it would mean that for part of the journey he was travelling as an ordinary passenger with an ordinary passenger's rights and then, and for the rest of the journey, he would be travelling free and subject to cl. 6.
- B On the whole, I do not think that that is the right way to interpret this clause. The other alternative is the view which the LORD CHIEF JUSTICE has taken, and which I think, is the right view. On the first point, I agree with what my Lord has said.

- C ASQUITH, L.J. : I also agree, though at times I felt some hesitation on the question when the plaintiff began to use his pass. At first it seemed to me somewhat artificial to answer this question by reference to the position of the plaintiff's body at a split second of time forming part of a continuous process. It seemed a more natural approach to ask, looking at the sequence of events as a whole and viewing them broadly, whether the plaintiff ever obtained the effective enjoyment of the benefits conferred by his pass, or whether the negligent act of the conductress in abruptly causing the bus to move on prevented him from doing so. In other words, it might be said in ordinary parlance that he was at no time a passenger travelling on the bus in the manner envisaged by the pass. After, however, listening to the judgment of the MASTER OF THE ROLLS I have come to the conclusion that the interpretation which he propounds is the logical one and I respectfully accept it. I agree that the appeal should be dismissed.
- D

Appeal dismissed with costs.

- E Solicitors : W. C. Crocker (for the plaintiff) ; A. H. Grainger (for the defendants).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

LEAN v. ALSTON

- F [COURT OF APPEAL (Scott, Morton and Somervell, L.JJ.), January 20, 21, 1947.]

Practice—Third-party procedure—Joint tortfeasors—Contribution—No representative of deceased joint tortfeasor's estate—Power of court or judge to appoint representative—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 6—R.S.C., Ord. 16, r. 46.

- G A motor car and a motor cycle collided, the driver of the motor cycle being killed and his pillion passenger being injured. The pillion passenger began an action for damages for negligence against the owner of the car. The driver of the motor cycle had died intestate and there was no representative of his estate. The car owner sought to make the estate of the dead driver liable to contribute under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, and he applied under R.S.C., Ord. 16, r. 46, for the appointment of a representative of the estate who could be made
- H a third party in the action :—

HELD : the court or judge had power to make such an appointment and that it should be made, and the person appointed was liable to third party procedure, although the deceased person whose estate he represented had not been concerned in the original action between the pillion passenger and the motor car owner.

[AS TO ADMINISTRATION AD LITEM AND REPRESENTATION OF DECEASED PARTIES, see HALSBURY, Hailsham Edn., Vol. 26, p. 18, para. 14 ; and FOR CASES, see DIGEST, Vol. 23, pp. 209-215, Nos. 2484-2555.]

Cases referred to :—

- (1) *Watts v. The Official Solicitor*, [1936] 1 All E.R. 249; Digest Supp.
- (2) *Pratt v. L.P.T.B., and Green v. Vandekar*, [1937] 1 All E.R. 473; 156 L.T. 265; Digest Supp. (1941).
- (3) *Joint Stock Discount Co. v. Brown* (1869), L.R. 8 Eq. 376; *sub nom. London Joint Stock Discount Co., Ltd. v. Brown*, 20 L.T. 844.

INTERLOCUTORY appeal from DENNING, J., who, in confirming the order of the District Registrar, Norwich, refused to appoint a representative on a summons under R.S.C., Ord. 16, r. 46.

Montague Berryman, K.C., and *Geoffrey Lawrence* for the defendant motor-car owner.

R. Cope-Morgan, K.C., and *Robert Ives* for the plaintiff pillion passenger.

SCOTT, L.J. : This is an appeal from an order of DENNING, J., in an action brought by the plaintiff who was riding on a motor bicycle on the pillion seat behind the driver. A collision occurred between the motor bicycle and a motor car, the plaintiff being injured and the driver of the motor bicycle being killed. Thereupon an action was started by the plaintiff against the owner of the motor car. The question of the negligence of the deceased driver of the motor bicycle was thus not in issue, but the defendant desired to be in a position to make the estate of the driver of the bicycle liable under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1) of which provides that an action of tort survives against the estate of the tortfeasor. To establish the right of contribution, which the defendant had under s. 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, from the estate of the deceased driver of the motor bicycle, he desired to serve a third-party notice bringing in the representative of the estate, but he was faced with the position that the deceased had left no will and his widow, when asked if she would take out letters of administration, decided that she did not wish to do so. She was, however, thus given an opportunity of becoming the administratrix and representing the interests of the estate which she had inherited from her husband.

In those circumstances the defendant desired to get somebody appointed by the court to represent the estate of the deceased and be the person against whom an order might be made for contribution. Order 16, r. 46, is expressed to be limited to a cause or matter proceeding in the court. The provision there is :

If, in any cause, matter, or other proceeding it shall appear to the court or a judge that any deceased person who was interested in the matter in question has no legal personal representative, the court or judge may proceed in the absence of any person representing the estate of the deceased person, or may appoint some person to represent his estate for all the purposes of the cause, matter, or other proceeding.

It was contended for the plaintiff that the rule does not apply to the present case because as between the defendant and the widow or the estate of the deceased driver of the motor cycle there was no cause or matter pending, but counsel for the defendant has pointed out that that rule is only one application of an inherent power of the court exercised by the Court of Chancery and expressed in s. 44 of the Chancery Procedure Act, 1852, by which the Court of Chancery and its successor the Chancery Division have always had the power to appoint a person to represent any particular interest in any proceeding where it was thought right to make the appointment.

The question was considered by the Court of Appeal in 1936 in *Watts v. Official Solicitor* (1). I will read the headnote, correcting a slight inaccuracy in it as suggested by MORTON, L.J. :

The Official Solicitor, on appointment to represent the deceased's estate in an action in place of a deceased defendant, gave notice of change of solicitors and substituted his name for that of the solicitors on the record as acting for the deceased defendant, who were also the solicitors of the deceased's insurance company. On a summons for directions issued by the plaintiff, counsel for the solicitors moved the learned judge to order that the Official Solicitor should leave the control of the defence in the hands of the said solicitors, and that they should remain on the record, and that the notice of change of solicitors should be removed from the file. The learned judge accordingly varied in this sense his original order appointing the Official Solicitor to represent the deceased defendant. The Official Solicitor appealed :—HELD : as the Official Solicitor had the same right as any other litigant to choose who should be his solicitor, and was

entitled to act for himself, he was entitled to control the defence of himself as representative of the deceased defendant and the change of solicitor on the record was properly made, and the learned judge had no jurisdiction to make the variation complained of.

I have quoted the headnote at length because it shows that the case is a precedent for an appointment comparable to that in the present case made under r. 46. EVE, J., said ([1936] 1 All E.R. 249, at p. 254) :

A The application of this rule is of very frequent occurrence in the other division of this court, and I have never heard before that it is not open to the party who is appointed to represent the estate to select in all respects the persons to act as solicitors.

In 1937 there were two other cases, *Pratt v. London Passenger Transport Board*, and *Green v. Vandekar* (2). The headnote says :

B In the first case the defendants in an action for personal injuries attributed the blame to a third person, who had since died. He left no estate, but he had been insured against such claims for negligence by an insurance company. The plaintiff applied under R.S.C., Ord. 16, r. 46, for an order that the Official Solicitor should represent the deceased's estate and be added to the record as a defendant. The order asked was made without the consent of the Official Solicitor. In the second case, the facts were similar, except that the deceased was one of the defendants in the action, and that the order was made without the knowledge of the Official Solicitor. The Official Solicitor appealed in both cases.

C It was held that there was no power to appoint a representative without his consent, but the power of the court to appoint was there recognised in a case similar in its circumstances to the present action.

The old practice in the Court of Chancery is illustrated in *Joint Stock Discount Co. v. Brown* (3), the headnote of which says (L.R. 8 Eq. 376) :

D Where a defendant to a bill which prayed relief against all the defendants jointly in respect of an alleged breach of trust as directors, died abroad, and the evidence shewed that he was believed to have left a will, and to have named his widow executrix, but that she had not seen the will, and did not know its contents, and that his solicitors on the record had not been instructed since his death :—The court, on the application of the plaintiffs, made an order for the appointment of a person named by the plaintiffs, and consenting to act, to represent the deceased defendant for the purposes of the suit, There the court made an appointment, and, although it said that it could not appoint a person who was unwilling to act, the appointment was good if the person was willing so to act.

E In the present case there is no question that the widow herself has been given an opportunity to appear and has elected not to appear, and a person was appointed by the Master, but DENNING, J., thought either that there was no power or that in his discretion he ought not to make the appointment. I am satisfied that there was power and that the appointment ought to be made because under the statute the defendant may have a right of contribution against the estate of the deceased driver of the motor cycle on the ground of his having been negligent. The plaintiff has no interest in putting a third party on the record as a defendant, and, no doubt, decided not to sue that third party and make him a co-defendant with the owner of the motor car because he thought the estate was small and that, so long as he proved some act of negligence on the part of the servant of the defendant, he was sure to get his judgment.

G My own view is that it was obviously right to make the order, and for this very simple reason. If the case is decided with the representative of the estate of the deceased bicycle driver present as a third party, the question of contribution will be decided by the judge after hearing evidence in the action and at the minimum of expense to the two parties concerned in the question of contribution. If he did not hear it with the representative of the deceased bicycle driver present, the right of the defendant to bring an action for contribution afterwards would not be barred, but it would be an obvious waste of money to have a second trial and it might be very unfair to the defendant because a material witness might in the interval have died. On the ground of discretion alone, it seems to me obviously right that an order should be made. The appeal must, therefore, be allowed with costs and the appointment of the representative of the third-party confirmed in order that the third-party notice may be duly served.

H MORTON, L.J. : I agree, and I only wish to add a few observations on two arguments presented to us. It was first submitted that Ord. 16, r. 46, only

applied in a case where a person already a party to proceedings had died and there was no legal personal representative of such party. In my view, that argument cannot be accepted. In the first place, it seems to me that the wording of the rule is clearly against it. The rule says :

If in any cause, matter, or other proceeding it shall appear to the court or to a judge that any deceased person who was interested in the matter in question has no legal personal representative . . .

I can see no ground for confining those words to deceased persons who have been parties to the proceedings. In the second place, I think there is direct authority which shows that that is not the proper interpretation of the rule. I refer to the case already mentioned by my Lord, *Pratt v. London Passenger Transport Board* (2). As I read the facts in that case, the person whose estate the Official Solicitor was appointed to represent was not a party to the litigation. The facts were very like the facts in the present case. It is true that in *Pratt's* case (2) the question was whether the Official Solicitor's consent was necessary, but nobody suggested that the Official Solicitor could not be appointed because the dead man was not a party to the litigation. Finally, within my own experience, although no case was cited to us on the point, it is very common in the Chancery Division for a person to be appointed to represent the estate of a deceased person under this rule when the deceased person has never been a party to the litigation. One of the most common cases is where there is a doubt about the true construction of a will. The trustees of the will take out an originating summons and it is their duty to make parties to that originating summons the persons who are interested in putting before the court various different constructions of the will. It often happens that some person who, if alive, would have a very direct interest in putting an argument before the court is dead, and has no legal personal representative. In these circumstances, it is the usual practice for the Chancery Division to appoint a person to represent the estate of the deceased person under this rule. I have never heard it suggested until today that that could not be done unless the deceased person had been a party to the litigation at some stage.

The other argument on which I desire to make a few observations is this. It was pointed out that this is a matter for the discretion of the judge and that this court would not interfere with the exercise of a judge's discretion unless satisfied he had acted on some wrong principle. We were also informed that the judge refused to make the appointment because he did not think that the widow of the deceased motor cyclist, being a person beneficially interested in his estate, should have this representation "imposed on her." If that is what influenced the judge's mind, I think he did exercise his discretion on a wrong principle. The widow was invited to represent her husband's estate and she declined to do so, it may be for very good reasons not unconnected with the question of costs. For all we know, the widow may be glad that another person (who is, we understand, to be indemnified in respect of his costs by the defendant) should represent her husband's estate, and it may well be that in the long run it will save that estate the expense of a subsequent trial and possibly of an application to the Probate Division to appoint a personal representative. I agree that this is a case in which the court has jurisdiction to make the order and that in all the circumstances the order should be made.

SOMERVELL, L.J. : I agree.

Solicitors : *Berrymans* (for the defendant); *Butt & Bowyer*, agents for *Daynes, Keefe & Durrant*, Norwich (for the plaintiff).

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.]

THOMPSON v. McCULLOUGH

[COURT OF APPEAL (Morton, Bucknill and Asquith, L.J.J.), January 14, 15, 1947.]

Deed—Escrow—Conveyance executed, but purchase money not paid in full.

Landlord and Tenant—Notice to quit—Validity—Notice given by purchaser after execution of conveyance, but before payment of purchase money in full.

A *Landlord and Tenant—Notice to quit—Validity—Weekly tenancy—Month's notice given to quit on May 4—Subsequent week's notice to quit on April 20.*

In Sept., 1942, K., the owner of a freehold dwelling-house, granted a weekly tenancy thereof, unfurnished, to the defendant. In Feb., 1945, the defendant sub-let the house furnished to the plaintiff on a weekly tenancy. On Apr. 1, 1946, the plaintiff verbally agreed with K. to purchase the fee simple of the house, for £110, and he paid £5 as a deposit. On B Apr. 5, 1946, the defendant gave the plaintiff notice to quit expiring on May 4. On Apr. 10 the defendant sent a further notice to the plaintiff to quit the premises on Apr. 20, and on the same day K. executed a conveyance to the plaintiff who paid a further £29 on account of the purchase money. On Apr. 12 the plaintiff gave the defendant notice to quit. The balance of the purchase money was not paid to K. by the plaintiff until June 21.

C **HELD :** (i) the conveyance of April 10, 1946, was an escrow until payment of the balance of the purchase money on June 21.

(ii) the subsequent fulfilment of the condition on which the deed was to operate, namely, the payment of the balance of the purchase price, did not relate back to the date of the conveyance (Apr. 10) so as to have the effect of validating the notice to quit given by the plaintiff on D Apr. 12, when the fee simple was not vested in him.

(iii) up to May 4 the plaintiff's tenancy was still in existence as a weekly tenancy and it was still open to the defendant to give the plaintiff a notice appropriate to determine such a tenancy, and, therefore, the second notice to quit given by the defendant was valid.

E **[EDITORIAL NOTE.]** The reasoning on the third point must be distinguished from that underlying the decision in *Loewenthal v. Vanhoute* (*ante* p. 116). There a notice to quit had been given to expire on a certain date, it had been ignored, and later a further notice to quit had been given, and it was held that the subsequent notice to quit was of no effect unless it could be inferred from the circumstances that a new tenancy had been created after the expiration of the first notice. Here the notice to quit was given and expired during the subsistence of the tenancy.

F As to DELIVERY AS AN ESCROW, see HALSBURY, Hailsham Edn., Vol. 10, pp. 199-203, paras. 243-245; and FOR CASES, see DIGEST, Vol. 17, pp. 212-213, Nos. 245-251, and AS TO NOTICE TO QUIT, see HALSBURY, Hailsham Edn., Vol. 20, p. 145, para. 157; and FOR CASES, see DIGEST, Vol. 31, pp. 434, 435, 438, 439, Nos. 5792-5798, 5837-5845.]

Cases referred to :

- G (1) *Bowker v. Burdekin*, (1843), 11 M. & W. 128; 12 L.J.Ex. 329; 152 E.R. 744; 17 Digest 211, 231.
(2) *Foundling Hospital (Governors and Guardians) v. Crane*, [1911] 2 K.B. 367; 80 L.J.K.B. 853; 105 L.T. 187, C.A.; 17 Digest 205, 166.

APPEAL of plaintiff from an order of JUDGE ALLSEBROOK at Whitehaven and Millom County Court, by which possession of a dwelling-house was granted to the defendant. The facts appear in the judgment of MORTON, L.J.

G. Heilpern for the plaintiff.

J. V. Nesbitt for the defendant.

H MORTON, L.J. : In this case the county court judge refused an order for possession to the plaintiff, but granted an order for possession to the defendant, of the house known as No. 21, Springfield Road, Bigrigg. The action was a curious one in that the plaintiff, who claimed possession of the house, was in possession of it when the action started and is still in possession of it. The question we have to decide is : Who is entitled to possession of this house, the plaintiff or the defendant ?

The original owner in fee simple of the house was a Mr. Joseph Thompson Kirkbride, and the original tenant of Mr. Kirkbride was the mother of the

defendant. In September, 1942, the defendant's mother died, and the defendant, who was then in the army, was granted a weekly tenancy by Mr. Kirkbride of the house unfurnished at a rent of 7s. a week. In November, 1942, the defendant, still being in the army, sub-let the house to certain parties furnished at a rent of 14s. a week, and those parties left in January, 1945. In February, 1945, the defendant sub-let the house furnished to the plaintiff at a rent of 14s. a week under a verbal agreement. In 1946 Mr. Kirkbride was minded to sell the fee simple of the house, and on Apr. 1, 1946, the plaintiff, who was still the tenant of the house furnished, verbally agreed to buy the house from Mr. Kirkbride for the sum of £110, and he paid £5 by way of deposit. The same solicitor, Mr. Lawton, acted for both the plaintiff and Mr. Kirkbride on that occasion. On Apr. 5, 1946, the defendant, having heard that the plaintiff was trying to acquire the property and being himself desirous of occupying it, gave the plaintiff notice to determine the plaintiff's furnished tenancy, that notice purporting to expire on May 4, 1946. On Apr. 10, 1946, the defendant, apparently thinking that he had given too long a notice—he had given almost a month whereas the tenancy was a weekly one—sent a further notice to the plaintiff to quit the premises on Apr. 20. On April 10, Mr. Kirkbride executed a conveyance to the plaintiff. That conveyance was made between Mr. Kirkbride (thereinafter called the vendor), of the one part, and the plaintiff (thereinafter called the purchaser), of the other part. The seisin of the vendor was recited, and the operative part, so far as it is material, is as follows :

In consideration of one hundred and ten pounds paid by the purchaser to the vendor (the receipt whereof the vendor hereby acknowledges) the vendor as beneficial owner hereby conveys unto the purchaser . . .

and then follows a description of the house in question. The witnessing part is in the usual form :

In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first before written. Signed sealed and delivered by the said Joseph Thompson Kirkbride in the presence of

and then follows the name of the witness. On the same day the plaintiff paid a further sum of £29 on account of the purchase money. Thus, the position on Apr. 10 was that Mr. Kirkbride had executed that conveyance and had received a total of £34 out of the purchase price of £110. On Apr. 12, 1946, the plaintiff gave the defendant notice to quit on Apr. 20. There were then in existence, therefore, the first notice to quit given by the defendant to the plaintiff, the second notice to quit given by the defendant to the plaintiff, and a notice to quit from the plaintiff to the defendant. The last two notices both expired on Apr. 20. The present proceedings were begun on May 29, 1946, at a time when the balance of the purchase money had not yet been paid. On June 21, 1946, the balance of the purchase money, plus a sum by way of interest, was paid by the plaintiff to Mr. Kirkbride.

The matter came before the county court judge on July 10, and he decided the issues as follows. He held (1) that the conveyance which was executed by Mr. Kirkbride on Apr. 10, 1946, was then delivered only as an escrow, and that it remained an escrow and nothing but an escrow until the plaintiff paid the balance of the purchase price on June 21 ; (2) that on Apr. 12, by reason of the fact that the conveyance had only been delivered as an escrow, the plaintiff had not got the legal estate to entitle him to give a valid notice to the defendant determining the defendant's tenancy on Apr. 20 ; (3) that the sub-tenancy of the furnished premises which had been held by the plaintiff had been validly determined by the second notice given by the defendant to the plaintiff. On these findings he refused possession to the plaintiff and gave possession to the defendant. If the findings were right that conclusion, was, no doubt, right, because the defendant's contractual tenancy of the house unfurnished had never been lawfully determined and the defendant had lawfully determined the furnished tenancy of the plaintiff.

The plaintiff appealed from that decision, and before us his counsel put forward the following four contentions. (1) that there was no evidence on which the county court judge could find that the conveyance dated Apr. 10, 1946, was delivered only as an escrow on that date ; (2) that, even if he were wrong on that point, when the balance of the purchase price was paid on June 21, the delivery

of the conveyance dated back to Apr. 10, and thus the notice to quit which was given by the plaintiff on Apr. 12 was validated; (3) that, although the premises admittedly come within the Rent Restriction Acts, the plaintiff was entitled to possession because the defendant would not be protected by those Acts, and he relied on the fact that the plaintiff and not the defendant was in possession of the house when the notice to quit given by the plaintiff terminated; (4) that, in any event, the defendant's notice to quit given on Apr. 10 could not be a valid notice because the defendant had already given a notice to quit delivered on Apr. 5 and expiring on May 4. On the pleadings the only notice relied upon by the defendant is the second notice which he gave on Apr. 10 and was due to expire on Apr. 20.

As to the first contention, it is clear that the burden was originally on the plaintiff to prove that the conveyance was effectively delivered on Apr. 10. His attention had been brought pointedly to that question by an attempt on the part of the defendant to deliver interrogatories. The question whether a document is delivered as an escrow or as a deed is in general one of fact, and I think that the following passage from *NORTON ON DEEDS*, 2nd ed., p. 20, accurately states the law:

Whether the document was delivered as an escrow or as a deed is a question of what the parties intended, and that intention may appear either from their statements or the circumstances.

The author then quotes an observation of PARKE, B. in *Bowker v. Burdekin* (1) (11 M. & W. 128 at p. 147) as follows:

'You are to look at all the facts attending the execution, to all that took place at the time, and to the result of the transaction, and therefore, though it is in form an absolute delivery, if it can reasonably be inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will nevertheless operate as an escrow'

... Thus the delivery of a transfer of mortgage was held to be an escrow until the mortgage money had been paid ...; and of a conveyance until the purchase money had been paid ... The circumstances relied upon to show delivery as an escrow must be prior to or contemporaneous with, not subsequent to, the delivery ... Evidence is, of course, admissible as to what were the circumstances attending the delivery; ... and the question is in general one of fact for the jury ...

What was the evidence before the county court judge on the question whether or not the deed was delivered as an escrow? The plaintiff produced the conveyance to which I have referred, and that conveyance contains the statement that it was "signed sealed and delivered by the said Joseph Thompson Kirkbride." It also contains the statement, "This conveyance is made the tenth day of April One thousand nine hundred and forty six, [and the statement which I have already read]: In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first before written." The production of the conveyance was supplemented by the oral evidence of the plaintiff, and, according to the judge's note, he said: "On April 10, 1946, I purchased from Kirkbride." He was then cross-examined, and said: "I first agreed to purchase from Mr. Kirkbride on April 1, 1946. A verbal agreement. I paid a deposit and obtained a receipt from a clerk in Mr. Lawton's office. Mr. Lawton was then acting for both of us." Mr. Sumner, who is the solicitor for the plaintiff in these proceedings said: "Deposit of £5 paid on Apr. 1. Further payment on Apr. 10, £29, and on June 21 balance £79 10s. 0d., which last sum was balance plus interest, the interest being approximately equivalent to the rental. The evidence thus stands in this way. On the one hand there is the conveyance and the evidence of the plaintiff; on the other hand, there is uncontradicted evidence that the same solicitor, a Mr. Lawton, acted for both parties and that at the date which the conveyance bears only

£34 had been paid out of the purchase price of £110. From the latter evidence, it seems to me the natural inference would be that, if the deed was delivered at all on Apr. 10, it was delivered as an escrow. It would have been a most remarkable thing if Mr. Kirkbride had effectively delivered to the purchaser a conveyance at a time when only £34 out of the purchase price of £110 had been paid. The purchaser could then have sold or mortgaged the property or dealt with it in any way he wished. The normal thing would have been for Mr. Lawton, acting for both parties, to retain the deed until the balance of the purchase price was paid, and for the deed to have been effectively

delivered, so as to pass the property to the purchaser, when that happened. As to the other evidence, the purchaser, the plaintiff, having been previously forewarned of this point about delivery, said nothing more than this: "On April 10, 1946, I purchased from Kirkbride." That may mean nothing more than that Mr. Kirkbride executed a conveyance on that date. The evidence that the whole of the purchase price had not been paid on April 10 seems to me to lead to the inference that the document was not effectively delivered on Apr. 10. That being the position on the evidence, I think it was open to the county court judge to find, as he did find, that on April 10 the conveyance was delivered only as an escrow and that the condition, the fulfilment of which would make the delivery effective, was payment by the plaintiff of the balance of the purchase money. The result is that, as regards the first point, I see no reason for disturbing the finding of the county court judge that this document was an escrow and nothing but an escrow until June 21, 1946.

I turn to the second point in the argument of counsel for the plaintiff that, even if that is so, the delivery relates back so as to make his notice to quit given on Apr. 12 an effective notice. Apart from authority that would seem to me a very startling proposition. It involves this, that a man can effectively give a notice as landlord to a tenant at a time when it is uncertain whether he will ever be the landlord in fact. On Apr. 12 it was uncertain whether the plaintiff would ever pay the balance of the purchase money. He did not pay the balance of the purchase money until long after the notice to quit had expired. If relation back is to have such an effect as this, it seems to me to render the position of a tenant intolerable. On Apr. 20, if plaintiff's counsel is right, the defendant would not know whether or not the notice which he had received was a valid notice to quit. Apart from authority, I should have thought that the ultimate payment of the purchase money could not have the effect of validating a notice given at a time when the fee simple was not effectively vested in the giver of the notice. The only authority to which we were referred is *Foundling Hospital (Governors and Guardians) v. Crane* (2). The facts of that case do not matter for the present purpose, but counsel for the plaintiff relied on a passage in the judgment of FARWELL, L.J. ([1911] 2 K.B. 367 at p. 377) as follows:

The rules relating to escrows are thus stated by PRESTON in his book on Abstracts, 2nd ed., vol. 3, p. 65 . . . "(3) On the second delivery of the writing [that is the effective delivery] it will have relation, for the purposes of title, and not for the purpose of giving a right to intermediate rents, etc., from the delivery; (4) So as the conditions be performed, and the deed delivered a second time, the deed will be good, notwithstanding the death of both or either of the parties before the second delivery"; and SHEPARD'S TOUCHSTONE, 8th ed., pp. 58-60, is to the same effect.

It seems to me that that passage does not establish counsel's proposition. The relation back does not have the effect of giving "a right to intermediate rents, etc." from the time of the original delivery, and, if that be so, I can see no good reason why it should have the effect of validating a notice to quit given at a time when the fee simple was not vested in the plaintiff. The result is that my view as to the true position is not shaken by any authority which has been quoted to us. I add this, in case it may be material, that when these proceedings began the document was still an escrow and the plaintiff was not the owner of the property. The result is that the notice to quit given by the plaintiff to the defendant was not effective, and the contractual tenancy of the defendant at a rental of 7s. a week is still subsisting. Thus, the question under the Rent Restriction Acts, which is the subject of the third argument of counsel for the plaintiff, does not arise.

It is still necessary to determine the fourth point, which is whether the defendant has given an effective notice to determine the furnished tenancy of the plaintiff. This point seems to be entirely devoid of authority one way or the other, but it seems to me that the answer must be "Yes." When the defendant gave his first notice on Apr. 5 expiring on May 4 the position was that, if nothing further had been done, the tenancy would have expired on May 4. In the meantime, up to May 4, the tenancy was still in existence as a weekly tenancy. That being so, in the absence of authority to the contrary, I think it was still open to the defendant to give to his sub-tenant a notice appropriate to the determination of a weekly tenancy, and that he did by giving a notice on

Apr. 12 expiring on Apr. 20. The result is that, in my opinion, the furnished tenancy of the plaintiff was validly determined.

Thus, the defendant is entitled to the possession of these premises as a contractual tenant at the rental of 7s. a week. The order made by the county court judge was right and this appeal must be dismissed.

A BUCKNILL, L.J. : I agree that the appeal should be dismissed and I will only say a very few words on the crucial question in the case, that is, whether the plaintiff on Apr. 12 had a legal right to give the defendant notice to quit expiring on Apr. 20. The judge in his judgment said this :

B Also it is said that the deed, that is, the deed of conveyance giving the legal estate to the plaintiff, was not delivered until June 21, and, too, that the tenant has a right to know when he receives notice to quit that the person giving it has a right or title to give it, and, therefore, this is an exception to the rule that the title relates back. These submissions are, I think, right, and I find that on the date this notice to quit was given the plaintiff was not in a position to give it and the notice was invalid.

C That seems to me to be a finding of fact. The evidence about the transfer of title from Kirkbride to the plaintiff seems to me to be most unsatisfactory. and the judge had to rely very largely on the probabilities of the case. In my view, the overwhelming probabilities in a case of this kind are that the vendor did not pass the property in the premises to the purchaser until he had received the purchase price, and the bulk of the purchase price here was not paid until June 21. I think the judge came to a right conclusion on this point, and on the rest of the case I only say that I agree with what my Lord has said and have nothing to add.

ASQUITH, L.J. : I agree.

Appeal dismissed with costs.

D Solicitors : William Charles Crocker, agent for W. C. Sumner, Whitehaven (for the plaintiff) ; Broughton & Co., agents for Milburn & Co., Workington (for the defendant).

[Reported by RONALD ZIAR, Esq., Barrister-at-Law.]

BRIERLEY v. PHILIPS AND ANOTHER

E [KING'S BENCH DIVISION (Lord Goddard, C.J., and Humphreys, J.), January 22, 1947.]

Emergency Legislation—Maximum prices—Sale of eggs for purposes of hatching—Whether purchaser a “consumer”—Eggs (Control and Prices) (Great Britain) Order, 1946 (S.R. & O., 1946, No. 880), art. 7 (1) (c) ; sched. II, part II (f).

F A person who buys eggs for the purposes of hatching is not a “consumer” within the meaning of the Eggs (Control and Prices) (Great Britain) Order, 1946, sched. II, pt. II, para. (f), and, consequently, neither the buyer nor the seller of eggs sold for that purpose at a price exceeding that laid down by that paragraph is guilty of an offence under art. 7 (1) (c) of the Order.

[FOR THE EGGS (CONTROL AND PRICES) (GREAT BRITAIN) ORDER, 1946, see BUTTERWORTH'S EMERGENCY LEGISLATION, title Supply [1].]

G CASES STATED by Skipton (Yorkshire) Justices,

The respondents were charged before the Skipton (Yorkshire) justices, with buying and selling eggs at a price exceeding the maximum price specified in the Eggs (Control and Prices) (Great Britain) Order, 1946, sched. II, pt. II (f) as amended, contrary to art. 7 (1) (c) of the Order. The facts appear in the judgment of LORD GODDARD, C.J.

H H. L. Parker for the appellants.

Maurice Ahern for the respondents.

LORD GODDARD, C.J. : These two Cases Stated, which arise out of a sale of eggs, raise the same point. The seller is charged with selling above the maximum price, and the buyer is charged with buying above the maximum price. It is necessary to look with some care at the offence which is charged. The offence charged in the first case is that the respondent, Philips, “did sell eggs to one Richard Campbell Brear at a price exceeding the appropriate maximum price specified in pt. II of sched. II to the said Order contrary to art. 7

as amended . . . ; and in the other case, that the respondent Brear "did buy from a producer . . . at a price exceeding the appropriate maximum price." In each case the producer, *i.e.*, the person who owns the hens who lay the eggs, is a person who has the "care, control or management of 25 head of poultry or less." In other words, he is one of those small producers of eggs who keeps domestic fowls and sells the eggs.

So far as these small producers are concerned, the Order is one which one would hope could be understood by the class of person against whom its provisions are directed. It seems, however, to be an Order which provides argument for junior counsel for the Treasury and another learned counsel, and certainly is not very clear to two judges of the High Court who are sitting to try these two cases, and yet it is an Order which is creating a criminal offence. If Orders are made to create criminal offences, it is surely desirable that they should be stated in language which the persons who may commit the offences—in this case, as I say, humble people like cottagers—can understand. It is a very serious thing to produce Orders or regulations, whether under Defence Regulations or anything else, creating offences which can be dealt with as very serious matters, if they are couched in language which does not make clear whether a person is committing an offence or not. I am certainly not prepared ever to support Orders and to find people guilty of criminal offences when the Orders which they are charged with violating are couched in language which is open to all sorts of meanings and causes all sorts of difficulties, so that the unfortunate people cannot know whether they are acting legally or not, unless possibly they get counsel's opinion, or at any rate a solicitor's advice.

In this case it is said that the respondents have committed an offence by selling and buying above the maximum price contained in pt. II of sched. II. What is said to have been done is that a producer owning 25 head of poultry or less has sold eggs to a consumer, and the price in sched. II is 2s. a dozen. These eggs, which were sold for hatching, were sold at 10s. a dozen.

First of all, has there been a sale by a producer owning 25 head of poultry or less to a consumer? What does "consumer" mean? If I were asked what "consumer" meant in an Order or a statute, the first thing I would direct myself to do would be to give to the word "consumer" the ordinary meaning which the English language attaches to that word. The ordinary meaning which the English language would attach to that word in relation to an egg is a person who is going to eat the egg or to use the egg in the process of cooking in his own house. That is consuming an egg, and I should have thought there was not much doubt about that. If I buy an egg to put one of my hens on it to hatch it I do not consume that egg. I should not have thought anybody could by any possibility have said that a person who buys an egg for the purpose of hatching it is a consumer of an egg.

The matter is, it seems to me, reinforced when one looks at art. 3 of this Order which refers to a producer having under his care, control or management more than 25 head of poultry, and provides that he shall not sell or dispose of the eggs except to a licensed buyer or packer, but that prohibition is not to "prohibit the use of fresh eggs by the producer thereof for consumption in his own household or by persons resident in an institution carried on by him." There is no doubt what the word "consumption" means there, and consumption is what a consumer does. Then we find what a producer having under his care, control or management 25 head of poultry or less may do. He may not dispose of his eggs to any person for the purposes of a catering establishment carried on by him or to a manufacturer for the purposes of his manufacturing business, and no person shall buy or obtain any such eggs from that producer for resale or for the purpose of any catering establishment or manufacturing business carried on by him, provided that the restrictions imposed by this paragraph shall not prohibit the sale of such eggs to a licensed buyer or licensed packer. In the next paragraph it is provided:

(5) No person shall dispose of or sell or supply any home produced preserved eggs or use any such eggs for the purposes of a catering establishment or manufacturing business, provided that—(a) the restrictions imposed by this paragraph shall not prohibit the use of such eggs by the person who preserved them, for consumption in his own household . . .

Here again "consumption" clearly means eating or using in the process of cooking.

Therefore, it seems to me that that reinforces the meaning to be attached to the word "consumer" in pt. II of sched. II where it says that on a sale by a producer owning 25 head of poultry or less to a consumer the price of eggs is to be 2s. a dozen. It would have been perfectly easy, if it were meant to apply the maximum price of 2s. a dozen to any sale by a producer, to have said: "On a sale by a producer to a purchaser," but that is not what the draftsman has said. He has said, "to a consumer." Therefore, as far as I can see, there is no maximum price fixed here for the sale by a producer owning 25 head of poultry or less to a person for the purpose of hatching, and I am certainly not prepared to give to the word "consumer" a meaning other than the ordinary meaning which the English language has attached to it. What the draftsman intended, I do not know, but if he intended to prevent a producer selling any eggs to anyone he has used a most unhappy expression, and he could have used another word which everybody would have understood. He chooses to use the word "consumer," and he must give the ordinary meaning to it.

In my opinion, therefore, the offence which was charged in this case was not committed, and, accordingly, I uphold the decision of the justices and dismiss both these appeals with costs.

HUMPHREYS, J.: I am of the same opinion. It is to be observed that in preparing the form of summons in this case the prosecution were careful not to charge the offence, which is the only offence appropriate to the facts of this case, and that is a sale to a consumer. In the case of the seller, the charge is that he, being a producer, sold to a person whose name is given, and that is all, but that is not an offence at all, and, if objection had been taken, the information would have had to have been amended by adding the words, "to a consumer, to wit, one Richard Campbell Brear." In the same way, in the other case, which is an information against Brear, the only charge is that he did buy from a producer, but it is no offence for him to buy unless he himself is a consumer, and the same observations apply. Whether the omission of the word "consumer" was deliberate I do not know, but, if it was, I think it fails in its object, because I cannot see any offence of the nature that is charged in these two cases other than the offence of selling by a producer to a consumer, and for the reasons which my Lord has given, with which I entirely agree, I think it is absurd to say that the person who buys eggs for hatching is buying them to consume them, and is, therefore, a consumer of those eggs. I also desire to associate myself in full with the observations made by my Lord as to the necessity for clarity in these Orders which create criminal offences.

Appeal dismissed with costs.
Solicitors: *Treasury Solicitor* (for the appellants); *Walker, Charlesworth & Jefferson* (for the respondents).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

D. P. MACDONALD & SONS, LTD. v. SHARPE

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Lewis, JJ.), January 16, 1947.]

Emergency Legislation—Sale of food—False labelling—Conspiracy—Proceedings begun more than six months from date of commission of offence—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927, as amended), regs. 90 (1), 93 (2)—Defence (Sale of Food) Regulations, 1943 (S.R. & O., 1943, No. 1553), regs. 1 (1); 4.

As the provisions of pt. V of the Defence (General) Regulations, 1939, which includes regs. 90 and 93, are applied by the Defence (Sale of Food) Regulations, 1943, reg. 4, to the latter regulations, a conspiracy to contravene reg. 1 (1) of the latter regulations is an offence against reg. 90 of the General Regulations, a prosecution for which may, under reg. 93 (2) of the General Regulations, be begun within 12 months of the commission of the offence.

[FOR THE DEFENCE (SALE OF FOOD) REGULATIONS, 1943, regs. 1 (1) and 4, see HALSBURY'S STATUTES, Vol. 36, pp. 126, 128; and FOR THE DEFENCE (GENERAL) REGULATIONS, 1939, regs. 90, 93 and sched. II, see *ibid.*, pp. 722, 723, 736.]

CASE STATED by Chipping Wycombe justices.

The appellants and one other person were convicted before justices for the Borough of Chipping Wycombe of conspiring together to contravene reg. 1 (1) of the Defence (Sale of Food) Regulations, 1943, by procuring the offer for sale of a food under the label "Finest British Wine. Port Style," falsely describing that food. The information was preferred by the respondent, who was at all material times the chief sanitary inspector and sampling officer for the borough of Chipping Wycombe, more than six months after the commission of the alleged offence.

Slade, K.C., and Colin Duncan for the appellants.

Sebag Shaw for the respondent.

LORD GODDARD, C.J. : In the proceedings on which this Case is stated the appellants were charged under the Defence (Sale of Food) Regulations, 1943, reg. 1 (1), and the Defence (General) Regulations, 1939, reg. 90, with having conspired together with certain other persons and with persons unknown to contravene reg. 1 (1) of the Defence (Sale of Food) Regulations, 1943. I need not read out the whole of the charge, but it had to do with offering a concoction described as "Finest British Wine. Port Style." The point has been taken that the justices had no jurisdiction to go into the matter, or that, if they had, no offence was disclosed.

The point in the case is clear. Regulation 90 of the Defence (General) Regulations provides that any person who conspires with another person to commit an offence against any of the regulations shall be guilty of an offence against that regulation punishable in like manner as the said offence. In other words, if two people conspire to commit an offence, but have not got so far as committing it, they can receive the same punishment as if they had committed it. Regulation 93 (2) of the Defence (General) Regulations, 1939, provides that any proceedings under the Summary Jurisdiction Acts which may be taken against a person for any offence specified in sched. II to the regulations, may, notwithstanding anything to the contrary in those Acts, be commenced at any time not later than twelve months from the date of the commission of the offence. One of the matters contained in sched. II to the regulations is "an offence against any of these regulations," and, as a conspiracy to contravene the regulations has been made an offence, it is an offence against the regulations and can be prosecuted within twelve months.

The appellant company was prosecuted for an offence against the Defence (Sale of Food) Regulations, 1943. Regulation 4 of the Sale of Food Regulations, provides :

Part V of the Defence (General) Regulations, 1939, shall apply for the purpose of these regulations as if in the said part V any reference to those regulations included a reference to these regulations.

In other words, any provision of pt. V of the General Regulations (which contains regs. 90 and 93), is to be treated as applicable to the Sale of Food Regulations, and the Sale of Food Regulations are to be read as though pt. V had been expressly incorporated in them. From this it seems to follow that a conspiracy to contravene one of the Sale of Food Regulations is punishable under reg. 90 of the General Regulations, and, it being punishable under reg. 90 of these regulations, it is an offence against the regulations, and can be prosecuted within twelve months. The appeal is dismissed with costs.

HUMPHREYS, J. : I agree.

LEWIS, J. : I agree.

Appeal dismissed with costs.

Solicitors : *Philip Conway, Thomas & Co.* (for the appellants) ; *Town Clerk,* High Wycombe (for the respondents).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

CHESTERTON R.D.C. v. RALPH THOMPSON, LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Lewis, JJ.), December 16, 1946,]

Public Health—Drainage—New building—Satisfactory provision for drainage of building—Drains of particular building—Public Health Act, 1936 (c. 49), s. 37 (1).

A Section 37 (1) of the Public Health Act, 1936, provides: "Where plans of a building . . . are . . . deposited with a local authority, the authority shall reject the plans unless . . . the plans show that satisfactory provision will be made for the drainage of the building . . ."

B The words "drainage of the building" in the sub-section refer to the drains of the individual building or buildings the plans of which are deposited, and not to the system of drainage for that building or buildings and other buildings. Consequently, if the plans of a building show that satisfactory provision will be made for the drainage of that particular building, the local authority are not entitled to reject them on the ground that the sewer designed to take that drainage leads to an inefficient septic tank with the result that a nuisance may be caused by the failure of the tank adequately to deal with the sewage.

C [FOR THE PUBLIC HEALTH ACT, 1936, s. 37, see HALSBURY'S STATUTES, Vol. 29, p. 352.]

CASE STATED by Cambridgeshire Quarter Sessions.

D The appellant local authority appealed from a decision of the quarter sessions that the plans of a building showed that satisfactory provision would be made for the drainage of the building and should not have been rejected by the local authority. The facts appear in the judgment of LORD GODDARD, C.J.

Melford Stevenson, K.C., and *Garth Moore* for the appellant council.

Ryder Richardson and Squibb for the respondent company (who had submitted the plans).

E LORD GODDARD, C.J.: This is a Case stated by the court of quarter sessions for the county of Cambridge. The appellant council found that the plans of some buildings did not show satisfactory provision for the drainage of the buildings and rejected them under the Public Health Act, 1936, s. 37 (1). On appeal under s. 37 (2) of the Act to a court of summary jurisdiction that court held that the provision for drainage proposed to be provided ought to be accepted by the council as satisfactory, and an appeal by the council to quarter sessions was dismissed.

F The plans were deposited some years ago. Under s. 66 (1) of the Act, where the work to which plans relate has not been begun within three years of the deposit of the plans the local authority can recall their consent to the work, and that is what they did in this case. From the facts stated in the Case it appears that there is a private sewer down the roadway where these proposed houses were to be built, and that sewer, which is designed to take the drainage of the houses to be built in the road, leads to a septic tank or chamber which has an overflow into a stream. It seems to be a singularly inefficient septic tank, and I cannot help suspecting that the real question between the parties is how to make that septic tank satisfactory, as to which I express no opinion at all. The whole object of a septic tank is to treat the sewage in such a way that the effluent will be inoffensive and pure and cause no nuisance. Another septic tank, constructed for the drainage of neighbouring houses on the same estate, has turned out to be so ineffective that serious nuisance is caused by the discharge of foul, evil-smelling effluent. The local authority have refused to pass these plans admittedly on the ground that they think that, with the addition of a large number of houses, this sewer as it exists will either cause or increase a nuisance due to the fouling of the stream into which both these septic tanks drain. Therefore, they have rejected the plans as not making satisfactory provision for the drainage of the buildings, and the real question in this case is whether or not the expression in s. 37 (1), "satisfactory provision . . . for the drainage of the building," refers to the drains of the individual building or whether it refers to the system of drainage for the building or buildings.

By s. 37 (1) :

Where plans of a building . . . are . . . deposited with a local authority, the authority shall reject the plans unless . . . the plans show that satisfactory provision will be made for the drainage of the building . . .

It is further enacted by s. 37 (3) that :

A proposed drain shall not be deemed to be a satisfactory drain for the purposes of this section unless it is proposed to be made, as the local authority, or on appeal a court of summary jurisdiction, may require, either to connect with a sewer, or to discharge into a cesspool or into some other place . . .

I agree that the mere fact that the drain is shown to connect with a sewer, as it must if it is not to drain into a cesspool or other drain, does not mean of necessity that it is satisfactory. On the other hand, counsel for the respondent company contends that provided the plans show that the drain, *i.e.*, the single private drain, to use a common expression, of the house, is a satisfactory drain, and both petty sessions and quarter sessions have held that this drain is, the local authority are not entitled to reject the plans under s. 37 (1) because something outside that drain itself, *viz.*, the sewer, is not satisfactory. That is a matter on which my mind has fluctuated more than once in the course of the argument.

I think it is rather a difficult case. One thing I bear in mind, sitting in this court, as in other courts of appeal, is that one ought not to interfere with the decision of the court below unless one is satisfied that its decision was wrong, and I am not satisfied that the decisions of the court of quarter sessions and the court of petty sessions were wrong. I think the wording of s. 37 (1) indicates that all one ought to consider is the drainage of the particular building, and it is abundantly clear from other sections to which our attention has been called that, if the sewage from these various houses is not satisfactorily disposed of, if the sewer and the cesspool are not satisfactory, there is ample provision in the Public Health Act by which the local authority can see that that is remedied. I do not think, especially having regard to the words "of the building," that one can read the word "drainage" in s. 37 (1) as meaning a system of drainage. At one time I thought one might be able to, by reason of the interpretation in s. 343 :

"Sewer" does not include a drain as defined in this section but, save as aforesaid, includes all sewers and drains used for the drainage of buildings . . .

A drain is only for the drainage of one building. If there were any reference in s. 37 (1) to sewers, I think one would have been able then to read the word "drainage" as meaning a combination of sewers and drains, but I do not think there are any words in s. 37 (1) which make it admissible to read it in that way, and I should find it very difficult, if we did read it in that way, to reject the argument of counsel for the company that, if we are to read "drainage" as meaning a system of drainage, it would enable the local authority to reject plans on the ground that the proposed drains led into a sewer connected with sewage disposal works some miles away which, on account of the growth of the neighbourhood or some other reason, were not satisfactory for the disposal of the sewage which might be conveyed there. It is true that counsel for the appellant council argued that we ought to assume the local authority would act reasonably, but the argument of counsel for the company shows that, if one brings in considerations with regard to the sewers into which the drains are to drain, a variety of complications might arise which do not seem to be contemplated by the section.

I think, therefore, that quarter sessions were right in coming to the conclusion that the only matter they had to consider was the suitability of the particular drain which connects with the sewer and they were not concerned with what happens to the drainage of the houses once it passes into the sewer or whether the sewer itself is satisfactory. If the sewer or parts of the sewer are not satisfactory, there are other means by which it can be dealt with. The appeal should be dismissed.

HUMPHREYS, J. : I agree. The matter is not easy, the question being whether the words in s. 37 (1), "satisfactory provision will be made for the drainage of the building," include satisfactory provision for the drainage of that and other houses—what may be described as the system of drainage. I was very much impressed by the argument of counsel for the company that this

A section must be looked at on the assumption that (as will happen in a great many cases, if not in the majority of cases) the person who puts forward plans of a building, including the proposed drainage of that building, will be a different person from the person who owns the sewer with which that drainage will connect. It would be difficult for this court to hold that a person could not be said to have provided a satisfactory drainage of the house to which alone the plans related, because the owner of a sewer, with which he was not concerned and over which he had no control, had allowed that sewer to get into an improper state. As I read s. 37, the only requirement with regard to the connection between the private drain of a house and a sewer is to be found in sub-s. (3), which merely requires that the drains of the house must connect with a sewer or discharge into a cesspool or some other place. I also think it is worth remembering that by approving the plans of these houses the local authority are not debarring themselves from taking any steps they think right to prevent a nuisance. My judgment is confined to the decision that s. 37 is not the section under which the very laudable desires of the local authority should be carried out. I have no doubt that if and when approval is given to the plans of these houses on the ground that the drainage of each house is in itself a satisfactory drainage, the local authority will still retain the powers which they possess—and, in passing, I would refer to ss. 39 and 50 of the Act, and, perhaps to bye-laws made under s. 61 of the Act—to prevent anything in the nature of a nuisance or anything which they think undesirable. So I come back to the narrow construction of s. 37 itself, being of opinion that where plans of a building are deposited the authorities shall reject the plans unless (and, I take it, should not reject the plans if) the plans show that satisfactory provision will be made for the drainage of that building. I use the word “that” instead of the word “the”, which is to be found in the section. For these reasons I agree with the judgment of my Lord.

D LEWIS, J.: I agree.

Appeal dismissed.

Solicitors: *Waterhouse & Co.*, agents for *Few & Kester*, Cambridge (for appellant council); *Blyth, Dutton & Co.*, agents for *W. J. & J. G. Taylor*, Newmarket (for respondent company).

E [Reported by C. St.J. Nicholson, Esq., Barrister-at-Law.]

HENRY RICHARDSON, LTD. v. INLAND REVENUE COMMISSIONERS

F [KING'S BENCH DIVISION (Atkinson, J.), January 16, 22, 1947.]

Revenue—Excess profits tax—“Directors’ remuneration”—Secretary of company also a director—Salary received as secretary and fees as director—Finance Act, 1940 (c. 29), s. 33 (5).

G C. was the secretary and a director of the appellant company. For the years ending Mar., 1943, and Mar., 1944, her salary as secretary was £450 and £750 respectively. As a director she also received fees for these two periods, together with certain bonuses. In assessing the company to excess profits tax for those years the Inland Revenue Commissioners refused to allow C.’s salary as secretary as an expense on the ground that it was caught by the meaning of “directors’ remuneration” in s. 33 (5) of the Finance Act, 1940.

H HELD: C.’s salary as a secretary was not part of her remuneration as a director; “directors’ remuneration” was remuneration received for services as a director; therefore C.’s salary as a secretary was allowable in the assessment of the company to excess profits tax.

[EDITORIAL NOTE. It is to be observed that there was no finding of fact in this case which justified the view that the secretary was “a manager of the company or otherwise concerned in the management of the trade or business” (within the Finance Act, 1937, sched. IV, r. 13 (b) (i)). In a case in which that rule applied, the decision here reported would not be in point (see *per ATKINSON, J.*, in *I.R.C. v. Rustproof Metal Window Co., Ltd.*, June 27, 1946 (202 L.T.Jo. 118)).

AS TO INTERPRETATION OF TAXING ACTS, see HALSBURY, Hailsham Edn., Vol. 17, pp. 29 to 31, paras. 46-51; FOR EXCESS PROFITS TAX, see HALSBURY, Hailsham Edn., 1946 Supplement, p. 1310, para. 1041A; and FOR the FINANCE ACT, 1940, s. 33 (5), see HALSBURY'S STATUTES, Vol. 33, p. 186.]

Case referred to:

- (1) *Cape Brandy Syndicate v. Commissioners of Inland Revenue*, [1921] 2 K.B. 403; 90 L.J.K.B. 461; 125 L.T. 108; 12 Tax Cases 258.

APPEAL from the Special Commissioners of Income Tax. The relevant facts as found in the Case Stated by the Commissioners are set out in the judgment.

Donovan, K.C., and *Victor Coen* for the company.

D. L. Jenkins, K.C., and *Reginald P. Hills* for the Commissioners of Inland Revenue.

ATKINSON, J.: The question in this appeal turns on the meaning of the expression "directors' remuneration" in s. 33 (5) of the Finance Act, 1940. In the Finance (No. 2) Act, 1939, it is provided in sched. VII, para. 10:

(1) In the case of a trade or business carried on in any accounting period which constitutes or includes a chargeable accounting period by a company the directors whereof have a controlling interest therein—(a) if the standard profits of the company are computed by reference to the profits of a standard period, no deduction shall be allowed in respect of directors' remuneration in excess of the amount paid for directors' remuneration in respect of the standard period . . . (2) In this paragraph the expression "directors' remuneration" does not include the remuneration of any director who is required to devote substantially the whole of his time to the service of the company in a managerial or technical capacity, and is not the beneficial owner of, or able . . . to control, more than five per cent of the ordinary share capital of the company.

That section was displaced by s. 33 of the Finance Act, 1940, and the language somewhat varied. By s. 33 (5) it is provided:

The following paragraph shall be substituted for para. 10 of part I of the said sched. VII . . . 10 (1) In the case of a trade or business carried on, in any accounting period . . . (a) in computing the profits for that accounting period; and (b) if the standard profits of the trade or business are computed by reference to the profits of a standard period . . . no deduction shall be made in respect of directors' remuneration.

Then came the same proviso as that in para. 10 (2) of sched. VII to the 1939 Act regarding the meaning of "directors' remuneration." I read the earlier provision because of the presence of the words "remuneration in excess of the amount paid for directors' remuneration," which I think are worth observing. The difference between the two enactments is that under sched. VII, para 10 (2), any excess over what had been paid in the standard period was disallowed as an expense, whereas in the 1940 Act the whole of the remuneration was left out of both computations. The definition of "director" is to be found in the Finance (No. 2) Act, 1939, s. 22 (c), which provides that the expression "director" has the same meaning as it has "for the purposes of sched. IV to the Finance Act, 1937." Sched. IV, para. 13 (b), to the Act of 1937 provides:

The expression "director" has the same meaning as in s. 144 of the Companies Act, 1929, except that it includes any person who—(i) is a manager of the company or otherwise concerned in the management of the trade or business; and (ii) is remunerated out of the funds of the trade or business; and (iii) is the beneficial owner of not less than 20 per cent. of the ordinary share capital of the company.

The company concerned was incorporated on June 24, 1918, to acquire the business of printer, stationer and binder carried on by a Mrs. Richardson. The Case states:

The present issued share capital is £3,100 divided into 1,000 6 per cent. cumulative preference shares of £1 each fully paid, and 2,100 ordinary shares of £1 each fully paid . . . Since the formation of the company Mrs. Winifred Cozens has been a director of the company and since 1927, following the death of Mrs. Richardson, has been the chairman of the directors.

Mrs. Cozens is a daughter of Mrs. Richardson and at all material times from the formation of the company—that is, probably since her mother's death—she has been the holder of all the issued preference shares, and of 1,450 ordinary shares of the company. There is, therefore, no question about the company being a director-controlled company. The Case proceeds:

Since the formation of the company, Mrs. Cozens has been the secretary and as such

she has admittedly carried out the usual duties of the secretary of a limited company. Her duties as secretary were separate from her duties as director and chairman of the board.

Her salary in 1918 was fixed by art. 33 at £10 per annum. Later, by resolution, it was raised to £15 per annum. During the years 1927 to 1942 and 1944 and 1945, her salary has been raised very substantially. From Apr. 1, 1927, to Mar., 1942, it was £250. For the year ending Mar. 31, 1943, her salary was £450, and for the year ending Mar. 31, 1944, her salary was £750. I think the directors' fees were something like £250 a year, and they had bonuses allotted to them about which there is no question.

The only question which arises is whether, in assessing the business for excess profits tax for the years ending Mar., 1943 and 1944, the secretary's salary has to be disallowed as an expense. The only ground on which it could be disallowed *in toto* would be that the salary was "directors' remuneration."

It is contended for the Crown that "directors' remuneration" means all remuneration paid to a director in whatever capacity the money may be earned. The commissioners acceded to that argument. The contention of the company, on the other hand, is that "directors' remuneration" means what it says—the remuneration paid to a director for services rendered as a director. Counsel for the Crown argued that the intendment of these provisions was to put a company in the same position as a partnership. There is a very strong argument against that. In the Finance Act, 1916, s. 49 (1), there was a provision dealing with directors' remuneration, and the last few lines of the sub-section are as follows :

... for the purpose of the determination and computation of profits under pt. I of sched. IV to the principal Act, a company [may be treated] as if it were a firm and not a company . . . and the directors or any of them as if they were partners in the firm.

If it had been the intention of Parliament in framing the Finance Acts during the recent war to bring about that situation, it could have adopted the language of the Act of 1916. The fact that Parliament has deliberately refrained from using the same clear language as that used in the Act of 1916 seems to me to make it difficult to say that the court ought to interpret the new language as meaning the same thing.

There is another difficulty about it. In *Cape Brandy Syndicate v. Inland Revenue Commissioners* (1), ROWLATT, J., said (12 Tax Cases 358, at p. 366) :

Now, of course, it is said and urged by Sir William Finlay that in a taxing Act clear words are necessary to tax the subject. But it is often endeavoured to give to that maxim a wide and fanciful construction. It does not mean that words are to be unduly restricted against the Crown or that there is to be any discrimination against the Crown in such Acts. It means this, I think, it means that in taxation you have to look simply at what is clearly said. There is no room for any intendment ; there is no equity about a tax ; there is no presumption as to a tax ; you read nothing in ; you imply nothing, but you look fairly at what is said and at what is said clearly and that is the tax.

There has never been any quarrel with that as an accurate statement of the law. "There is no room for any intendment," ROWLATT, J., said, "and I find it difficult to yield to the argument that I must interpret the statutory provisions with which we are concerned here on the basis of an intention to equate companies to partnerships."

There is one other argument of counsel for the Crown which I should mention. If one gives the expression "directors' remuneration" its strict meaning—he calls it its narrow meaning—that is, the remuneration paid to a director as such—he says you are opening the door to an indirect raising of directors' remuneration and so to a cutting down of the fair taxation companies ought to pay, but I cannot think that there is anything in that point because there are three provisions at least which enable the revenue to deal with matters of that kind. Section 32 of the Act of 1940, provides :

(1) In computing the profits of any trade or business for any accounting period, no deduction shall be allowed in respect of expenses in excess of the amount which the commissioners consider reasonable and necessary, having regard to the requirements of the trade or business, and, in the case of directors' fees, or other payments for services, to the actual services rendered by the person concerned.

If the commissioners thought that the secretary's salary was unreasonable, there is a section which enables the commissioners to deal with it. Then there is para. 9 of sched. VII to the Finance (No. 2) Act, 1939 :

No deduction shall be made in respect of any transaction or operation of any nature if and so far as it appears that the transaction or operation has artificially reduced or would artificially reduce the profits.

If a director were suddenly appointed secretary during the war and given a salary as secretary, but was doing no more than he had done before, there is that section for the revenue to resort to. Then s. 35 of the Finance Act, 1941, gives the Crown a power of revision. So it is difficult to urge that there is any necessity, from the Crown's point of view, for an extended definition of "directors' remuneration."

I was struck by the argument of counsel for the company that you might just as well speak of the director's remuneration which Mrs. Cozens got as secretary's remuneration. She was the secretary, and she was a director. You might just as well call everything she received "secretary's remuneration" as "director's remuneration." If she ceased to be a director, the post of secretary would remain, and her salary as secretary would remain. Again, I feel great difficulty in seeing why what may equally be regarded as secretary's remuneration should be all regarded as "director's remuneration."

The matter, I think, would have been unarguable if it were not for the proviso, and counsel for the Crown really based his argument on that. He said that the words about not including in the definition of "directors' remuneration" the remuneration of a director who is required to devote substantially the whole of his time to the service of the company destroyed the narrow interpretation. The guiding rule in interpreting statutes is to interpret the language used giving it its ordinary meaning unless there is some context which indicates that the ordinary meaning is to be departed from. Directors are of two kinds. There are directors who merely attend directors' meetings and get directors' fees, but there are also working directors who give all their time to carrying on the business of the company. A managing director is a good illustration. I suppose that in most private companies and in many small companies the directors are working directors. The articles may fix their remuneration, or it may be fixed by resolution from time to time.

Let me give a simple illustration of what I mean. A, B and C are carrying on business in partnership. A is the senior partner and is getting half the profits. B is the next partner, and he gets two-sixths of the profits, and C, the junior partner, gets one-sixth. They determine to turn the company into a limited company. They get further capital from their friends and relations and others. All three are to be directors and are to continue giving their time to the service of the company. There is an article saying that A's remuneration shall be £1,500 a year, B's remuneration £1,000 a year, and C's remuneration £500 a year. That is a typical example of the remuneration of a director who is required to devote substantially the whole of his time to the service of the company. The remuneration of such a director can be debited as an expense if he does not control more than 5 per cent. of the capital. That is what that part of the section is aimed at. So far from extending the previous provision, it is taking out of it the case of working directors who do not own or control more than 5 per cent. of the capital.

Let me take another example, the case of a hotel company with half a dozen hotels. A is the manager of one of the hotels with a working agreement for 10 years at £1,000 a year. The board make him a director, and he goes on the board with a director's fee of £150 a year, but continues as manager of his particular hotel. The Crown would say that his director's remuneration is £1,150, and that the £1,000, which had always been allowed as an expense, must no longer be allowed as an expense. To my mind, that is, I will not say an absurdity, but a wholly impossible argument. The £1,000 remains payable to him under his 10 years' agreement. If, in the following year, he ceased to be a director, his £1,000 would still remain. In no sense is that "director's remuneration"; it is his remuneration for managing the hotel. See how unfairly the contention might operate (and I gather would operate in this case) by taking this example. Suppose, before the war, when the secretary's salary

was low, the secretary had the assistance of a couple of girl shorthand typists, and, it may be, an assistant secretary, so that the secretary really had not very much to do. The salaries of the girls and the assistant are all deducted as expenses in the standard period. The war comes, and they are called up in one capacity or another. The secretary cannot get any help, and has to do all the work which previously had been done in the main by these various assistants. The board might fairly say: "You must be remunerated for this," and raise her remuneration. Then the Crown can step in, according to the argument here, and say: "In the standard period these expenses clearly would be debited thereby lowering the standard, but we object to the salary which the secretary is now getting for doing the work these three people did before the war, and we say that must be deemed to be 'director's remuneration.'" It would be a grossly unfair result if that were the interpretation of the section. In my judgment, "director's remuneration" means what it says—

A the remuneration of a director for services rendered as a director, and therefore, the appeal succeeds.

Appeal allowed with costs.

Solicitors: *Goulden, Mesquita & Co.* (for the company); *Solicitor of Inland Revenue* (for Commissioners of Inland Revenue).

[Reported by W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

Re C. W. DIXON, LTD.

[CHANCERY DIVISION (Vaisey, J.) January 20, 1947.]

Companies—Dissolution—Avoidance—Form of order—Effect on property vested before date of order—Companies Act, 1929 (c. 23), ss. 294 (1), 296.

On an application under the Companies Act, 1929, s. 294 (1), for a declaration that the dissolution of a company was void:—

HELD: the form of the order, following the words of the subsection, should be to declare "the dissolution to have been void," and its effect was that the dissolution was void *ab initio*, all the consequences under the statute or otherwise which followed from it being arrested and avoided, with the result that any property which was purported to have been vested in the Crown under s. 296 never so vested. No order for the re-vesting of such property in the company was necessary.

[AS TO POWER TO DECLARE VOID THE DISSOLUTION OF A COMPANY, see HALSBURY, *Hailsham Edn.*, Vol. 5, pp. 755, 756, para. 1282; and FOR CASES, see DIGEST, Vol. 10, p. 1034, Nos. 7174-7177.]

Case referred to:

(1) *Morris v. Harris*, [1927] A.C. 252; 96 L.J.Ch. 253; 136 L.T. 587; [1927] B. & C. R. 65, H.L.; Digest Supp.

MOTION, on behalf of the liquidator and contributories, for an order under Companies Act, 1929, s. 294, declaring that the dissolution of C. W. Dixon, Ltd., was void.

The company was incorporated as a private company under the Companies Acts, 1908-1917. C. W. Dixon was the principal shareholder, the other shareholders being his daughters and his manager. The chief assets of the company consisted of freehold and leasehold property. On Aug. 8, 1940, C. W. Dixon died. By his will he expressed the desire that the company should be wound up and that his trustees and the remaining shareholders should take over the freehold and leasehold properties in satisfaction of their interest therein. Accordingly, on June 12, 1941, a special resolution was passed at an extraordinary meeting to wind up the company voluntarily and a liquidator was appointed. Various properties were valued, and it was agreed how they were to be divided between the shareholders. As from 1943 the shareholders had taken the rents and profits from the properties allocated to them, but no conveyances or assignments vesting the property in the shareholders had ever been made. On Jan. 28, 1945, the company was finally dissolved under the Companies Act, 1929, s. 236 (4). Sometime towards the end of 1946 one of the original shareholders wished to sell the property which had been allocated to him, and conveyancing

difficulties arose as to how the property which still remained in the name of the company should be made over. It was thus necessary that the dissolution of the company should be annulled, and the court was moved to make an order that the dissolution of the company was void and an order as to vesting of the property.

Oliver Smith for the applicants (the liquidator and contributories).

H. O. Danckwerts for the respondent (the Attorney-General).

VAISEY, J. : This motion asks that a company called C. W. Dixon, Ltd., should be revived. At present it is not in existence, owing to the fact that the voluntary liquidation in which it was placed on July 12, 1941, resulted in a final dissolution of the company on Jan. 28, 1945, under the Companies Act, 1929, s. 236 (4). It now appears that there was an arrangement that certain freehold and leasehold properties should be divided among or allocated to the shareholders or some of them *in specie*, and by inadvertence that allocation was never carried out, with the result that the company disappeared and ceased to exist, leaving these properties to go where the law indicated in the circumstances they should go. It is now desired to restore the company's existence under s. 294 (1) of the Companies Act, 1929, which provides :

Where a company has been dissolved, the court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the court to be interested, make an order, upon such terms as the court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.

The form of that section is in somewhat striking contrast to s. 295 (6) which envisages the case of the resuscitation of a company which has not been dissolved but has been struck off the register, and says that the court on an application made by the appropriate person

. . . may, if satisfied that the company was at the time of striking off carrying on business . . . order the name of the company to be restored to the register, and upon an office copy of the order being delivered to the registrar for registration, the company shall be deemed to have continued in existence as if its name had not been struck off, . . .

The differences between those two sections were elaborately considered by the House of Lords in *Morris v. Harris* (1). The headnote to that case ([1927] A.C. 252) is :

An order of the court made under [the section in the Companies Act, 1908, corresponding to s. 294 of the Act of 1929] declaring the dissolution of a company to have been void does not affect the validity of proceedings taken during the interval between the dissolution and its avoidance.

That was the conclusion reached by the majority of the House of Lords consisting of Viscount Dunedin, Lord Sumner and Lord Blanesburgh, (Lord Shaw of Dunfermline and Lord Wrenbury dissenting). The facts are very different, and, perhaps, the case itself is not a very good guide, but there is a passage in the speech of Lord Blanesburgh ([1927] A.C. 252, at p. 268), which seems to be of some assistance to me on this occasion. Lord Blanesburgh, after quoting the appropriate words from the section, says :

It is true that a declaratory order under the section unqualified in terms does, and it was in my judgment essential, if many difficulties which readily occur to the mind were to be avoided, that such an order should have the effect of restoring to the revived company its corporate existence as from the very moment of the dissolution thereby declared "to have been void." But the expository words which follow carefully and, as I think, advisedly refrain from adding that such an order is to have the effect of restoring to the company from the same moment, not its corporate existence only, but its corporate activity also. On the contrary, these expository words import, as I think, that it is only after the order has been made—it is "thereupon" but not before—that any active consequences are to ensue.

His Lordship considered the effect of that on the facts of that particular case and used this rather illuminating metaphor ([1927] A.C. 252, at p. 269) :

The company is restored to life as from the moment of dissolution but, continuing a convenient metaphor, it remains buried, unconscious, asleep and powerless until the order is made which declares the dissolution to have been void. Then, and only then, is the company restored to activity.

The trouble which is contemplated as possibly arising in the present case is due to the terms of s. 296 of the 1929 Act which says :

Where a company is dissolved, all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution (including leasehold property but not including property held by the company on trust for any other person) shall, subject and without prejudice to any order which may at any time be made by the court under the two last foregoing sections of this Act [*i.e.*, ss. 294 and 295 (6)], be deemed to be *bona vacantia* and shall accordingly belong to the Crown, or to the Duchy of Lancaster or to the Duke of Cornwall for the time being, as the case may be

I am informed by counsel for the Attorney-General that in order to avoid any possible suggestion being made that the effect of an order under s. 294 is not sufficient to re-vest for all purposes any property which came within the ambit of s. 296, at any rate, in one case a vesting order as to such property in favour of the restored, revived or resuscitated company was made, but I understand the making of such a vesting order is by no means frequent, and although it may have been done in one case *ex abundanti cautela* I think it would not be right for me to make such an order as though it were the necessary or common thing to do.

Therefore, I propose to indicate shortly what, in my view, is the effect of s. 294 on any property which, but for my order, might have been affected, or which, until my order takes effect, has been affected by s. 296. In my judgment, I must read the words that the court had power to declare "the dissolution to have been void" as enacting that the court is given power effectively to declare the dissolution to have been void. Anyone can declare a dissolution to be void as a mere matter of utterance, but when the court is given power to declare that something has happened, I apprehend that the legislature must inevitably intend to give the court power to make a declaration which is effective. In other words, if the court makes a declaration to the effect that the dissolution is void, the declaration is not that the dissolution is void at the date of the order, or that it is to be deemed to be so void, or that it is to become void, or anything of that kind. The declaration is that the dissolution was void at the time when the company was supposed to have been dissolved. In my judgment, if I declare, as I intend to declare, the dissolution of C. W. Dixon, Ltd., which was effected on Jan. 28, 1945, to have been void, the result is that it was void *ab initio*, and all the consequences under the statute or otherwise which flow from that arrest themselves and are avoided.

I propose, therefore, following the words of the section, to make an order declaring the dissolution to have been void, and, in doing so, I express the view that any property which has vested in the Crown under s. 296, either in fact or in so far as it must be assumed to have vested, did not so vest, the vesting being avoided by my order. I think the vesting is "subject and without prejudice to any order which may at any time be made by the court" (see s. 296), and I express the view that, by making the order in the terms which I do, nothing remains in the Crown, if anything was ever vested in the Crown or in the Royal Duchies, in the shape of interest in this freehold or leasehold property. The difference of expression between s. 294 and s. 295 (6) is curious, and though for some purposes, no doubt difference in language may be significant, it is not so for this purpose. In my view, the avoidance of dissolution has the effect which one would have expected, and I propose, therefore, to give the applicants no more than an order following the precise words of the relevant section. There will be an order to tax the costs of the Attorney-General, and those costs will have to be paid by the applicants.

Order accordingly.

Solicitors : Collyer-Bristow & Co., agents for Grange & Wintringham, Grimsby (for the liquidator and contributories) ; Treasury Solicitor (for the Attorney-General).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

CALVERT (INSPECTOR OF TAXES) *v.* WAINWRIGHT

[KING'S BENCH DIVISION (Atkinson, J.), January 15, 1947.]

Income Tax—Assessment—Tips given to taxicab-driver—Income Tax Act, 1918, (c. 40,) sched. E, r. 1.

Sched. E., r. 1, to the Income Tax Act, 1918, provides: "Tax . . . shall be annually charged on every person having or exercising an office or employment of profit . . . in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom . . ."

W. was employed by R. T., Ltd., as a taxicab driver. He received a definite wage but "tips" given to him by passengers were no part of the bargain between himself and the company. In the course of his daily journeys he received a number of tips.

HELD: such tips were assessable to tax under sched. E., r. 1, since these arose out of his employment as a taxicab driver and were given as a reward for services.

[As to TAXATION UNDER SCHED. E, see HALSBURY, Hailsham Edn., Vol. 17, pp. 211-217, paras. 429-438; and FOR CASES, see DIGEST, Vol. 28, pp. 85-88, Nos. 490-507.]

Cases referred to:

- (1) *Re Strong* (1878), 1 Tax Cases 207; 15 Sc.L.R. 704; 28 Digest 85, *h*.
- (2) *Herbert v. McQuade* (1902), 4 Tax Cases 489; [1902] 2 K.B. 631; 71 L.J.K.B. 884; 87 L.T. 349; 66 J.P. 692; 28 Digest 86, 492.
- (3) *Blakiston v. Cooper*, [1909] A.C. 104; 78 L.J.K.B. 135; 100 L.T. 51; *sub nom. Cooper v. Blakiston*, 5 Tax Cases 347; 28 Digest 86, 495.
- (4) *Seymour v. Reed*, [1927] A.C. 554; 96 L.J.K.B. 839; 137 L.T. 312; 11 Tax Cas. 625; *revsg.*, *S.C. sub nom. Reed v. Seymour*, [1927] 1 K.B. 90; Digest Supp.
- (5) *Beynon v. Thorpe* (1928), 97 L.J.K.B. 705; *sub nom. Beynon v. Thorpe*, 14 Tax Cas. 1; Digest Supp.
- (6) *Henry v. Foster (A.)*, *Henry v. Foster (J.)*, *Hunter v. Dewhurst* (1932), 16 Tax Cas. 605; *sub nom. Dewhurst v. Hunter*, 146 L.T. 510; Digest Supp.

APPEAL under s. 149 of the Income Tax Act, 1918, from the decision of the Commissioners of Income Tax for the division of Upper Strathforth and Tickhill, Yorkshire, dated Jan. 4, 1946. The facts appear in the headnote and the judgment of ATKINSON, J.

D. L. Jenkins, K.C. and *Reginald P. Hills* for the Inspector of Taxes.
J. Senter for the taxpayer.

ATKINSON, J.: This case raises the comparatively simple point: Are tips which are received by taxicab-drivers in the ordinary way assessable to income tax? The commissioners state that the taxpayer appealed against an assessment of £75 made on him for the year beginning April 6, 1944, under the provisions of sched. E to the Income Tax Act, 1918, in respect of tips received by him from passengers in his capacity as a taxicab-driver in the employment of Reuben Thompson, Ltd. There was no suggestion that his position differed from that of any other taxicab-driver. It was particularly stated that the taxi-men received a definite wage "and that tips were no part of the bargain." The commissioners discharged the assessment, they being of opinion that the tips given to the taxpayer were not profits or gains of his employment, but were gifts given to him personally, and were, therefore, not assessable. In my view, the finding by the commissioners that the tips were gifts given to the taxpayer personally, and, therefore, not assessable, they showed that they had completely misunderstood the law. The principle which the authorities establish, if I understand them correctly, is this. Tips received by a man as a reward for services rendered, although voluntary gifts made by people other than his employers, are assessable to tax as part of the profits arising out of his employment if they are given in the ordinary way as a reward for services, but, on the other hand, personal gifts, which means gifts to a man on personal grounds irrespective of and without regard to the question whether services have been rendered or not, are not assessable. The commissioners have obviously misunderstood what is meant by a personal gift. They have not found that the tips were personal gifts, but they have found that they were gifts given to the taxpayer personally, which is a totally different thing. Of

course, every tip is given to a man personally, but that merely means that it is given to him for his own benefit and not for that of his employers. Having considered the authorities, the commissioners thought that the words "personal gift" meant something given to a man personally, whereas it is clear from the cases that what is meant by "personal gift" is a condensation of the full sentence, "gift given on personal grounds other than for services rendered." On the evidence set out in the Case, it is impossible, as a matter of law, to come to a decision other than that these tips were assessable to income tax.

A I will just run through the cases. In *Re Strong* (1) the headnote is :

A gift of money, raised by voluntary subscription, and made annually to a minister of religion by his congregation is assessable.

The matter was put, in the judgment in these words (1 Tax Cas. at p. 208) :

B It is with some reluctance that I have formed the opinion that the commissioners are wrong, and that the appellant is liable for income tax on the £100 mentioned in the Case. It is true that it is a voluntary contribution by the parishioners, one which they are under no obligation to make, and which they may withdraw at any time. But still it is a payment made to the appellant as their clergyman, and is received by the appellant in respect of the discharge of his duties of that office, which is one of public employment in the sense of the statutes.

C The point there was : Was the money received in respect of the discharge of the duties of his office ? The mere fact that a payment is voluntary does not prevent the payment being assessable.

The next case is *Herbert v. McQuade* (2) in which it was decided that grants made in augmentation of the income of a benefice were assessable. COLLINS, M.R., said (4 Tax Cas., 489 at p. 493) :

D Now, undoubtedly those facts give rise to very nice considerations ; and the question is : which side of the line does this particular augmentation fall ? If, as was contended by the incumbent, it was in fact a gift personal to himself, why then I do not think it would come within the provisions of the Income Tax [Act]. If, on the other hand, it does accrue to him by reason of his office as incumbent, then I do not think it would be disputed by the incumbent that income tax is payable.

The sums accrued to him by reason of his employment.

E *Cooper v. Blakiston* (3) was the Easter offerings case. There the principle was stated by LORD LOREBURN, L.C., thus (5 Tax Cas., 347 at p. 355) :

F In my opinion, where a sum of money is given to an incumbent substantially in respect of his services as incumbent, it accrues to him by reason of his office. Here the sum of money was given in respect of those services. Had it been a gift of an exceptional kind, such as a testimonial, or a contribution for a specific purpose, or to provide for a holiday, or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but a mere present.

G To my mind, that puts the principle very clearly. The distinction would apply to a taxicab-driver in this way, if I may give an illustration. Some people have the same taxicab every morning to take them to their work. The cab calls in the morning as a matter of course and takes the passenger home at night. The ordinary tip given, in those circumstances, would be something which would be assessable, but supposing at Christmas, or when the driver is going for a holiday, the hirer says : " You have been very attentive to me, here is a £10 note," he would be making a present, and I should say it would not be assessable since it has been given to the man because of his qualities, his faithfulness, and the way he has studied the passenger's interests and has always been available. In those circumstances, it would be a payment of an exceptional kind, but a tip given in the ordinary way as remuneration for services rendered is well within the principles there defined.

H One comes a little more closely to tips in *Reed v. Seymour* (4). It was the case of a benefit match, and there the House of Lords took the view, differing from the majority in the Court of Appeal, that the proceeds of the match were not assessable. VISCOUNT CAVE said (11 Tax Cas. 625 at p. 646) :

... it must now (I think) be taken as settled that they [the taxable profits] include all payments made to the holder of an office or employment as such—that is to say, by way of remuneration for his services, even though such payments may be voluntary—but that they do not include a mere gift or present (such as a testimonial) which is made to him on personal grounds and not by way of payment for his services.

I cannot conceive of any more apt words than "by way of remuneration for his services, even though such payments may be voluntary." Could one describe the payments made to a taxi-driver in more apt language than that? I doubt it.

In *Beynon v. Thorpe* (5), ROWLATT, J., dealt with the case of a pension. In that case the taxpayer had resigned his position as managing director of a limited company on account of ill health and had been voted a pension. I need not trouble with the facts, but I shall go to the following passage (14 Tax Cases 1 at p. 13):

The best known instances are of course the offerings made voluntarily to ministers of religion which give rise to many cases, that is they become profits or gains of an office, because although they are voluntary it is by the office which is the source of the minister's taxable income that he has been given them. So also voluntary payments made to persons exercising employments; gratuities to servants and so on, are, undoubtedly, because they are servants—I do not mean to say from master to servants but to people like waiters, to put a concrete example—gratuities to people of that kind, which they get because they are carrying on a particular employment; although they have no right to ask for them, when they do get them they get them as profits or gains in their employment and therefore they are profits or gains which are taxable. But a mere gift is not a profit or gain at all.

Again, if that is the law, there can be no doubt about this case.

The last case cited was *Hunter v. Dewhurst* (6), in which LORD ATKIN referred to tips in this way (16 Tax Cases, 605 at p. 644):

But the circumstances in which the first payment was made seem to me to negative the proposition that the payment was received "from" the office. Rule 1 (of sched. E) appears to me to indicate emoluments either received from the employer or from some third party (such as tips, permitted commission and the like) as a reward for services rendered in the course of the employment.

In my opinion, the matter is really beyond argument. Applying the principle laid down to the tips of taxicab drivers, I cannot see that there can be any doubt whatever but that these tips are assessable, and I so hold.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue* (for the Inspector of Taxes); *Pattinson & Brewer* (for the taxpayer).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

SPENCER TRADING CO., LTD. v. DEVON (FIXOL AND STICKPHAST, LTD., THIRD PARTIES)

[KING'S BENCH DIVISION (Hilbery, J.), January 15, 1947.]

Sale of Goods—Implied condition—Fitness—"Goods of a description which it is in the course of the seller's business to supply"—Goods within general description, though taking special form or designed for special use—Sale of Goods Act, 1893 (c. 71), s. 14 (1).

In 1944 manufacturers and suppliers of adhesive substances and gums supplied to the defendant on a special order an adhesive substance, of which the basis was a gum resin and which was invoiced as a fly gum, for making fly papers for catching flies. They had not previously (or only once a long time before) supplied a similar commodity. In 1945 the defendant ordered a further supply for the same purpose from the manufacturers, who this time used synthetic raw materials in place of the natural materials previously employed, as a consequence of which the fly gum was unsatisfactory for its purpose. The manufacturers were joined as third parties to an action by the plaintiffs against the defendant in which damages were claimed for supplying goods not reasonably fit for the purpose for which they were ordered under the Sale of Goods Act, 1893, s. 14 (1).

HELD: goods are "of a description which it is in the course of the seller's business to supply" if they fall within the general description of the goods supplied by the seller, although in a particular instance they take a special form or are designed for a special use, and, therefore, the manufacturers were liable to the defendant under s. 14 (1) of the Sale of Goods Act, 1893,

for the breach of an implied condition that the goods were fit for the purpose for which they were required.

[AS TO IMPLIED TERMS AS TO QUALITY OR FITNESS FOR PARTICULAR PURPOSE, see HALSBURY, Hailsham Edn., Vol. 29, pp. 63-66, paras. 72-73; and FOR CASES, see DIGEST, Vol. 39, pp. 440-446, 448-449, Nos. 693-746, 763, 764.

FOR THE SALE OF GOODS ACT, 1893, s. 14 (1), see HALSBURY'S STATUTES, Vol. 17, p. 618.]

A Cases referred to :

- (1) *Wallis v. Russell*, [1902] 1 R. 585.
- (2) *Hall v. Burke* (1886), 3 T.L.R. 165, C.A.; 39 Digest 442, 709.
- (3) *Cammell Laird & Co., Ltd. v. Manganese Bronze & Brass Co., Ltd.*, [1934] A.C. 402; 103 L.J.K.B. 289; 151 L.T. 142; 50 T.L.R. 350; 39 Com. Cas., 194 H.L.; Digest Supp.

B

- (4) *Manchester Liners, Ltd. v. Rea, Ltd.*, [1922] 2 A.C. 74; 91 L.J.K.B. 504; 127 L.T. 405; 38 T.L.R. 526; 66 Sol. Jo. 421; 27 Com. Cas. 274, H.L.; 39 Digest 445, 744.

C

- (5) *Jones v. Just* (1868), L.R. 3 Q.B. 197; 9 B. & S. 141; 37 L.J.Q.B. 89; 18 L.T. 208; 16 W.R. 643; 39 Digest 434, 632.
- (6) *Canada Atlantic Grain Export Co. (Inc.) v. Eilers* (1929), 35 Com. Cas. 90; Digest Supp.

- (7) *Grant v. Australian Knitting Mills, Ltd.*, [1936] A.C. 85; 105 L.J.P.C. 6; 154 L.T. 18; 52 T.L.R. 38; 79 Sol. Jo. 815, P.C.; Digest Supp.

- (8) *Thornett & Fehr v. Beers & Son*, [1919] 1 K.B. 486; 88 L.J.K.B. 684; 120 L.T. 570; 24 Com. Cas. 133; 39 Digest 451, 783.

- (9) *Varley v. Whipp*, [1900] 1 Q.B. 513; 69 L.J.Q.B. 333; 48 W.R. 363; 44 Sol. Jo. 263; 39 Digest 432, 616.

- (10) *Bristol Tramways, Etc., Carriage Co., Ltd. v. Fiat Motors, Ltd.*, [1910] 2 K.B. 831; 79 L.J.K.B. 1107; 103 L.T. 443; 26 T.L.R. 629, C.A.; 39 Digest 445, 743.

- (11) *Baldry v. Marshall*, [1925] 1 K.B. 260; 94 L.J.K.B. 208; 132 L.T. 326, C.A.; 39 Digest 448, 762.

D

- (12) *Harris & Sons v. Plymouth Varnish & Colour Co., Ltd.* (1933), 49 T.L.R. 521; 38 Com. Cas. 316; Digest Supp.

ACTION for damages for breach of implied condition in a contract that goods sold for a purpose disclosed to the supplier should be reasonably fit for such purpose under s. 14 (1) of the Sale of Goods Act, 1893. The defendant satisfied the claim of the plaintiff and the claim by the defendant against the third parties now came for trial. The facts are set out in the judgment.

E

C. L. Hawser for the defendant.

H. H. Maddocks for the third parties.

HILBERY, J. : The defendant describes himself as a manufacturing chemist. In 1944, among other household things which would normally be of every day use, but which could not then be procured anywhere, were fly papers. The defendant was minded, if he could get the necessary material, to make some and put them on the market. He did not know where to procure a suitable substance to put on the paper to make it sticky and at the same time attractive to flies until he discovered the existence of the third parties, Fixol & Stickphast, Ltd., who hold themselves out, according to the heading on their notepaper, as being persons who supply gold glues, gum, size, dextrine and vegetable adhesives in liquid and powder form. He got into communication with the managing director, Mr. Burton, whom he told expressly that he wanted a sticky material, a gum, suitable for putting on fly papers for catching flies. There is a conflict between them in the matter of recollection whether at that time Mr. Burton said he had never provided such a thing before or whether he said he had provided such a thing, but it was only once before and a long time ago. At any rate, he made it clear at that stage that it was an example of the sort of goods that he supplied and which he had been in the habit of making, that is, it was not outside the general course of the company's business, but it was something new as a particular transaction. He held himself out to supply gum, and it was gum for fly papers that the defendant expressly asked for. Mr. Burton sent him a sample, and the defendant tested it and ordered a quantity of gum on the strength of the sample. The article was invoiced to him as fly gum, it proved satisfactory, and the defendant sold his papers made with it satisfactorily. So the defendant paid for his consignments of the gum and the business was satisfactorily concluded on both sides.

H

In 1945 the defendant went to Mr. Burton with an enquiry for a further supply. Here there comes a conflict of evidence again. Mr. Burton says that he told the defendant that he could not give him the same thing as the previous year, and the defendant denies that. I am sure that neither the defendant nor Mr. Burton would say anything which he did not believe to be true, but, having regard to certain other matters, I think that the defendant is probably right, and I am prepared to hold that his is the right version, namely, that the first mention of materials not being the same came after he had had some complaints. No sample was sent, and, if Mr. Burton had had the least fear that the fly gum made up with the new raw materials was likely to be, or might be, ineffective as a fly gum, I am certain he would have sent a fresh sample. When the matter of making up a fly gum was, so far as Mr. Burton was concerned, experimental in March, 1944, he sent for testing what he made up as an experiment. When, in 1945, with the aid of his chemists, he had to substitute, and believed he had satisfactorily substituted, certain other raw materials, synthetic as opposed to natural materials, he believed that he had an article which would be every bit as effective for its purpose, and there was, therefore, no need to send any fresh sample. That is, in my view, why no fresh sample was sent.

In those circumstances, the defendant ordered his 1945 supply under the description of fly gum, a description which had been given in 1944 by the third parties to the article. He ordered it as fly gum and in circumstances, which, I think, clearly show that he was relying on the third parties to make up a substance under the description of fly gum which was suitable for catching flies on fly papers, the purpose which he had made known to Mr. Burton.

The next question is: Were the goods of a description which it was in the course of the business of the third parties' business to supply? They hold themselves out as persons who traffic in adhesive substances and gums. This was a transaction in a sticky substance, and a sticky substance the basis of which was a gum, resin, and, although it is true that the third parties were not making up gum for this particular purpose every day in the course of their business, it was none the less an article of a description which it was in the course of their business to supply. The words of the section are important. To attract an implied condition as to their fitness, the goods must be "of a description which it is in the course of the seller's business to supply," but goods can belong to that description, although they take a special form in a particular instance. The form may be particular but none the less the goods can belong to the description. In my view, this was an adhesive substance and a gum substance, and *prima facie* it fell into the category of goods which it was in the course of the third parties' business to supply. Furthermore by 1945 the third parties had already a season's experience in dealing in this article, and it was already developing as a trade with them. The defendant was not the only customer. They had two other customers to whom they were supplying fly gum for fly paper making and fly catching. In the circumstances, I think the defendant succeeds against the third parties.

Judgment accordingly.

Solicitors: *Manches & Co.* (for the defendant); *Slaughter & May* (for the third parties).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

SALES AFFILIATES, LTD. v. LE JEAN, LTD.

[CHANCERY DIVISION (Evershed, J.), January 22, 23, 24, 28, 1947.]

Trade Marks and Trade Names—Passing off—Knowingly purporting to give named process using other than branded articles—Misrepresentation analogous to passing off.

A The plaintiffs were the owners of registered trade marks relating to “Jamal” lotion and “Vapet” sachets, both materials used in waving hair. Both lotion and sachets contained a secret chemical composition and the distinctive feature of the plaintiffs’ process lay in the composition of the lotion and the Vapet. The articles were marketed by the plaintiffs, but they were manufactured by a firm who made them exclusively for the plaintiffs and treated the composition as secret. The defendants were hairdressers who professed to do Jamal hairwaving and exhibited at their establishment a showcard of the plaintiffs’ on which was depicted a photograph of a young woman with a style of hair wave on which the word “Jamal” was clearly printed. On two occasions when customers asked for a Jamal hair wave, the defendants used sachets other than the plaintiffs’ Vapets. In the hairdressing trade “Jamal hair waving” or a “Jamal hair wave” had a well understood and accepted significance, meaning a wave performed by a particular method in which it was essential that the “Jamal” lotion and “Vapet sachet” should be used, and not merely a particular style of coiffure. In an action framed as a simple action for passing off the plaintiffs claimed, *inter alia*, an injunction to restrain the defendants from using any process of hair waving not of the plaintiffs’ design and manufacture as and for the process of the plaintiffs and from using the word “Jamal” in connection with any process of hair waving other than the process of the plaintiffs, evidence was given to establish trade notoriety, but none was produced to establish public notoriety :—

HELD : (i) that form of injunction and that formulation of the cause of action was inappropriate, because the plaintiffs were not designers or manufacturers of any process and, apart from patented or secret processes, a business or person could not be the proprietor of a process.

E (ii) where a brand name or fancy name was applied to some service or process, in circumstances in which it was well understood by the trade that when that process was carried out it should be carried out only with the branded articles, a trader knowingly carrying out what was supposed to be that process with articles other than the branded articles was guilty of a form of misrepresentation analogous to passing off.

F (iii) in this case an injunction should not be granted, but a declaration should be made that the defendants were not entitled to give to a customer asking for a Jamal hair wave a permanent hair wave purporting to be a Jamal hair wave unless the defendants used exclusively as the lotion and heating media for such process the plaintiffs’ products, Jamal lotion and vapets respectively.

G *Semble*, when it was shown that over a period of years there was a course of trading whereby a trader bought a particular article from one who was marketing it, for use in the course of a particular service or process, a term might be implied in the contract that, when that process was asked for those goods and those goods only would be used.

Qu : whether some evidence from members of the public should be had in cases of this nature to prove public notoriety as apart from trade notoriety.

H [AS TO TRADE NAMES AND PASSING OFF, see HALSBURY, Hailsham Edn., Vol. 32, pp. 614-651, paras. 920-959; and FOR CASES, see DIGEST, Vol. 43, pp. 264-336, Nos. 1017-1583.]

Cases referred to :

- (1) *Harrods, Ltd. v. Harrod (R.), Ltd.* (1923), 40 T.L.R. 195; 41 R.P.C. 74; C.A. 43 Digest 294, 1205.
- (2) *Havana Cigar & Tobacco Factories, Ltd. v. Oddenino*, [1924] 1 Ch. 179; 93 L.J.Ch. 81; 130 L.T. 428; 40 T.L.R. 102; 68 Sci. Jo. 164; 41 R.P.C. 47, C.A.; 43 Digest 279, 1106.
- (3) *Delavelle (G.B.), Ltd. v. Stanley* (1946), 63 R.P.C. 103.

ACTION framed as a simple action for "passing off," claiming an injunction, amongst other things, to restrain the defendants from passing off as the Jamal hair waving process, any processes of hair waving not of the plaintiffs' design or manufacture. The facts appear in the judgment.

S. Pascoe Hayward, K.C., and D. McIntyre for the plaintiffs.

Harold Lightman for the defendants.

EVERSHED, J.: In this action the plaintiffs seek an injunction to restrain the infringement by the defendants of what they allege to be their rights in relation to the use of the word "Jamal" in its application to permanent hair waving. I put the matter in those general terms because I shall have to consider presently the form of the pleadings in the action and the precise character of the cause of action which the plaintiffs have sought to litigate and are entitled to litigate, but I think it will be convenient for me first to deal with the facts and express my findings on the facts of the case as proved before me.

The plaintiffs, who were incorporated in the year 1939, among other activities market a lotion and certain sachets which are made for them, and in connection with that lotion and those sachets they are the registered proprietors of trade marks, namely, in the first case "Jamal," and in the second case "Vapet." As I have stated, the plaintiffs themselves do not manufacture, and never have manufactured any of those articles, nor, as I understand the evidence, are they the inventors of the prescriptions which are used in the making up of the lotion or the sachets. Both the lotion and the sachets are in fact manufactured by another company, called Evans Chemicals, Ltd., a representative of which company, Mr. Bell, gave evidence before me. I understand that the composition of those products is locked in the bosoms of the persons concerned in Evans Chemicals, Ltd., and in so far as it is a secret, it is presumably the secret of that company. It is noteworthy that there is no agreement in any formal shape whereby Evans Chemicals, Ltd., manufacture these articles according to any particular specification, or for the exclusive marketing by the plaintiffs. Mr. Bell told me that in fact they are manufactured according to specifications which are uniform, and that they are supplied only to the plaintiffs under what he called a gentleman's agreement, and I have no reason to doubt that they are not supplied by the manufacturing company to anybody except the plaintiffs. The marketing consists in their sale by the plaintiffs to hairdressers and similar trading establishments for use by them in the process of permanent waving. In addition to those marketing operations it is proved that since 1939 the plaintiffs have expended a considerable sum of money, to wit £109,000 or thereabouts, in the advertising of the system of hair waving which they have associated with the name "Jamal." I have not seen more than two examples at most of the advertising matter. One of them is in the form of a showcard to be exhibited (as it was, in fact, exhibited by the defendants) in the windows of the hairdressers' establishments, and it consists of a photograph of a young woman of markedly attractive features and the word "Jamal" printed plainly on it, together with the words: "The Freedom Wave. No wires, no electricity, no machinery." Another advertisement was put in which states on the face of it: "Jamal Machineless Permanent Waving," and it answers the question which it poses: "What is Jamal?" as follows: "The Jamal method of permanent waving is entirely machineless. It does away with heaters, wires, electricity and cumbersome appliances. The Featherweight Jamal Vapet replaces all machinery and gently steams the hair at 100 degrees centigrade moist heat. No chemical action on the hair. The blended and graded lotions ensure individual treatment for all textures and types of hair. The Jamal wave gives perfect results with complete comfort and absolute freedom."

I cannot pretend, notwithstanding the assistance I have had from witnesses, to be expert in the art of permanent hair waving. Substantially, as I follow it, it consists first of treatment of the hair by washing, then of its separation into what have been called strands or sections, the hair so separated, or the separated strands, being then placed on hair curlers and clamped into position. As I understand it, it is a particular characteristic and an essential feature of what has been called the Jamal system that the Jamal lotion is applied to the hair before the placing of the hair in the curlers. When the hair has been placed in the curlers heat is then applied to it. In some systems this is done by some form

of machine or by electrical devices, but in the case of Jamal hair waving the heat is generated in these sachets or Vapets placed on and clamped into the curlers. The chemical contents of the sachet react to the application of either a saline solution or plain water and give off heat which is communicated to the hair with which it is in contact. The result, after a proper interval of time, is that the hair is given a wave which, at any rate, has a degree of permanence.

A It is plain from the evidence that the formula or phrase "Jamal Hair Waving" has, to the trade, that is to say, to all persons concerned in hairdressing, a well understood and accepted significance. It means a system of waving hair in which, essentially, the products to which I have referred, the lotion and the Vapets, are used as part of the process, and (as regards the Vapets) to provide the necessary heat at the appropriate stage. The question whether, in addition to notoriety in the trade, the formula "Jamal Hair Waving" has equally an acceptance in the minds of the public, I will turn to presently.

B About the middle of 1945, the plaintiffs became suspicious that the defendants were infringing the proper professional practice by using products other than the products of the plaintiffs, *i.e.*, other than the products which they market, when giving Jamal waves to customers who requested to have a Jamal wave. The plaintiffs thereupon set about to try to ascertain the truth by means of two "trap orders," as they are called. In August, September and October, 1945, they commissioned two women to go to the premises of the defendants and ask for a Jamal wave, and take careful note of the products which were used in the process. Following on what was then discovered, the writ in the action was issued in January, 1946.

C One of the issues in the action has been whether the evidence of the facts of what occurred when those two women attended at the premises of the defendants should be accepted by the court. [His LORDSHIP reviewed the evidence and continued:] In my judgment, on those occasions, when, plainly and to the knowledge of all concerned on the defendants' premises, a Jamal hair wave was asked for, a hair wave was given which was not in accordance with proper trade or professional practice in that sachets were used which, either exclusively or substantially, were other than the plaintiffs' vapets.

D The matter therefore stands thus. Assuming that there is any right in the plaintiffs when a member of the public asks for a Jamal hair wave to have that wave performed exclusively with the material of the plaintiffs' marketing, it is established that on two occasions that right was infringed. That has given rise to the point which I have thought to be of some difficulty, and, perhaps, of some public interest, namely, the consideration of the nature of the right, if any, which a plaintiff such as these plaintiffs has in a subject-matter of this kind. The action is framed as a simple action for what is called "passing off," so closely following the more normal *formulae* as to ask for an injunction, among other things, to restrain the defendants from passing off, as Jamal hair waves, processes of hair waving not of the plaintiffs' design or manufacture. Counsel for the plaintiffs has readily conceded that that form of injunction, and that formulation of the cause of action, will not do, because, if for no other reason, clearly the plaintiffs are not designers or manufacturers of any process, nor, to my way of thinking, can it be said, apart from patented processes or secret processes, that a business or a person can say that it is or he is the proprietor of a process. Certainly it cannot be logically or intelligibly asserted in this case that the plaintiffs are the proprietors of a process. On the other hand, it is clear that, if a business markets certain goods for use in a process or in rendering some service, and if the buyers of those goods, namely, other traders, are entitled, when asked for the named process or service, to use any other material, a great hardship and a great injustice may be done to the business marketing the product, who might have, ultimately, no means of securing any sale for their products, and it would seem indeed pitiable if in a proper case the arm of the law were too short to protect a reputable business which had expended capital, energy and labour in building up a reputation and a goodwill, only to be defeated by an inability to formulate any well-recognised cause of action.

H In this connection the question necessarily arises: To what extent is it necessary, in such a case as the present, to lead evidence directly from members of the public? It has been laid down many times that in the case of a passing-off action in respect of goods in the ordinary way it must be proved not only

that the reputation alleged for the goods, or for the connection between the goods and the plaintiff, is well known in the trade, but also that it is well known to the public, and where the subject-matter of the action is the sale of an article ultimately reaching the public, one can see well enough the necessity for establishing the requisite knowledge in the public. Passing off, as has been said many times, is a form of misrepresentation not necessarily fraudulent. On the other hand, it is plain also that passing off, properly so called, is not confined to cases of the sale of goods. A form of action which restrains a man from trading under a particular name is called "passing off," though the defendant trader is not selling goods. He may be trading under a name which causes the public to suppose that he is connected with some other business. The well-known case of *Harrods, Ltd. v. Harrod (R.) Ltd.* (1) comes to mind as an example. There the defendant, if my recollection is right, was attempting to carry on under the name of "Harrod" a banking business, and the plaintiffs, the well-known company in Knightsbridge, raised the objection that the public would suppose that the business that the defendant was proposing to carry on was in some way connected with their well-established Knightsbridge business.

In the present case, the subject-matter is the rendering of a service, namely, the permanent waving of the hair, and it caused me surprise and dismay to learn that the hair so waved is not necessarily female. The service involves no sale of any article to any member of the public; the articles in question are used in the process. An illustration which was discussed in the course of the argument was a system of cleaning either carpets or clothing. It would not be difficult to imagine a case in which a person or company might establish a high reputation in connection with a system of cleaning (let us say) men's clothes. For that purpose the trader would market certain articles, whether mechanical, chemical, or otherwise, to be used in the cleaning process, and they would sell those articles to the cleaners. The member of the public, relying on the reputation that the trader had obtained, would send his clothing to the cleaners to be cleaned according to the named process. The member of the public in such a case would not, and *prima facie* could not, know, and certainly would not be concerned to know, the actual process to which the clothing was subjected. He would be content to rely on the reputation which the name, when applied to clothes cleaning, had obtained. There is some parallel between that case and the present, although, indeed, it may be said that one is simply illustrating one obscure matter by another equally obscure. But I give that instance because in the case of clothes cleaning, assuming that the reputation had been acquired, it is impossible to suppose that the member of the public could, by the phrase "I wish my clothes X cleaned" understand anything other than a system or method of cleaning the clothes. In the present case I do not think such an assumption is so certain. To many the alternatives may seem absurd. To anyone, male or female, who has had the experience of having his or her hair permanently waved, it may be axiomatic that the named hair wave refers to the method and the system and not to the particular style which is reproduced or illustrated in the photograph in the advertisement. But I am not entirely clear that the court ought to assume that, when a member of the public speaks of a "Jamal hair wave," he or she is referring to the system and not to the particular style or configuration of the curls which is the end of the hair-waving operation. If there is that doubt, the problem of deception obviously becomes more debatable, and if there is a debatable point, then, in accordance with more normal practice, *prima facie*, at any rate, it would be essential that some evidence of some members of the public should be given to prove that by "Jamal hair waving" a particular system or method is understood and not a particular style.

Assuming, therefore, that that burden did lie on the plaintiffs, have they discharged it? That is, of course, a matter of the proper inferences to be drawn from the evidence as given, and I confess that I have felt considerable doubt on this matter. In the view that I take, I am by no means certain that such evidence is necessary in a case of this character, but assuming that it is, on the whole (although I think it is exceedingly near the line), I have come to the conclusion that the court can and should in this case draw the necessary inference, namely, that a member of the public asking for a "Jamal hair wave" would mean, and intend to get, a wave performed by a particular method and not

merely a particular style of coiffure. I draw that inference, first, from the fact that the showcard advertisement and also the brochure makes it plain to anybody who reads them that a Jamal hair wave is a method and not a style. Further, counsel for the plaintiffs, in his reply, has drawn my attention to the evidence given by the hairdressers. I think it is established that evidence by a retailer of what members of the public ask for and what inference is proper to be drawn from those requests is properly admissible evidence. That, I think, emerges from the judgment of LORD RUSSELL in the *Havana Cigar* case (2) and was applied by myself in the *Delavelle* blue orchid case (3). Without elaborating it further, I think that if one reads, sensibly and reasonably, the evidence about the requests made by the public, bearing in mind what is done when those requests are made and that members of the public, apparently, are satisfied with that which is done, the inference seems to be that the public ask for a particular method of waving. Putting the whole matter together, I think that on the whole the inference in this case may properly be drawn, but I say so with some diffidence, because I am sure that in cases of this sort where it is necessary to prove public notoriety, as apart from trade notoriety, some evidence from members of the public should be given. I, therefore, conclude that there is sufficient, if it be necessary, to establish a degree of public notoriety, and certainly no evidence was given to suggest the contrary. At the same time, as I indicated a short time ago, I am not wholly clear that in a case of a service of this kind evidence of public notoriety is necessary.

The question then arises what is the right, if any, which the plaintiffs have, and whether it is infringed. It would be far too wide, plainly, to suggest merely that the plaintiffs have a goodwill or similar right in the name, so that any injury to the goodwill is a tortious act. Many ordinary acts of competition are designed to injure another man's goodwill, but in no possible sense could they be tortious. On the other hand, where a brand name or a fancy name is applied to some service or process in circumstances in which it is well understood by the trade that when that process is carried out it should be carried out only with the branded articles, such articles not being re-sold to the public but consumed in the process, then it seems to me that, if a trader knowingly carries out what is supposed to be that process with articles other than the branded articles, he is doing something which is wrongful, would damage the business from which the branded articles originated and would entitle the injured plaintiff to his remedy. I think it is, or may be, as counsel for the plaintiff put it, a form of misrepresentation, which is analogous to passing-off, that the trader is purporting to give, in answer to a request to him, a particular named process, when to his knowledge he is not giving any such process at all. He is, in other words, misrepresenting the process he is giving as being that which is associated with the name and the goodwill of the plaintiffs. I am inclined to think that the matter may also be put on a contractual basis. If it is shown that over a period of years there is a course of trading whereby a trader buys a particular article from one who is marketing it, for use in the course of a particular service or process, there may well be, I think, a term implied in the contract that, when that process is asked for, those goods and those goods only will be used. However, I need not pursue that further, because certainly the plaintiffs have not framed their pleading on any such implied contract. They have, as I say, framed the proceedings as a passing-off action, but it has to be conceded that that formulation in the pleadings is not, as I think, really in accordance with the rights which the plaintiffs could allege and should allege when they are properly analysed. Certainly the form of injunction sought in the first part of the prayer : "An injunction to restrain the defendant company its directors servants and agents from advertising or using in the course of their said business any process of hair waving not of the plaintiff company's design and manufacture as and for the said process of the plaintiff company," seems to me, if counsel for the plaintiffs will forgive the expression, to have no real relation whatever to the facts proved. The prayer, however, goes on : "and from using the word 'Jamal' in connection with any process of hair waving other than the process of the plaintiff company." That I think is more near to it. On the other hand, as counsel for the plaintiff justly points out, the material facts on which the whole action has rested are pleaded clearly in the particulars which consisted of certain affidavits filed on the motion. It is a somewhat unusual form of particulars, but it did

put plainly before the defendants the facts on which the plaintiffs were going to rely for alleging wrongful interference with their rights, contractual or otherwise.

In my opinion, in trying to do justice between the two parties, it would be lamentable to be debarred from giving effect to what a judge felt that justice demanded simply by some aberration on the part of counsel in the form of a pleading. If the facts are fairly put forward it is not the function of the pleading to formulate the result. That, however, must not make one forget that the defendant is entitled to address himself to the case which is being made against him, and he is not bound to assume that the judge will remake the plaintiff's case so as to subject him to injunctions or claims or penalties which were not provided for in any original pleading. I have tried to bear all those matters in mind, and I have reached a conclusion as to what to do which I hope will do justice between the parties. I think that, in all the circumstances and having regard to the pleadings and other matters, this is not a case in which I ought to grant any injunction which would impose on the defendants the severe criminal liability which an injunction would impose, but, on the other hand, I think it would be right if I made a declaration of what I conceive to be the rights which the plaintiffs are entitled to have and which the defendants must not infringe. The declaration is: "The defendants are not entitled to give to a customer asking for a Jamal hair wave a permanent wave purporting to be a Jamal hair wave unless the defendants use exclusively as the lotion and heating media for such process the plaintiffs' products, the Jamal lotion and the Vapets respectively."

I do not propose to grant any injunction, but I propose to give liberty to apply. I propose to award the sum of 40s. 0d. as damages, and I propose to direct, in all the circumstances, that the defendants pay half of the plaintiffs' costs.

Declaration accordingly.

Solicitors: *Griffinkoofe & Brewster* (for the plaintiffs); *S. Myers & Son* (for the defendants).

[Reported by R. W. H. OSBORNE, ESQ., Barrister-at-Law.]

GUGENHEIM v. LADBROKE & CO., LTD.

[COURT OF APPEAL (Lawrence, Tucker and Cohen, L.J.J.), February 4, 1947.]

Practice—*Striking out action*—*Frivolous and vexatious*—*Account stated arising out of betting transactions*—*R.S.C., Ord. 25, r. 4.*

In 1946 the plaintiff made bets in England with the defendants, who were bookmakers, and he claimed to have won from them £8,784. The defendants refused to pay this sum to the plaintiff because they understood that he had been reported to the stewards of the Jockey Club as a defaulter on bets and had been warned off the course in England. The defendants having proposed to hold the plaintiff's account in abeyance until he had settled certain alleged liabilities, the parties entered into negotiations as the result of which the plaintiff claimed that the defendants had agreed that a final balance of £7,256 was due to him from them and he began proceedings against the defendants, founding his action on an account stated:—

HELD: the action should not be struck out under R.S.C., Ord. 25, r. 4, as being frivolous and vexatious, but should go to trial.

[FOR OBJECTIONS TO PLEADINGS, see HALSBURY, Hailsham Edn., pp. 252 to 256, paras. 418 to 420; and DIGEST, Pleading, pp. 71 to 92, 623 to 777.]

Cases referred to:

- (1) *Kershaw v. Sievier* (1904), 21 T.L.R. 40; 25 Digest 409, 128.
- (2) *Siqueira v. Noronha*, [1934] A.C. 332; 103 L.J.P.C. 63; 151 L.T. 6; Digest Supp.
- (3) *Cocking v. Ward* (1845), 1 C.B. 858; 15 L.J.C.P. 245; 135 E.R. 781; 12 Digest 165, 1200.
- (4) *Evans Joseph & Co., Ltd. v. Heathcote*, [1918] 1 K.B. 418; 87 L.J.K.B. 593; 118 L.T. 556; 12 Digest 289, 2375; 583, 4868.

- (5) *In re Home and Colonial Insurance Co., Ltd.*, [1930] 1 Ch. 102; *sub nom.*, *Re Home & Colonial Insurance Co., May v. Barham*, 99 L.J.Ch. 113; 142 L.T. 207; Digest Supp.
- (6) *Dyson v. Attorney-General*, [1911] 1 K.B. 410; 80 L.J.K.B. 531; 103 L.T. 707; 27 T.L.R. 143.

INTERLOCUTORY APPEAL by the defendant company from an order of DENNING, J., reversing an order of MASTER MOSELEY striking out the plaintiff's action as A frivolous and vexatious under R.S.C., Ord. 25, r. 4. The facts are set out in the judgment of LAWRENCE, L.J.

Beyfus, K.C., and *Gerald Gardiner* for the defendant company.
Sir Valentine Holmes, K.C., and *Eric Myers* for the plaintiff.

LAWRENCE, L.J. : This is an interlocutory appeal from an order of DENNING, B J., allowing an appeal from MASTER MOSELEY who had struck out the action as being frivolous and vexatious. The action arises out of gambling transactions at Ascot in June, 1946. The plaintiff made various bets with the defendants, who are a well known company of bookmakers. The bets were made on credit. After the meeting on July 1, 1946, the plaintiff put forward a claim to a sum of £8,784, which he said was due to him on the bets that he had made. On July C 11 the defendants wrote to the plaintiff saying that they understood that he had been reported to the stewards of the Jockey Club as a defaulter on bets and warned off the course in England, and that in those circumstances they proposed to hold his account in abeyance until he had settled certain alleged liabilities, and that they differed in the figures which were put forward, but that that could be adjusted when he had done as they suggested. He denied what they had alleged, and the matter comes before us on an affidavit which, as counsel D for the defendants agrees, must be taken as being true for the purposes of this appeal. In that affidavit, which was not actually sworn, but was put in before MASTER MOSELEY, the plaintiff alleged and subsequently swore that on July 27, 1946, his son and another man had an interview with the representatives of the defendants and it was agreed that the lesser items in the account which the plaintiff put forward should be deemed paid and that, after cancelling out the cross-claims, a final balance was due to him of £7,256. In arriving at this E figure the plaintiff's son on his behalf agreed to forego the difference between it and the claim for £8,784 as a further consideration for the compromise. The writ was issued on Sept. 24, 1946, and by it the plaintiff claimed £7,256 from the defendants on an account stated.

In those circumstances MASTER MOSELEY struck out the statement of claim. On an appeal DENNING, J., reversed that order and the statement of claim F was subsequently amended so as to read :

The account was stated and agreed by and between the plaintiff and the defendant company in letters from the plaintiff to the defendant company dated June 22 and 25, and July 1, 1946, and letters from the defendant company to the plaintiff dated June 28 and July 11, 1946, respectively. Further, or in the alternative, the account was stated and agreed by and between one Jacques Gugenheim, acting for and on behalf of the plaintiff, of the one part, and one H. Green and one T. Kilbey, acting for and on behalf of the defendant company, of the other part, at the defendant company's G offices, on or about July 27, 1946. The said account stated was a settled account respecting cross-claims.

Counsel for the defendants has submitted to us that the action ought to be struck out as being frivolous and vexatious, and he drew our attention to a considerable number of cases, in the first place, to *Kershaw v. Sievier* (1), as showing that this jurisdiction was proper to be resorted to in betting cases, H and then to *Siqueira v. Noronha* (2), *Cocking v. Ward* (3), *Evans & Co., Ltd. v. Heathcote* (4), and *Re Home & Colonial Insurance, Co. Ltd.* (5). On those authorities he submitted that an action on an account stated which was an account of cross-claims in respect of gambling debts is so obviously and incontestably an account which cannot be sued on in a court of law that the action ought to be struck out as frivolous and vexatious. In *Cocking v. Ward* (3) TINDAL, C.J., had expressed himself with some doubt on the point, although he had said (1 C.B. 858, at p. 870) :

The principle may not, perhaps, be applicable to cases where it can be shown the

original debt is absolutely void from any illegal or immoral consideration, or where it is made void by any statute, as, by those against usury or gaming : but we think it applies to cases where the only objection is, that the original debt might not have been recoverable, from the deficiency of legal evidence to support it.

On the other hand, counsel for the plaintiff contended that there were two points which he wished to argue. The first was that this was a real account stated, and that there were items on both sides, and that the putting forward of those items on both sides and a promise to pay the balance was an agreement that was enforceable at law. Secondly, he said that the facts stated in the affidavit, if substantiated, created a compromise which was a good compromise enforceable in law. It does not appear to me that the pleading as drawn at present raises the second point which was raised by counsel for the plaintiff.

The real question which the court has to decide is whether the rule as to striking out actions which are frivolous and vexatious ought to be applied in this case, and, in my opinion, having regard to the numerous cases which have been decided on betting transactions and agreements which are alleged to have been made and to be legal arising out of betting transactions, this is not the class of case which ought to be struck out as being frivolous and vexatious. In all the circumstances of this case I think it ought to be allowed to go to trial, and, therefore, I am of opinion that the appeal ought to be dismissed.

TUCKER, L.J. . This is an action brought by a foreign plaintiff against a company trading in this country. DENNING, J., and LAWRENCE, L.J., both think that he should not be driven from the judgment seat before his case has been heard. I make no secret of the fact that I should have come to a different conclusion, but as I think it is most undesirable with that amount of judicial difference of opinion that a plaintiff, especially a foreign plaintiff, should not be allowed to bring his case to trial, I am not prepared to dissent from the order suggested by LAWRENCE, L.J.

COHEN, L.J. : I agree, and mainly for the reasons given by TUCKER, L.J. I would add that as the decision in the *Home & Colonial* (5) case was only a decision of a court of first instance, there may be a question of law which requires to be decided, though, as at present advised, I see no reason to dissent from it. As was said by FLETCHER MOULTON, L.J., in *Dyson v. Attorney-General* (6) ([1911] 1 K.B. 410, at p. 419) :

Differences of law, just as differences of fact, are normally to be decided by trial after hearing in court, and not to be refused a hearing in court by an order of the judge in chambers.

The alternative claim suggested by SIR VALENTINE HOLMES may, if the pleadings are amended, raise an issue of fact, though even if the facts are founded in his favour, it is not clear that the plaintiff can in law succeed.

Appeal dismissed.

Solicitors : *Herbert Smith & Co.* (for the defendant company) ; *S. Myers & Son* (for the plaintiff).

[Reported by RONALD ZIAR, ESQ., *Barrister-at-Law.*]

SEABROOK *v.* MERVYN

[COURT OF APPEAL (Morton, Bucknill and Asquith, L.JJ.), January 16, 17, 29, 1947.]

Landlord and Tenant—Rent restriction—Furnished letting—Value of landlord's furniture to tenant—Tenant possessed of furniture, but willing to accept furnished tenancy to secure premises—Subsequent removal of furniture by landlord and use by tenant of his own—Conversion of tenancy into protected tenancy—Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), s. 10 (1).

In 1942 a landlord let furnished premises to a tenant at a weekly rent of £1 15s. The tenant possessed his own furniture which he would have preferred to use, but he took the flat furnished as he "could not get it in any other way" and he stored his furniture. In September, 1945, the rent was raised to £2 10s. a week. In December, 1945, the landlord informed the tenant that she required the furniture in the flat for her personal use, and the tenant asked the landlord if she would "allow him to move his own furniture into the flat and, therefore, permit him to remain as her tenant." To this the landlord agreed, there being no alteration made in the amount of the rent. Subsequently, the landlord removed her furniture and the tenant brought in and used his own furniture.

HELD: (i) where the letting of a dwelling-house includes furniture which the landlord has no right to remove, there is a presumption that the rent includes some element attributable to that furniture and that the furniture is of some value to the tenant, and also a presumption that the furniture is of the same value to the tenant involved in the case under consideration as to any other tenant, but these presumptions are not conclusive.

Property Holding Co. Ltd. v. Mischeff ([1946] 2 All E.R. 294) and *Palser v. Grinling* ([1946] 2 All E.R. 287) referred to.

(ii) although the tenant in the present case possessed furniture of his own which he would have preferred using, the landlord's furniture was of value to him within s. 10 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, since he had the use of it and yet retained an asset in the shape of his own furniture which he could, if he wished, raise money on or hire out for valuable consideration. Even though the landlord's furniture was of real value to the tenant the rent might logically remain the same when that furniture was removed in 1945, since its loss was balanced by the acquisition by the tenant of a clearly protected tenancy.

(iii) in Dec., 1945, there was a variation in the original agreement of tenancy resulting in the substitution of an unfurnished letting which was protected under the Rent Restrictions Acts for a furnished letting which was not so protected.

[AS TO DWELLING-HOUSES LET AT A RENT INCLUDING USE OF FURNITURE, see HALSBURY, *Hailsham Edn.*, Vol. 20, p. 314, para. 370; and FOR CASES, see DIGEST, Vol. 31, pp. 560 and 561, 7078 to 7084.]

Cases referred to:

(1) *Property Holding Co., Ltd. v. Mischeff*, [1946] 2 All E.R. 294; [1946] 1 K.B. 645; 175 L.T. 192.

(2) *Wilkes v. Goodwin*, [1923] 2 K.B. 86; 92 L.J.K.B. 580; 129 L.T. 44; 31 Digest 560, 7080.

(3) *Palser v. Grinling*, [1946] 2 All E.R. 287; [1946] K.B. 631; 175 L.T. 204.

APPEAL by tenant from a decision of Kingston-on-Thames County Court giving possession to the landlord of a dwelling-house within the Rent Restrictions Acts. The facts are set out in the judgment of the court.

C. L. Hawser for the tenant.

A. E. Holdsworth for the landlord.

Cur. adv. vult.

Jan. 29. ASQUITH, L.J., read the judgment of the court. This is an appeal from a decision of the Kingston-on-Thames county court granting the landlord an order for possession of the lower floor of premises at Ilford let as a separate dwelling-house by the landlord to the tenant. The premises were let in 1942 at a rent of 35s. per week, later (in September, 1945)

raised to £2 10s. The basis of the order for possession was that the premises, though assumed by both parties and the court to be covered by the Rent Restrictions Acts so far as annual value was concerned, were outside their protection because the letting was a furnished letting within s. 10 (1) of the Rent and Mortgage Interest Restrictions Act, 1923.

Counsel for the tenant in this court sought to establish two propositions: (1) that neither when originally let nor at any subsequent time was there a furnished letting of these premises within the subsection referred to; (2) alternatively, that, if the original letting was a furnished letting, it lost that character towards the end of 1945 owing to certain arrangements then made by the parties, and was a protected letting when proceedings for possession were launched in the summer of 1946.

We will deal first with the first of these propositions. Section 10 (1) provides:

For the purposes of proviso (i) to subs. (2) of s. 12 of the [Increase of Rent and Mortgage Interest (Restrictions) Act, 1920] (which relates to the exclusion of dwelling-houses from the principal Act in certain circumstances), a dwelling-house shall not be deemed to be *bona fide* let at a rent which includes payments in respect of attendance or the use of furniture unless the amount of rent which is fairly attributable to the attendance or the use of the furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent.

The tenant's contention under this head is that on the facts of the present case the dwelling-house was not originally let at a rent which "included payments in respect of the use of furniture," but that, even if it were, the letting cannot come within the terms of s. 10 (1) because, in deciding whether the portion of the rent attributable to the use of the furniture is substantial, regard has to be had "to the value of the same" (that is the furniture) "to the tenant" and because that value, in this case, on the evidence was nil.

The evidence on this issue is that of the landlord, the tenant and the tenant's wife. It seems that the furniture supplied by the landlord was ample to furnish the flat fully. No question as to its sufficiency in point of quantum, such as arose in *Property Holding Co., Ltd. v. Mischeff* (1) arises here, but the tenant says he did not want the landlord's furniture as he had plenty of his own and would have preferred to import and use that. Hence, it is argued, the landlord's furniture was valueless to the tenant. It is also argued that the landlord herself attributed no weight to it as an element determining the amount of the rent she should demand. The following extracts from the evidence are the relevant ones. The landlord's evidence was: "Rent was 35s. fair proportion for use of furniture, I could not say, I did not take it into consideration, I did not think about it at all. When I let the flat I knew tenants had their own furniture. After some time said they would have liked to have own furniture. I know they had substantial furniture stored." The tenant's wife said in evidence: "We always had furniture in store and always wanted our own furniture." The tenant said: "We took the flat furnished in the first instance because we could not get it in any other way." Counsel for the tenant sought to infer from these passages, not only that the furniture was valueless to the tenant, but that the landlord also attributed no value to it in fixing the rent and hence the rent was not one which "included payments in respect of the use of furniture" at all. He relied on another fact as pointing to the same conclusion. As will be seen, in November and December, 1945, the landlord, in negotiating terms for the removal of her furniture, did not propose to reduce the rent, which before such negotiations was £2 10s. a week. Hence it is suggested that the presence or absence of the landlord's furniture was at that time manifestly regarded as a matter of no consequence, and that there is no reason for assuming a different state of affairs in 1942 when the lease was granted.

We do not think these arguments can prevail. To deal with the last point first, the rent might logically remain the same under the proposed arrangements in 1945, notwithstanding the loss of the landlord's furniture being a real loss to the tenant, since this loss was balanced by the acquisition by the tenant of a clearly protected tenancy. But the real answer is surely that some one else's furniture, if actually used by the tenant, must have been of some value to him, notwithstanding that he possessed equivalent furniture of his own which he would have preferred using. Things which are in fact made use of do not become valueless because used reluctantly or under compulsion. The tenant

had the use of the landlord's furniture, yet retained an asset of value in the shape of his own, which he could, if he wished, raise money on, or hire out for valuable consideration. As to the contention (already in part dealt with), that the letting was not at a rent which included payment for the use of the landlord's furniture at all, we think that counsel for the tenant based this largely on a strained construction of the passage cited above from the landlord's evidence. This passage, though a little ambiguously phrased, would seem to have meant no more than that, in fixing the rent of 35s. a week, the landlord did not consciously advert to the proportion of this sum which could properly be attributed to the use of the furniture, not that she would have let at the same rent, furniture or no furniture.

In these circumstances we are of opinion: (1) That the letting was for a rent which included payments for the use of furniture; (2) that the furniture was of value to the tenant, and (3) that, having regard to its quantity, a substantial proportion of the rent was attributable to it. Such a conclusion is, it seems to us, consonant with the few leading authorities bearing on the construction of the subsection, of which the most material are *Wilkes v. Goodwin* (2), *Palser v. Grinling* (3) and *Property Holding Co., Ltd. v. Mischeff* (1). Of these cases *Wilkes v. Goodwin* (2) was decided under s. 12 (2), proviso (i), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which provides as follows:

Provided that (i) this Act shall not, save as otherwise expressly provided, apply to a dwelling-house *bona fide* let at a rent which includes payments in respect of board, attendance, or use of furniture.

The case is, nevertheless, relevant and important to the construction of the later provision in the 1923 Act. In his judgment in *Wilkes v. Goodwin* (2), SCRUTTON, L.J., said ([1923] 2 K.B. 86 at p. 97):

What the parties agree must be judged by the words used, and if they have expressly included the particular furniture in the consideration for the rent agreed to be paid, it would seem that the rent "includes payment for the use of the furniture." If it is substantial and important enough to be expressly mentioned in the consideration, or if the landlord in withdrawing it from the house would commit a breach of contract, it is difficult to say that payment for it is not included in the rent.

The propositions which seem to emerge from these authorities are: (a) that, where the letting in fact includes furniture which the landlord has no right to remove, there is a presumption that the rent includes some element attributable to such furniture and that such furniture is of some value to the tenant; (b) that there is a presumption that such furniture is of the same value to the tenant involved in the case under consideration as to any other tenant: see *Property Holding Co., Ltd. v. Mischeff* (1) where MORTON, L.J., says ([1946] 2 All E.R. 294, at p. 297):

Next, the judge must have regard to "the value of the same to the tenant." These words raise difficult questions in some cases. In my view, if a dwelling-house is *bona fide* let to any tenant at a rent which includes payments in respect of certain articles of furniture, then *prima facie* those articles are of the same value to that tenant as they would be to any other tenant, and the burden lies on the tenant to show that, by reason of some special circumstances, those articles should be treated as being worth less to him than they would be to any other tenant: compare my judgment in *Palser v. Grinling* (3).

(c) These presumptions are not conclusive and in *Palser v. Grinling* (3), MORTON, L.J., gives an example of circumstances which may displace them. He is there dealing with a rent which includes payments for attendance, but his observations apply *mutatis mutandis* to a rent which includes payments for the use of furniture. He says ([1946] 2 All E.R. 287, at pp. 290, 291):

For instance, the tenant might prove that when the terms of the lease were being arranged, he told the landlord that he did not require this service, and that the landlord could make the appropriate alteration in the lease. If, in these circumstances, the landlord insisted on keeping to his common form of lease, which included this provision, the judge might well think that the amount of rent which was fairly attributable to that particular attendance was little or nothing.

While not laying down that no other circumstances than those instanced in this passage would suffice to rebut the presumption, we are of opinion, for the reasons given above, that the circumstances in the present case do not suffice

and that the letting was a furnished letting originally within the terms of s. 10 (1) of the 1923 Act.

We now turn to the question whether this dwelling-house was brought within the scope of the Rent Restriction Acts by reason of certain events which happened at the end of 1945. On Nov. 6, 1945, a firm of solicitors, acting on behalf of the landlord, served a notice on the tenant in the following terms:

Dear Sir, We have been instructed by your landlady, Miss Enid Margaret Seabrook, to give you herewith notice to quit and deliver up possession of the furnished rooms which you occupy at 2, Cranbrook Rise, Ilford, on Dec. 7, 1945, or at the end of the month of your tenancy which will expire next after the expiration of one month from the date hereof. Will you kindly acknowledge receipt, Yours faithfully, Frank White & Williams.

We feel some doubt whether that notice was effective. It appears to treat the tenant's tenancy as a monthly tenancy, whereas it had been a weekly tenancy and had probably become, by December, 1945, a four-weekly tenancy. We can find no evidence that it was ever a monthly tenancy, and there is no evidence to show that Dec. 7 was the end of a weekly or four-weekly period of the tenancy. However, it is not necessary to determine that point, having regard to the view which we take of certain subsequent events. It is clear from the evidence given at the hearing that at some time between Nov. 6, 1945, and Dec. 5, 1945, a conversation took place between the landlord and the tenant's wife, acting as agent for her husband. The landlord's evidence as to this was as follows: "I came to an arrangement with tenant's wife. I told Mrs. Mervyn I wanted my furniture downstairs for my own personal use . . . Mrs. Mervyn agreed to my having furniture and said she would like to remain on as tenant . . . Nothing definite said about rent." The tenant's wife said: "We discussed whether we could come to some agreement about furniture. She said she'd think it over. She said she wanted her furniture for her house at Angmering. Furniture in top flat more important, but she wanted it all. She said: 'You have nothing to worry about, you can stay, but I am unable to give you a definite date when I can remove my furniture.' I asked about rent. She said it would be the same, of course. I told husband of conversation and he wrote letter. She asked me to write a letter." The tenant said: "Letter of Dec. 5 written as result of conversation wife had with landlord. When I wrote letter purpose was I wanted my own furniture in the flat."

From the above quotations it appears that, while the landlord said that nothing definite was said about rent, Mrs. Mervyn gave evidence that the landlord said it would be "the same, of course." The judgment does not indicate which version the judge accepted. The rent which was, in fact, being paid prior to this conversation, from September, 1945, onwards, was £2 10s. a week. On Dec. 5, 1945, the tenant wrote the letter referred to above. The landlord said in her evidence that this letter was written to her at her request. It is as follows:

Dear Miss Seabrook, I understand that you require your furniture from this flat for your personal use and would esteem it a favour if you would kindly consider allowing me to move my own furniture into the flat and, therefore, permit me to remain as your tenant. Should you favour this arrangement it would, I trust, be to our mutual advantage. Thanking you and awaiting the favour of your reply. Yours very sincerely,

On Dec. 17, 1945, the landlord answered this letter as follows:

Dear Mr. Mervyn, I thank you for your letter of the 5th inst. and hereby agree to the proposals set out therein, yours faithfully.

It appears to us that these letters, read in the light of the surrounding circumstances, amount to a variation of the tenancy agreement already existing between the landlord and the tenant, the variation being that the furniture was no longer to be included in the letting, and the landlord was to be at liberty to remove it at any time. Thereupon, the tenant would move his own furniture into the flat. We think, further, that, having regard to the surrounding circumstances and the words "permit me to remain as your tenant," the intention of the parties, as revealed in this exchange of letters, was that the terms of the tenancy should remain the same as before, with this one exception. From the time that the landlord accepted the tenant's offer by her letter of Dec. 17, 1945, we think that the dwelling-house in question was no longer let at a rent which included payments in respect of the use of furniture. The landlord could have

removed the furniture at any time, and the tenant had no longer any contractual right to the use of it. In these circumstances, we do not think that, as from that date, it would be right to ascribe any part of the rent of £2 10s. a week, which the tenant continued to pay, to the use of the furniture: see *Property Holdings Co., Ltd. v. Mischeff* (1) ([1946] K.B. 645, at p. 650). Subsequently, there were certain further discussions between the landlord and the tenant in regard to certain items of furniture in the flat, but the only effect of these was that two further variations were made in the terms of the tenancy. The landlord was to leave in the flat the surrounds in the bedroom and dining room and the linoleum in the hall and breakfast room. Further, she was not to take away the "Ascot" (which seems to have been some form of heating apparatus) unless and until she provided "alternative or similar arrangements for the bath and kitchenette." We infer that the landlord agreed to these further variations because in a letter of Jan. 25, 1946, the tenant sent to her a cheque for £10 "being four weeks rent in advance from Thursday, Jan. 24, 1946," and in the same letter and its enclosure are set out in full the further variations to which we have already referred. In our view, the subsequent discussions and agreement on these minor matters do not have the effect of re-transforming this letting into a furnished letting, so as to take it outside the scope of the Rent Restrictions Acts. Even if we assume that as from Jan. 25, 1946, some portion of the rent might be attributable to the use of these items of furniture which the landlord was not free to remove, it was not suggested that such portion could be regarded as forming a substantial portion of the whole rent.

It follows that, in our view, the learned county court judge should have held that the premises had been within the protection of the Rent Restrictions Acts for some months before the proceedings began. His decision in favour of the landlord on this branch of the case was not based on any finding of fact, but was entirely based on his view of the law. The judge took the view that the tenant gave no consideration for the first variation of the original agreement of tenancy, and he further expressed the view that "so fundamental a change as the tenant contends took place, namely, the substitution of a protected for an unprotected tenancy, is not aptly described by the word 'variation.'" We are unable to accept either of these reasons. In our view, the variation was for the mutual benefit of the landlord and the tenant, and it can accurately be described as a variation, notwithstanding that in the result that which formerly was an unprotected tenancy became a protected tenancy. The result is that this appeal must be allowed. We should add that throughout this judgment we have assumed that the rateable value of the flat in question was such as to bring it within the protection of the Rent Restrictions Acts. No evidence appears to have been given on this matter, and it would appear that the parties must have agreed on this point.

Appeal allowed with costs.

Solicitors: *Manches & Co.* (for the tenant); *Robinson & Bradley*, agents for *Frank White & Williams*, Ilford (for the landlord).

[Reported by RONALD ZIAR, Esq., Barrister-at-Law.]

BOMFORD v. SOUTH WORCESTERSHIRE ASSESSMENT COMMITTEE AND ANOTHER.

[COURT OF APPEAL (Lawrence, Tucker and Cohen, L.JJ.), January 28, 1947.]

Rates and Rating—Valuation—Agricultural dwelling-house—Limitation of value by amount in respect of the dwelling-house which may be deducted from wages—Local Government Act, 1929 (c. 17), s. 72.

The ratepayer was a farmer who occupied two cottages in which two of his agricultural workers resided by virtue of their employment. By an Order, dated Dec. 12, 1941, made by the Worcestershire Agricultural Wages Committee under the Agricultural Wages (Regulation) Acts, 1924 and 1940, these cottages were to be treated as worth 3s. a week each, and only 3s. could be deducted weekly for each cottage from the minimum wage paid to each worker. The assessment committee valued the cottages for rating purposes at higher values than they would have borne if they had been let at only 3s. a week each.

HELD : assuming that under s. 72 of the Local Government Act, 1929, consideration of competition to obtain the cottages by other farmers in the neighbourhood must be excluded so that the only hypothetical tenant who was to be taken into account was the farmer whose workman was residing in the cottage occupied by the farmer, that farmer might be prepared to pay a higher rent for the cottage than 3s. a week, and, therefore, the assessment committee was not limited in its valuation by the 3s. a week laid down by the Order under the Agricultural Wages (Regulation) Acts, 1924 and 1940, which were enacted for an entirely different purpose from that of the Local Government Act, 1929. A

Decision of Divisional Court ([1946] 2 All E.R. 80) *affirmed*.

[FOR AGRICULTURAL WORKERS' WAGES, see HALSBURY Hailsham Edn., Vol. 1, pp. 389-395, paras. 625-660; AND FOR THE VALUATION OF AGRICULTURAL DWELLING-HOUSES, see *ibid*, Vol. 27, p. 434, para. 870.]

Case referred to :

(1) *Williams v. Smith*, [1934] 2 K.B. 158; 103 L.J.K.B. 421; 151 L.T. 112; Digest Supp. B

APPEAL by the ratepayer from the decision of a Divisional Court on a Case Stated by Worcestershire Quarter Sessions (reported [1946] 2 All E.R. 80) who had dismissed an appeal by the ratepayer, a farmer, against a valuation for rating purposes made by the South Worcestershire Assessment Committee of two cottages occupied by the ratepayer for the accommodation of agricultural workers employed by him. The facts are set out in the judgment of LAWRENCE, L.J. C

Rowe, K.C., and *Harold B. Williams* for the ratepayer.
Capewell, K.C., and *Squibb* for the assessment committee.

LAWRENCE, L.J. : This is an appeal from the Divisional Court on a Case Stated by quarter sessions on a question of rating. The ratepayer is a farmer who occupies two cottages in which dwell two of the workmen on his farm. The valuation of these two cottages which has been made by the assessment committee for rating purposes has been raised to a figure which is greater than the value for rating purposes of the cottages if let at 3s. 0d. a week. D

By an Order made by the county wages committee under the Agricultural Wages (Regulation) Acts, 1924 and 1940, for the purposes of the minimum wages which are payable to agricultural workers, a cottage (including any garden which is provided for the worker) is to be treated as worth 3s. 0d. per week, and only that amount can be deducted from the minimum wage which is paid to the worker. The question raised is put thus in the Special Case : E

The question for the opinion of the court is whether or not on the facts stated herein the gross value of the two cottages numbered 45 and 46, Salters Lane, Pershore, ascertained in accordance with s. 72 of the Local Government Act, 1929, is limited by the value at which they are to be reckoned as payment of wages in lieu of payment in cash under the Agricultural Wages (Regulation) Acts and the Order in force. If this question be answered in the affirmative, the said gross and rateable values are to be reduced to £6 and £4 respectively in respect of each cottage, and if in the negative, the gross and rateable values determined by the assessment committee are to stand. F

The only question we have to determine is whether the value of these cottages is to be taken at the 3s. 0d. specified in the Order made under the Agricultural Wages (Regulation) Acts in view of the terms of s. 72 of the Local Government Act, 1929. Section 72 provides : G

As from April 1, 1930, the gross value for rating purposes of a house occupied in connection with agricultural land and used as the dwelling-house of a person who— (a) is primarily engaged in carrying on or directing agricultural operations on that land; or (b) is employed in agricultural operations on that land in the service of the occupier thereof and is entitled, whether as tenant or otherwise, so to use the house only while so employed, shall, so long as the house is so occupied and used, be estimated by reference to the rent at which the house might reasonably be expected to let from year to year if it could not be occupied and used otherwise than as aforesaid. H

Counsel for the ratepayer has, as I understand it, based his argument on the words in para. (a) of s. 72, "that land," and those in para. (b), "is employed in agricultural operations on that land." He says that the restrictive covenant which one has to imagine attaches to the cottages is that they could not be

occupied and used "otherwise than as aforesaid," that is to say, otherwise than by the workmen of the farmer of "that land." That would have the effect, he contends, of excluding the competition of all other farmers, and would lead to competition, so far as the rent was concerned, merely between the farmer of the land and any employees of his on that land. This argument, however, was not accepted by the Divisional Court who decided the case in favour of the assessment committee on the view that the rent at which these cottages might reasonably be expected to let from year to year, if they could not be occupied and used otherwise than as aforesaid, would be a rent which might be expected to be obtained from the competition of any farmers in the neighbourhood who wanted these cottages for the occupation of their workmen. It appears to me, however, that the Special Case does not raise that question, and that it is unnecessary for this court to decide the question whether s. 72 excludes or includes the competition of all farmers. The Special Case seems to me to put the question simply as being whether or not the valuation must have regard to the 3s. 0d. rent which is laid down by the Order under the Agricultural Wages (Regulation) Acts. In my opinion, on that question the assessment committee are clearly right. Even if the only hypothetical tenant who is to be taken into account is the farmer whose workman is occupying the cottage, that farmer might be prepared to pay a higher rent for the cottages than the 3s. 0d. laid down by the Order. The Agricultural Wages (Regulation) Acts and the Local Government Act, 1929, have nothing to do with each other. They were enacted for entirely different purposes. In my opinion, as a matter of fact and ordinary economy, a single farmer, without any competition from any farmers, might be prepared to rent these two cottages—the present ratepayer might have been prepared to do so—at a higher rent than 3s. 0d. a week to get housing accommodation for his employees. I, therefore, answer the question put by the Special Case in the negative, and am in favour of dismissing the appeal.

TUCKER, L.J.: I agree. I think that s. 72 of the Local Government Act, 1929, envisages as possible hypothetical tenants of the hereditaments under consideration either the agricultural workers who are employed on the land in question or the farmer, the person in occupation of the agricultural land which is being worked, who may take the hereditament either for his own occupation, or for letting to his farm worker, or for allowing the farm worker to live there as a licensee. So, the hypothetical tenants are the farm worker or the farmer. The argument is that, in any event, by reason of the operation of the Agricultural Wages (Regulation) Acts, 1924 and 1940, and the Order made thereunder, the value, for the purposes of rating, of such a cottage as these is fixed irretrievably once and for all at 3s. 0d. a week, because that sum has been specified as that which may be deducted from the wages fixed by the statute to be paid to the farm workers. Furthermore, it is pointed out, it has been decided by the Divisional Court in *Williams v. Smith* (1), the correctness of which both sides accept, that such a cottage can be let to a farm worker only at 3s. 0d., and not at a rent in excess of that sum. It is said that it follows from that, as a matter of law, that only one figure can be taken as the gross value and that is the figure arrived at on the basis of 3s. 0d. a week. In my view, that is the only point which the Case raises. If that contention is right, the ratepayer succeeds; if it is not, he fails.

I think that he fails. It would be surprising, from the rating point of view, if an Act fixing the remuneration of agricultural workers has had the effect of fixing one uniform gross value for all kinds of hereditaments in Worcestershire of different sizes and types merely because they are occupied by a particular class of person. That would be a remarkable result, but it would be the result if the ratepayer is right. I should have thought that what the ratepayer in the present case, as one of the hypothetical tenants, would be willing to pay was clearly an element proper to be taken into consideration in fixing the value for rating purposes of these cottages. I agree that you must envisage a willing landlord and a willing tenant, but I think the fact that a willing tenant will only be able to deduct 3s. 0d. from his workman's wages in respect of the user of the hereditament is only one of the elements, though a very important element, to be taken into consideration in arriving at the value for rating purposes. There are other elements to be taken into consideration, namely, the desire of the farmer to secure the cottage to house one or more of his workmen, or the desire to get

it for his own occupation. Those seem to me to be proper elements to be taken into consideration, even assuming (which it is not necessary to decide for the purposes of this case) that other farmers desirous of obtaining the cottages for similar purposes must be excluded altogether as possible competitors. As has been said, this Case does not seem to raise that point, and I express no opinion on it. For the reasons I have stated, I agree that this appeal fails.

COHEN, L.J. : I agree.

Appeal dismissed with costs. A

Solicitors : *Ellis & Fairbairn* (for the ratepayer); *Vizard, Oldham, Crowder & Cash*, agents for *Smith & Roberts*, Evesham (for the assessment committee).
[Reported by RONALD ZIAR, ESQ., Barrister-at-Law.]

Applied. DUCK v. PEACOCK. [1949]
1 All E.R. 318.

RENNISON v. KNOWLER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Lewis, JJ.),
January 23, 31, 1947.]

Street and Aerial Traffic—Motor vehicle—Insurance against third-party risks—Causing a motor vehicle to be used on a road without a policy of insurance being in force—Disqualification for holding licence—"Special reasons" for refraining from disqualification—Misapprehension of legal effect of policy—Date from which disqualification runs where quarter session allow appeal against disqualification—Road Traffic Act, 1930 (c. 43), s. 35 (1) (2). C

The respondent was the owner of a motor cycle which he allowed a friend to drive, while he himself rode as a pillion passenger. The respondent's insurance policy covered him while driving his own or any other motor cycle, but did not cover any person other than himself who might be driving the cycle in question. The respondent was convicted by justices in petty sessions of causing a motor vehicle to be used on a road without a policy of insurance against third party risks being in force, contrary to the Road Traffic Act, 1930, s. 35 (1), and was disqualified for holding a licence for 12 months, under s. 35 (2). On his appeal to quarter sessions against the disqualification, the appeals committee found that the respondent honestly believed that his policy covered third party risks while the motor cycle was being driven by his friend and held that this was a special reason for not imposing disqualification. There was, however, no reasonable ground for this belief, as the respondent had never acquainted himself with the terms of the policy. The appeals committee also found that there was no likelihood that the respondent would drive again without satisfying himself that he was insured, and that, therefore, the safety of the public would not be prejudiced by allowing him to continue to drive :— D

HELD : (i) whether it was open to a court, on facts found by them, to hold that special reasons existed for not imposing a disqualification for holding a licence under s. 35 (2) of the Act of 1930 was a question of law. E

(ii) where an insured person neither informed himself of the provisions of his policy nor obtained advice as to what it covered, he had no reasonable ground for believing that his policy covered something which it did not. A mistaken belief with regard to any fact, however honest, could not be regarded as a "special reason" unless it was based on reasonable grounds. F

(iii) where there were special reasons for not disqualifying a driver, the court, in considering whether they would exercise the discretion then given them, should take into account the fact that he would not offend again, but that fact, in itself, was not a "special reason," nor was the evidence of hardship. G

(iv) the disqualification should be reimposed, and would be effective for 12 months from the date when it was imposed by petty sessions. H

Whitall v. Kirby ([1946] 2 All E.R. 552) *applied*.

[FOR THE ROAD TRAFFIC ACT, 1930, s. 35, see HALSBURY'S STATUTES, Vol. 23, p. 636.]

Cases referred to :

- (1) *Whittall v. Kirby*, [1946] 2 All E.R. 552 ; 111 J.P. 1 ; 175 L.T. 449.
- (2) *R. v. Leicester (Recorder)*, *Ex p. Gabbitas*, [1946] 1 All E.R. 615 ; 110 J.P. 228 ; 175 L.T. 173.
- (3) *R. v. Crossen*, [1939] N.I. 106.
- (4) *Muir v. Sutherland*, [1940] S.C. (J.) 66 ; Digest Supp.
- (5) *Adair v. Munn*, *Adair v. Brash*, [1940] S.C.(J.) 69 ; Digest Supp.
- (6) *Murray v. MacMillan*, 1942 S.C.(J.) 10 ; Digest Supp.
- (7) *Fairlie v. Hill* (1944), Sc.L.T. 224.
- (8) *Re Stevens, Ex p. Board of Trade*, [1898] 2 Q.B. 495 ; 67 L.J.Q.B. 932 ; 79 L.T. 80 ; 4 Digest 518, 5309.
- (9) *Shotts Iron Co., Ltd. v. Fordyce*, [1930] A.C. 503 ; 99 L.J.P.C. 101 ; 143 L.T. 200 ; 23 B.W.C.C. 73 ; Digest Supp.

CASE STATED by the appeals committee of Lincolnshire (Parts of Lindsey) Quarter Sessions.

The respondent was convicted by Scunthorpe justices of causing a motor bicycle to be used on a road without a policy of insurance being in force, contrary to the Road Traffic Act, 1930, s. 35, and was disqualified for holding a driving licence for 12 months. His appeal against disqualification was allowed by quarter sessions on the ground that there was a special reason for not imposing disqualification in that the respondent honestly believed that the user of the motor cycle was covered by an insurance policy. The appellant, a police officer, appealed. The facts appear in the judgment of the court delivered by LORD GODDARD, C.J.

J. MacMillan for the appellant.

R. C. Vaughan and *J. G. S. Hobson* for the justices in quarter sessions.

Jan. 31. LORD GODDARD, C.J., read the following judgment of the court. This is a case stated by the appeals committee of the quarter sessions for the Parts of Lindsey who allowed an appeal by the respondent against so much of a conviction by a court of summary jurisdiction at Scunthorpe as adjudged that he be disqualified for holding a driving licence for a period of 12 months. The case again raises the question what can constitute special reasons entitling a court to refrain from imposing disqualification—on this occasion for causing a motor vehicle to be used on a road without a policy of insurance being in force, contrary to the Road Traffic Act, 1930, s. 35. In the recent case of *Whittall v. Kirby* (1), this court was considering disqualification for an offence against s. 15 of the Act and gave no final decision as to s. 35, though it is clear from the judgment in that case that many, if not all, the considerations which should influence the court in considering this matter apply equally to both sections. Thus, the circumstances must be special to the offence and not to the offender, and, as, indeed, the appeals committee held, financial hardship cannot be taken into account.

The facts of the present case are that the respondent was the owner of a motor cycle and on the day in question it was being driven by a friend of his, the respondent at the time riding as a pillion passenger on the cycle. The friend had owned a motor cycle, and he and the respondent were accustomed to ride to work together, on one or other of the cycles. The friend had sold his cycle a few days before the offence, and the quarter sessions have accepted the respondent's evidence that he knew his friend was looking out for another cycle and also that he believed the friend had for this reason kept his policy in force. On the occasion of the offence these two men appear to have been on a poaching expedition, which was the reason why the respondent would give no information as to who his friend was, so that no inquiry whether the latter had a policy in force covering him while driving a cycle owned by another person was possible. The policy insuring the respondent covered him while driving his own or any other motor cycle, but did not cover a person other than the assured who might be driving the insured cycle. It is, indeed, common ground that the motor cycle was, in fact, uninsured at the material time.

In the Case, as originally stated, the appeals committee found that the respondent acted under a misapprehension as to his legal position relating to insurance and that he honestly believed that the user of the motor cycle was covered either by his own or his friend's policy, and that such belief constituted a special reason for not imposing disqualification. They added that they disregarded financial hardship and set out also another consideration on which

we shall say a word hereafter. We remitted the case for further information as to the grounds on which the respondent based his belief, and in their further statement the committee tell us that he did not give any grounds for believing either that his friend was going to buy another cycle or that he had kept his policy in force, but the committee thought he was an honest witness and accepted his evidence as to his belief. They also, we think, must have thought that the respondent believed that his own policy covered third party risks while it was being driven by his friend.

We are in agreement with decisions given in Scotland that the question whether, on facts found by the court, it is open to the court to hold that special reasons exist is one of law. Can, therefore, the fact that a man misapprehends the legal effect of his policy be a special reason? In our opinion, it would be most dangerous so to hold. The Act requires every person who uses a motor vehicle or causes or permits it to be used on a road to be insured against third party risks. The obvious duty, therefore, of the owner is to see that he is insured and to make himself acquainted with the contents of his policy. He is not obliged to have a motor vehicle, but, if he does, he must see that he has such a policy as the law requires. If he does not understand his policy, he can seek guidance and instruction, but, if he neither informs himself of its provisions nor gets advice as to what it covers, we are unable to see that he has any reasonable ground for believing that the policy covers something which it does not. Belief, however honest, cannot, in our opinion, be regarded as a special reason unless it is based on reasonable grounds. It could hardly be even suggested that forgetfulness to renew a policy could be a special reason, and, indeed, this court said in *Whittall v. Kirby* (1) that it could not. Can then, a man who has forgotten the renewal date of his policy and drives in the honest belief that his policy is still current, be in a worse position than one who, having a current policy, believes it covers him in a particular state of circumstances when it does not? It seems obvious that they are both in exactly the same position. It may be that, if a man who felt he did not understand his policy took the advice of someone who was, apparently, in a position to explain it, such as an insurance agent, and received a wrong opinion, this might be considered a special reason, or, again, if the question turned on some obscure phrase which might lead a person to believe he was covered when a court ultimately decided that he was not. Those are questions which can be decided if and when they arise. We express no opinion on them. Here there is no finding or suggestion that the respondent took any advice or that the policy was one which a person in his position or degree of education could not understand, still less that it contained any obscurity or ambiguity. The plain fact is that, having got the policy, he never troubled to acquaint himself with its terms. We cannot hold that a belief founded on no reasonable ground can constitute a special reason.

The second ground given by the committee is, in our opinion, covered by the same considerations and must also be rejected. In view of the findings we will assume that the committee thought that the respondent actually applied his mind to the question whether his friend had kept his policy in force and believed he had. But what possible ground had he for any such belief? That he knew his friend was looking for a new cycle may well be true, but that of itself could be no ground for believing that he still had an effective policy after he had parted with his cycle. Considering that he never even asked the question, we cannot possibly accept his belief on this matter as a special reason.

We desire to say a word with regard to the finding that there was no likelihood that the respondent would drive again without satisfying himself that he was insured, and that, therefore, the safety of the public would not be prejudiced by allowing him to continue to drive. This matter has been emphasised in some of the Scottish decisions, which, no doubt, is why the committee refer to it. We do not understand them to give this as a special reason, and, in our opinion, it could not be so regarded. In our opinion, the Scottish cases do not, when rightly understood, mean to say that the fact that a man is not likely to offend again can of itself be a special reason. This is a matter which it is right to take into account in considering, where there are special reasons, whether the court will exercise the discretion which is then given to them. The court is not bound to refrain from disqualifying a driver, be the circumstances as special as can

well be imagined. They may so refrain where there are special reasons and, in deciding whether they will or will not exercise their discretion, they may take into account whether it is probable that the offender has learnt his lesson.

- We recognise in this case that the appeals committee, although we are obliged to differ from their conclusions, gave it the most thorough and careful consideration, and what we are about to add is not intended as the slightest reflection on them, but is for the guidance of magistrates and quarter sessions generally.
- A It must be understood that disqualification is part of the punishment which Parliament has prescribed for certain motoring offences. Everyone will agree that, certainly where a fine and not imprisonment is imposed, it is the most serious part of the punishment. That it often inflicts hardship, and in many cases grievous hardship, none will deny, but it is the punishment which Parliament has ordained, and, moreover, has enacted that *prima facie*, at least, it is to be imposed in all cases to which this penalty applies. There are in the statute
- B book laws which in terms allow the courts to take, or refrain from taking, steps on the ground of exceptional hardship, but there is no such provision in the Road Traffic Acts. This court has already laid down that financial hardship is not a matter which can be taken into account in this respect, and we desire to emphasise that this applies to any other form of hardship. It may often be distasteful to a court to impose a penalty or to take a certain course which it may think is disproportionate to the offence, but it is not for them to question
- C what the legislature has enacted. It is no doubt true that disqualification may work very hardly in a case where a man drives for his living and have little effect in the case of another who can afford to employ someone to drive him while the disqualification is in force. Parliament has not seen fit to draw that distinction and the decisions may now be said to be uniform throughout the United Kingdom that hardship is not a special reason for refraining from imposing this punishment. It is the duty of all courts to apply the law as enacted
- D and as interpreted by the courts.

It follows that this appeal is allowed. We were asked by counsel to state, in the event of this court allowing the appeal, from what date the suspension of the licence was to run. The period of disqualification is, both in the case of s. 35 and s. 15, a period of 12 months from the date of the conviction. We observe that in s. 6 (2) it is provided:

- E A person who by virtue of an order of a court . . . is disqualified for holding or obtaining a licence may appeal against the order in the same manner as against a conviction, and the court may, if it thinks fit, pending the appeal, suspend the operation of the order.

- The justices were not, apparently, asked to suspend the operation of the order pending the appeal to quarter sessions, and, accordingly, the respondent was disqualified from Mar. 20, to May 27, 1946, when the quarter sessions removed the disqualification. There is no provision in the Act as to what is to happen if the decision of quarter sessions is given subject to a Case, though it would seem that, if quarter sessions either themselves imposed a disqualification or dismissed an appeal from petty sessions which had imposed a disqualification, they could suspend the operation of the order until the decision of the High Court. Where, however, quarter sessions states a Case, there is nothing in the
- F Act to suggest that it is open to the High Court to order that disqualification should run from the date of the judgment of the High Court. All we can do is to restore the order of the petty sessions, and it follows therefore, that the disqualification is reimposed, but will only be effective until Mar. 20 of this year.

Appeal allowed.

- Solicitors: *Sharpe, Pritchard & Co.*, agents for *Sergeant & Collins*, Seunthorpe (for the appellant); *Taylor, Jelf & Co.*, agents for *Eric W. Scorer*, Lincoln
- H (for the justices).

[Reported by F. A. AMLES, Esq., Barrister-at-Law.]

WILLIAMSON v. WILSON

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Lewis, JJ.),
January 28, 31, 1947.]

Street and Aerial Traffic—Motor vehicle—Insurance against third-party risks—Permitting vehicle to be used on road without policy of insurance in force—Disqualification for holding licence—"Special reason" for refraining from disqualification—Road Traffic Act, 1930 (c. 43), s. 35 (1), (2).

The respondent owned a motor car which was insured only while she or her brother was driving it. She allowed a friend to drive the car without an insurance policy being in force while it was so driven, and she was charged with, and convicted of, an offence against the Road Traffic Act, 1930, s. 35 (1). She was not, however, disqualified for holding a licence, under s. 35 (2), because the justices considered that disqualification was too severe a penalty in the circumstances and that this constituted a "special reason" within the meaning of the section:—

HELD: it was not for the justices to say that a penalty which Parliament had imposed was too severe, and no "special reason" existed for not imposing disqualification on the respondent.

Rennison v. Knowler (1) applied.

[FOR THE ROAD TRAFFIC ACT, 1930, s. 35, see HALSBURY'S STATUTES, Vol. 23, p. 636.]

Case referred to:

(1) *Rennison v. Knowler*, ante, p. 302.

CASE STATED by Lincolnshire (Parts of Lindsey) justices.

The respondent was convicted of permitting a motor vehicle to be used on a road without a policy of insurance against third party risks being in force, contrary to the Road Traffic Act, 1930, s. 35 (1). The justices did not, however, disqualify her for holding a licence under s. 35 (2), because they considered disqualification too severe a penalty in the circumstances of the case. The facts appear in the judgment of the court delivered by LORD GODDARD, C.J.

J. MacMillan for the appellant.

The respondent did not appear.

Cur. adv. vult.

Jan. 31. LORD GODDARD, C.J. (delivering the judgment of the court): This is a Case stated by justices for the Parts of Lindsey in which the respondent was charged under the Road Traffic Act, 1930, s. 35 (1):

... for that she, the respondent, on Sept. 22, 1946, at the Broadway, Woodhall Spa, in the Parts of Lindsey, in the county of Lincoln, unlawfully did permit a motor vehicle to be used on a road without there being in force in relation to the user of the vehicle by the person using the vehicle such a policy of insurance . . .

as is required by the Act.

The respondent, who owned a motor car, had a policy which only insured the car when she or her brother were driving, but she allowed a man named O'Keeffe to drive the car. Mr. O'Keeffe had no policy in force, and, therefore, she permitted the car to be driven without any policy being in force at the time when it was so driven. The justices convicted her, but they state that they were of opinion that:

... in view of the circumstances of the case disqualification was too severe a penalty, and that, such being the case, it constituted a special reason required by [s. 35 (2)].

Accordingly, they did not impose any penalty of disqualification.

In view of the judgment which we delivered in *Rennison v. Knowler* (1) it is not necessary to say more than that this case is covered entirely by that judgment. It is not for the justices to say that a penalty which Parliament has imposed is too severe, and it cannot be pretended that there is any special reason in this case for not imposing disqualification. The position is simply that the respondent either forgot or ignored the fact that her policy only covered the driving of the car when it was being driven by herself or by the brother who is also named in the policy. It may be that, after the decisions which we have now given, owners of motor cars will hesitate before they take advantage of the opportunity of paying a slightly smaller premium if the driving of the

A car is limited to named drivers, because it is obvious that, if they do, they run the risk of forgetting that provision in their policy and of finding themselves prosecuted for allowing uninsured cars to be driven. In that event, in view of this decision, it is impossible to suppose that magistrates will any longer refrain from imposing the sentence of disqualification because they think that it is a severe penalty. I repeat once more that it is not for magistrates or for this court to question the wisdom of Parliament in imposing disqualification as a punishment. It follows that this appeal is allowed. The case will go back for the justices to impose a disqualification of not less than 12 months from the date of the conviction.

Case remitted.

Solicitors : *Godfrey Warr & Co.*, agents for *John Barkers*, Louth (for the appellant).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

WILLIAMSON v. O'KEEFFE

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Lewis, JJ.), January 28, 31, 1947.]

C *Street and Aerial Traffic—Motor vehicle—Insurance against third-party risks—Using vehicle on road without policy of insurance being in force—Whether person other than owner of vehicle can be guilty of the offence—"Any person"—Road Traffic Act, 1930 (c. 43), s. 35 (1).*

D The respondent was driving a friend's car which was only insured while she herself or her brother was driving it. He was charged with an offence against the Road Traffic Act, 1930, s. 35 (1). The justices held that he had not committed an offence since he was not the owner of the car, because the offence could only be committed by the owner, the words "any person" in s. 35 (1) meaning "any owner":—

E HELD: the words "any person" in s. 35 (1) did not merely mean "any owner"; the offence of using a motor vehicle on the road without an insurance policy against third party risks being in force could be committed by any person; the respondent had committed an offence against s. 35 (1); and the case should be remitted to the justices with a direction to convict.

[FOR THE ROAD TRAFFIC ACT, 1930, s. 35 (1), see HALSBURY'S STATUTES, Vol. 23, p. 636.]

Cases referred to:

- F (1) *Williamson v. Wilson*, ante, p. 306.
 (2) *Morris v. Tolman*, [1923] 1 K.B. 166; 92 L.J.K.B. 215; 128 L.T. 118; 86 J.P. 221; 14 Digest 92, 612.
 (3) *Monk v. Warbey*, [1935] 1 K.B. 75; 104 L.J.K.B. 153; 152 L.T. 194; Digest Supp.

CASE STATED by Lincolnshire (Parts of Lindsey) justices.

G The respondent, who was driving a friend's car, was charged with using a motor vehicle on a road without a policy of insurance against third party risks being in force, contrary to the Road Traffic Act, 1930, s. 35 (1). No policy was, in fact, in force at the time, but the justices held that the respondent had not committed an offence since he was not the owner of the car, because the offence was one which could only be committed by the owner. The facts appear in the judgment of the court, delivered by LORD GODDARD, C.J., in *Williamson v. Wilson* (1) (ante, p. 306).

H *J. MacMillan* for the appellant.

The respondent did not appear.

Cur. adv. vult.

Jan. 31. LORD GODDARD, C.J. (delivering the judgment of the court): The respondent is the person who was driving the car which was owned by the respondent in *Williamson v. Wilson* (1), and it is unnecessary for me to state the facts again.

The justices in the present case held that no offence had been committed because of the construction which they placed on the Road Traffic Act, 1930,

s. 35 (1). The respondent was charged with using the car on the road when there was no policy in force and, in fact, no policy was in force. The reasons the justices give for their decision are :

(1) The words "any person" in the said section must mean either any person whatsoever or "any owner." They cannot have two meanings in the same section, and we consider they mean "any owner," as in *Morris v. Tolman* (2) for the following reasons. (2) The said section creates two offences (or rather three, but the case in question is only concerned with two), namely : (a) It shall be not lawful for "any person" to use, etc. (b) It shall not be lawful for "any person" to permit any other person to use, etc. In (b) the words "any person" must mean any owner because the owner is the only person who can legally permit another person to use. (3) As the words "any person" cannot have two different meanings in the same section they must mean "any owner" in (a) as well as (b). (4) If the legislature had meant the words to have two different meanings in the same section it would have said "It shall not be lawful for any person to use or, if he is the owner, to permit any other person to use." Therefore the words "any person" are confined to the owner. The respondent was not the owner, so the said section does not implicate him and he is not guilty of an offence. (5) We referred to the judgments in *Monk v. Warbey* (3) and considered they supported our conclusions in that they implied that the dominant intention of the said section was to impose a duty on the owner of a vehicle to see that it is insured when used either by him or by any other person.

This is a very subtle piece of reasoning, but the court finds it impossible to adopt the same view as the justices. The Act is perfectly clear in its terms. It creates an offence and imposes a penalty on any person who uses a motor car on the road without a policy being in force. The words are as clear as they possibly can be, and, as Mr. O'Keeffe was a person who used a car on a road without a policy being in force, it follows that he committed an offence and is liable to disqualification for not less than 12 months. The case must go back to the magistrates with a direction to convict.

Case remitted.

Solicitors : *Godfrey Warr & Co.*, agents for *John Barkers*, Louth (for the appellant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

ROBERTS v. COVENTRY CORPORATION

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Croom-Johnson, JJ.), January 21, 1947.]

Acquisition of Land—Compensation—Owner also a shareholder and director of tenant company—Possible depreciation of shares through notice to quit—Acquisition of Land (Assessment of Compensation) Act, 1919, (c. 57), s. 2.

The owner of land which was acquired compulsorily by a local authority was a director and shareholder of the company which was tenant and occupier of the land. She alleged that, if the company were dispossessed of the land, the value of her shares in it would be depreciated.

HELD : she could not claim as compensation under s. 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919, a sum representing this depreciation in the value of her shares.

[FOR S. 2 OF THE ACQUISITION OF LAND (ASSESSMENT OF COMPENSATION) ACT, 1919, see HALSBURY'S STATUTES, Vol. 2, p. 1178.]

Cases referred to :

- (1) *Horn v. Sunderland Corporation*, [1941] 1 All E.R. 480; [1941] 2 K.B. 26; 110 L.J.K.B. 353; 165 L.T. 298; 105 J.P. 223; 85 Sol. Jo. 212; 57 T.L.R. 404; Digest Supp.
- (2) *Smith, Stone & Knight, Ltd. v. Birmingham Corporation*, [1939] 4 All E.R. 116; 161 L.T. 371; 104 J.P. 31; 83 Sol. Jo. 961; Digest Supp.

AWARD in the form of a SPECIAL CASE stated by an Official Arbitrator appointed under the Acquisition of Land (Assessment of Compensation) Act, 1919. The facts appear in the judgment of LORD GODDARD, C.J.

H. A. Hill (for the appellant).

G. D. Squibb (for the respondents).

LORD GODDARD, C.J.: This is an award in the form of a Special Case stated by an official arbitrator appointed under the Acquisition of Land (Assessment of Compensation) Act, 1919. The appellant, Mrs. Roberts, is the owner of the land which the respondents, Coventry Corporation, have acquired compulsorily. On that site a company named F. Roberts & Sons, Ltd., were carrying on business, and were her tenants on a yearly tenancy. She was the principal shareholder in that company, holding a large majority of the shares, and the other two shareholders were her sons. The corporation having given notice to acquire this land, an arbitration was held, and before the official arbitrator there was no question that the value of the land, as land and as between a willing purchaser and a willing seller, was £13,500. The appellant, however, also claimed a further sum of £1,775, on the ground that it was an advantage to her as the principal shareholder in the company that the company should carry on their business on her land. As long as it did so, she said, she had a greater interest in and a control of the company and it would be a disadvantage to her if the company were dispossessed and could no longer carry on business on the land, and the value of her shares would be depreciated. The arbitrator found that the depreciation of the shares was £1,775, if she were entitled to claim it, and the question for this court is whether, in addition to the value of the land, she is entitled to that sum.

I am content to put my judgment on the short ground that that damage is far too remote for the appellant to be able to claim compensation in respect of it. The company is carrying on its own business. The fact that the appellant is a shareholder in the company does not give her a right to claim in respect of a loss which the company will suffer. It is said that she is entitled to claim, not because she is a corporator in the company, but because she is also the landowner. In my opinion, the only loss she has suffered is the value of the land which is being taken from her and that she is not entitled to have taken into account any possible depreciation in the value of the shares if the company has to carry on business elsewhere. In my opinion, the question submitted to the court by the arbitrator should be answered in the negative, and, therefore, the award will stand for £13,500, plus solicitors' scale costs for the conveyance and the other fees set out in the award, and the award for costs will be as the arbitrator has directed.

HUMPHREYS, J.: I am of the same opinion, and for the same reasons.

CROOM-JOHNSON, J.: I have come to the same conclusion. I do not find it necessary to go into the many questions which have been discussed before us as to what precisely is the extent to which, under the Acquisition of Land (Assessment of Compensation) Act, 1919, the right of a landowner to compensation is either limited, circumscribed or increased; the loss which is here in question is a loss by reason of the fact that the respondent corporation, having acquired the premises, may give notice which the appellant herself could give were she minded for any reason to do it, to terminate the tenancy which the company at present has. If that notice were given, either by the appellant or by the corporation after the property has been acquired, it is the company which would suffer the loss, and I should have thought it was plain almost beyond possibility of argument that a corporator in the company, as such, would have no claim. The arbitrator says in the Case that the loss he was dealing with in this respect was a loss of the appellant in her capacity as shareholder and director. Her case is: "I claim as a landowner, but I happen at the same time to be a large shareholder and a director: accordingly, I am entitled to say that in my capacity as owner of the land, I am suffering some sort of additional loss which I am entitled to recover under s. 2 (6) of the Act of 1919." I regard that as an astonishing proposition. I do not see where it is to stop. I put the case to counsel for the appellant: "Supposing the company had been a sub-tenant of compulsorily acquired land, what would be the position of the appellant then if she made a claim as shareholder in the company which owned a sub-tenancy?" As I understood, he agreed that there could be no separate claim by the appellant to compensation by reason of the property of the sub-tenant having been acquired in the way the tenancy of this company has been acquired. I agree with my Lord. This seems to me to be very remote. I think that to allow the claim would be to

break in on a rule which I thought was fairly well established, *viz.*, that a corporator in a company has no direct claim as corporator in respect of a loss which the company makes. I cannot see that it makes any difference that the appellant is also a director. A director is only a servant and agent of the company, with special duties and special responsibilities. How that makes any difference to him as a shareholder, it is a little difficult to understand. I agree that the order should be in the form proposed by my Lord.

Question answered.

Solicitors: *Peacock & Goddard*, agents for *Browne, Jacobson & Hallam*, Nottingham (for the appellant); *Sharpe, Pritchard & Co.*, agents for the Town Clerk of Coventry (for the respondents).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

R. v. EAST KESTEVEN RURAL DISTRICT COUNCIL, *Ex parte* SLEAFORD & DISTRICT WHITE CITY SPORTS STADIUM CO.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Croom-Johnson, JJ.), January 21, 1947.]

Town and Country Planning—Agricultural land—Refusal to permit construction of a sports stadium—Over-riding need of agriculture—Town and Country Planning Act, 1932 (c. 48), s. 10 (5).

The Minister of Town and Country Planning, in determining an appeal against the decision of a planning authority under s. 10 (5) of the Town and Country Planning Act, 1932, is entitled to refuse permission for the development of agricultural land as a sports stadium on the ground of "the over-riding need to preserve for agricultural use any land which can be so used and is not required for essential development, even though its quality may not be high."

[FOR THE TOWN AND COUNTRY PLANNING ACT, 1932, s. 10 (3), see HALSBURY'S STATUTES, Vol. 25, p. 482; and for THE TOWN AND COUNTRY PLANNING (INTERIM DEVELOPMENT) ACT, 1943, s. 1, see *ibid.*, Vol. 36, p. 240.]

Cases referred to :

- (1) *R. v. Johnson*, [1905] 2 K.B. 59; 74 L.J.K.B. 585; 92 L.T. 654; 69 J.P. 236; 53 W.R. 655; 21 T.L.R. 423; 49 Sol. Jo. 460; 16 Digest 414, 2732.
- (2) *Board of Education v. Rice*, [1911] A.C. 179; 80 L.J.K.B. 796; 104 L.T. 689; 75 J.P. 393; 27 T.L.R. 378; 55 Sol. Jo. 440; 9 L.G.R. 652; H.L.; 19 Digest 554, 9.
- (3) *Local Government Board v. Arlidge*, [1915] A.C. 120; 84 L.J.K.B. 72; 111 L.T. 905; 79 J.P. 97; 30 T.L.R. 672; 38 Digest 97, 708.
- (4) *R. v. Hendon R.D.C., Ex parte Chorley*, [1933] 2 K.B. 696; 102 L.J.K.B. 658; 149 L.T. 535; 97 J.P. 210; 49 T.L.R. 482; 31 L.G.R. 332; Digest Supp.
- (5) *Denby (Wilham) & Sons, Ltd. v. Minister of Health*, [1936] 1 K.B. 337; 105 L.J.K.B. 134; 154 L.T. 180; 100 J.P. 107; 32 T.L.R. 173; Digest Supp.
- (6) *R. v. Minister of Health, Ex parte Glamorgan County Mental Hospital (Committee of Visitors)*, [1938] 4 All E.R. 32; [1939] 1 K.B. 232; 108 L.J.K.B. 27; 159 L.T. 508; 102 J.P. 497; 55 T.L.R. 4; Digest Supp.

APPLICATIONS for orders of *certiorari* and *mandamus* directed to the Minister of Town and Country Planning to bring up and quash, and to order him to hear and determine in accordance with law, a decision of his under the Town and Country Planning Acts, 1932 and 1943. The Minister had dismissed an appeal by the applicants against the refusal of the East Kesteven Rural District Council to give permission for the development of agricultural land at Leasingham, Lincolnshire, as a sports stadium. The facts appear in the judgment of LORD GODDARD, C.J.

P. E. Sandlands, K.C., and *G. R. Swanwick* for the applicants.

The Attorney General (Sir Hartley Shawcross, K.C.) and *H. L. Parker* for the Minister of Town and Country Planning.

G. D. Squibb for the East Kesteven Rural District Council.

LORD GODDARD, C.J. : This is a motion for *certiorari* directed to the Minister of Town and Country Planning to bring up and quash a decision which he has given dismissing an appeal by the Sleaford & District White City Sports Stadium Co., which we are told is a partnership, under the Town and Country

Planning Act, 1932, s. 10, and the Town and Country Planning Act, 1943, s. 1, against the refusal of East Kesteven Rural District Council to grant permission for the development as a sports stadium, under the protection of the Town and Country Planning (General Interim Development) Order, 1945, of land situate in the parish of Leasingham in the county of Lincoln. The Minister has given as his reasons for so doing that "he has felt obliged to pay particular regard to the over-riding need to preserve for agricultural use any land which can be so used and is not required for essential development, even though its quality may not be high."

The circumstances of the case as disclosed in the affidavits are that the applicants for the order desire to establish in the area of the rural district council a stadium for sports of all sorts. The question is whether or not, an application having been made to the rural district council, and the council having refused their consent on the same grounds as the Minister, the Minister's decision is *ultra vires* the powers given him under the Town and Country Planning Act, 1932.

Without going in detail through the somewhat complicated provisions of these Acts, the main provision is that a council may provide a scheme for the planning of their district, which may be an urban district or, as in this case, a rural district, and it is obvious that the main object which Parliament had in view was that the best and most suitable use was to be made of the land within the district of the planning authority. In considering to what use the land within their district is to be put, the planning authority must be entitled to consider whether certain land should be kept and used as agricultural land, or whether it should be used as building land or for some other purpose. If they refuse an application to develop land in a particular way because they think that the land should be kept and used as agricultural land, I cannot see that it is any objection that there is in existence another Minister, namely, the Minister of Agriculture, who can, if he chooses, give directions as to the cultivation of any land in the kingdom. It is not necessary for me to go into details with regard to interim orders of development and resolutions to prepare schemes and so forth, because it is common ground that, when an application is made to the district council for permission to alter the use of the land, they then act under their powers as a planning authority and must consider whether they are going to give consent to the development of the land in the way desired. All the district council have said in this case is: "We are not going to consent to certain land in our district being used for a purpose other than that of agriculture," and it seems to me that to refuse their consent to agricultural land being used for another purpose is clearly within the powers which they have. They can say: "In planning this area we have to make the best use we can of the land. We think that certain land should be kept as agricultural land because potentially it is land which can be used for raising food." Whether it will actually be used for raising food is another matter, but if they choose to keep land within their district as agricultural land, I see nothing in the Act which says that it is beyond their powers to do so. In these circumstances, I think the East Kesteven Rural District Council were within their powers in refusing consent to the building of a stadium on agricultural land, and it follows from that that the Minister was within his powers in upholding that decision. Consequently, the application for *certiorari* fails, and in those circumstances also no *mandamus* can be granted. Both these applications fail and must be dismissed with costs.

HUMPHREYS, J. : I am of the same opinion.

CROOM-JOHNSON, J. : I agree. Under s. 1 of the Act of 1932, power is given to prepare schemes with respect to land—and it is not unimportant to observe that that is so whether there are or are not buildings on the land—with the object of controlling the development of the land. You may control development if you say: "We will not permit it to be used for any other purpose than its present purpose as agricultural land." I think the same sort of provision is to be found in s. 10 (3) under which, when there is an application for permission to develop land by an interim order, the authority may grant permission subject to such conditions as they think proper to impose, or may refuse the application. It seems to me that there is the widest power conferred on the authority to refuse to allow land to be developed, as it was called in the

argument to which we have listened. I can see no ground, therefore, for saying, on these general considerations in addition to those to which the Lord Chief Justice has referred, that the Minister has exceeded the wide powers conferred on him in this case. I can see no excess of jurisdiction, and I agree with the order which is proposed.

Applications dismissed with costs.

Solicitors: *Cunliffe & Airy*, agents for *Ernest H. Godson & Co.*, Sleaford (for the applicants); *The Treasury Solicitor* (for the Minister of Town and Country Planning); *Gibson & Weldon*, agents for *J. Hunt*, Peterborough (for respondents).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

HARRIS v. HAWKINS

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Croom-Johnson, JJ.), January 20, 1947.]

Infants and Children—Adoption—Dispensing with consent to order—“Person whose consent ought to be given”—Whether limited to person who has failed to contribute to support of infant—Adoption of Children Act, 1926 (c. 29), s. 2 (3).

The words “or is a person whose consent ought, in the opinion of the court and in all the circumstances of the case to be dispensed with,” in the proviso to s. 2 (3) of the Adoption of Children Act, 1926, which gives justices power to dispense with the consent to an adoption order of such a person, are not limited to the case of a person who is liable to contribute to the support of the child, but are intended to apply to any person whose consent is required under the enacting part of the sub-section.

[FOR THE ADOPTION OF CHILDREN ACT, 1926, s. 2 (3), see HALSBURY'S STATUTES, Vol. 9, p. 827].

CASE STATED by Brighton justices on an application for the making of an adoption order under s. 2 (3) of the Adoption of Children Act, 1926. The facts appear in the judgment of LORD GODDARD, C.J.

Douglas Lowe for the appellant.

C. J. T. Pensotti for the respondent.

LORD GODDARD, C.J.: This is a Case stated by justices for the county borough of Brighton on an application which was made to them by the appellant who desired to adopt an illegitimate child of which she is the natural maternal grandmother. The child was born in 1941 and lived with her mother till the mother died in September, 1944. Thereafter the appellant entered into an arrangement with the respondent, the putative father, that he should have the custody of the infant four days each week and that she should have the custody for the remaining three days of the week. This arrangement continued until Mar. 13, 1946, since which date the appellant has not had possession of the infant. We are left to infer from that that the respondent has had the actual custody of the child since Mar. 13, 1946, and, therefore, had the actual custody of the child when the application came before the justices.

The sole point that arises here is whether the justices, if they should see fit to do so, can make an adoption order without obtaining the consent of the respondent, who is the person having the actual custody of the child. That depends entirely on the true construction of s. 2 (3) of the Adoption of Children Act, 1926. It is there provided that:

An adoption order shall not be made except with the consent of every person or body who is a parent or guardian of the infant in respect of whom the application is made or who has the actual custody of the infant or who is liable to contribute to the support of the infant.

The respondent comes under the words “who has the actual custody of the infant,” and, therefore, *prima facie*, his consent must be obtained, but there is the following proviso to that section:

Provided that the court may dispense with any consent required by this sub-section if satisfied that the person whose consent is to be dispensed with has abandoned or deserted the infant or cannot be found or is incapable of giving such consent or, being a person liable to contribute to the support of the infant, either has persistently neg-

lected or refused to contribute to such support or is a person whose consent ought, in the opinion of the court and in all the circumstances of the case, to be dispensed with.

The justices have taken the view that those words "or is a person whose consent ought, in the opinion of the court and in all the circumstances of the case, to be dispensed with," apply only to the case of a person liable to contribute to the support of the infant. It is said that such a person's consent can be dispensed with if he has persistently neglected or refused to contribute to the support of the infant, or for some other reason is a person whose consent ought to be dispensed with. On the other hand, it is contended by counsel for the appellant—and, in my opinion, rightly contended—that the last three lines of the proviso apply to any person whose consent has to be obtained but whose consent the justices may for one reason or another think in all the circumstances of the case ought to be dispensed with. I attach great importance to the words "and in all the circumstances of the case." It seems to me to be intended to give the justices the widest possible discretion, and I ventured to point out in the course of the argument that, if that be not the right construction, one might certainly get a very remarkable state of affairs. If a most disreputable person had kidnapped a child against the will of its parents and *habeas corpus* had not been obtained, so that, at the time the application for an adoption order came before the court, that person had the actual custody of the child, though wrongly, and was not liable to support it, the court would not be able to dispense with his consent; or one might get the case of a woman who had been divorced by her husband, the custody of the child being given to the husband, and then a relative of the husband, knowing the husband had difficulty in looking after the child, coming forward and asking for an adoption order, to which the father would consent, but the justices would not be able to dispense with the consent of the mother, who might refuse it purely to annoy her husband.

In my opinion, these words mean exactly what they say and are not limited to the case of a person who is liable to contribute to the support of the child, but are intended to apply to any person whose consent ought to be given if the justices feel in all the circumstances of the case that his consent should be dispensed with. In my opinion, the case should go back to the justices with an intimation that they can dispense with the consent of the respondent if, in all the circumstances of the case, they think it ought to be dispensed with.

HUMPHREYS, J.: I am of the same opinion. I think the proviso was clearly intended to allow the justices, if they think it right in all the circumstances of the case, to dispense with any consent required by the sub-section, and, indeed, those are the opening words of the proviso. I can see no reason why one of the persons, namely, a person who has the actual custody of the infant, who comes within the words "person whose consent is required by this sub-section," should not be a person whose consent may in the discretion of the justices be dispensed with in a particular case. It is for the justices to decide whether the consent in the case of the respondent ought to be dispensed with or not.

CROOM-JOHNSON, J.: Grammatically, I should have thought there was no difficulty about this proviso. What the court is empowered to do is to dispense with the consent of any person whose consent is required under the first part of sub-s. (3) and what follows are reasons why the justices may dispense with consent. They are not obliged to. The matters mentioned are those which they may consider, and, in my judgment, the last 25 words of the proviso are words of general application giving a general reason for the justices dispensing with consent with regard to a particular person, and are not limited to applying that particular reason only in the case of a person who is liable to contribute to the support of the infant. I should have thought as a pure matter of English grammar that a different view would lead to a hopeless construction. I agree with the order proposed.

Appeal allowed with costs.

Solicitors: Gordon Gardiner, Carpenter & Co., agents for F. H. Carpenter, Brighton (for the appellant); Haslewood, Hare & Co., agents for Bosley & Co., Brighton (for the respondent).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

R. v. EDWARDS AND OTHERS, *Ex parte* JOSEPH.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Croom-Johnson, JJ.), January 20, 1947.]

Public Health—Housing—Limitation of purchase price of houses constructed under building licence—Sale of registered land at price exceeding limit—Place of sale—Jurisdiction of justices—Building Materials and Housing Act, 1945 (c. 20), ss. 7 (1), 9 (3).

A
A sale, within the meaning of the Building Materials and Housing Act, 1945, s. 7 (1), takes place where the contract is completed, and it is immaterial that the transaction requires registration at the Land Registry Office. Consequently, justices for the area in which the sale is completed, and not those in the Land Registry area, have jurisdiction to deal with a summons for contravening s. 7 (1).

[FOR THE BUILDING MATERIALS AND HOUSING ACT, 1945, ss. 7 (1) and 9, see HALSBURY'S STATUTES, Vol. 38, pp. 373, 375]

MOTION for an order of prohibition to be directed to Essex justices sitting at Becontree prohibiting them from proceeding on two summonses charging the applicant with unlawfully selling a house, constructed under the authority of a licence granted for the purpose of a Defence Regulation subject to a condition limiting the price for which the house might be sold, for a greater price than the price so limited, contrary to s. 7 of the Building Materials and Housing Act, 1945. The application was made on the ground that the sale did not take place in the area of the justices and they, accordingly, had no jurisdiction. The facts appear in the judgment of LORD GODDARD, C.J.

C. L. Henderson, K.C., and Frank Whitworth for the applicant.
Nelson, K.C., and Vernon Gattie for the respondents.

D
LORD GODDARD, C.J.: This is an application for a writ of prohibition to be addressed to the justices of Essex sitting in the Beacontree division prohibiting them from proceeding on two summonses which have been issued against the applicant charging him that he "unlawfully did sell a house, to wit, 228, Sheringham Avenue, East Ham, constructed under the authority of a licence granted for the purpose of a Defence Regulation, which said licence was granted subject to a condition limiting the price for which the house might be sold, for a greater price than the price so limited, contrary to . . . s. 7 of the Building Materials and Housing Act, 1945." It is not suggested that the applicant in this case did not commit an offence, but he has an objection to being dealt with by the justices of the Beacontree Division and says he prefers to be dealt with by the magistrate sitting at Bow Street. Those are the merits, so far as one can dignify them by the term, of this application, and it really all comes down to the question what the word "sell" means in the Building Materials and Housing Act, 1945.

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The object of that Act was to prevent people getting a licence under the Defence Regulations, which entitled them to use building materials and so forth in building a house, and also to make it a condition that they must not sell the house for more than a certain sum of money, and then, selling the house when they had built it in excess of what the licence provided. In other words, the Act is designed to stop what sometimes may be inaccurately described as profiteering in houses. If you are given a licence to build a house with a condition that you shall not sell it for not more than £1,000 and you sell it for £1,500, you commit an offence under the Act. Section 7 provides:

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H
(1) Where a house has been constructed under the authority of a licence granted for the purposes of a Defence Regulation (hereinafter referred to as "a building licence") and the licence, whether granted before or after the passing of this Act, has been granted subject to any condition limiting the price for which the house may be sold . . . any person who, during the period of four years beginning with the passing of this Act, sells or offers to sell the house for a greater price than the price so limited . . . shall be guilty of an offence.

By s. 9 (3) it is provided:

For the purposes of this Act, (a) a person sells a house if he sells or agrees to sell any interest in the house. . . .

That clearly shows that a person can commit an offence under the Act even if he

agrees to sell the house, which would mean that he has entered into a contract to sell the house but has not perfected the matter and the matter is not completed. The point that is taken in the present case is that, as this was registered land, and, therefore, the sale had to be registered and the land registration certificate issued at the Land Registry, the sale was not complete until that was done; that was done at the Land Registry in Lincoln's Inn Fields; and, therefore, the offence, if any, was committed in Lincoln's Inn Fields. In my opinion, that is not correct.

The vendor carried out the preliminary negotiations and so forth and signed the contract of sale, in the county borough of East Ham, more than 500 yards from the boundary of the Beacontree division, and any proceedings in relation to the agreement to sell would have to be taken before the stipendiary magistrate at East Ham, but the completion of the purchase, as that is understood by conveyancers and others, took place at a solicitor's office at Barking, which is in the Beacontree division. The money was paid there; the necessary documents were there put into the possession of the solicitor to enable him to send them to the Land Registry and get this transaction registered and the necessary certificate issued by the Land Registry. The sale, therefore, took place at Barking, where the money was paid and the completion took place. It seems to me that for the purposes of the Building Materials and Housing Act we are not concerned with all the nice provisions of the Land Registration Act dealing with the registration of a completed transaction. All we have to see is where the sale took place. I am satisfied that the sale took place within the meaning of this section in the office at Barking, and the Beacontree justices came to the right conclusion when they said that they had jurisdiction. There is no ground for granting this application for a rule of prohibition and the application is dismissed.

HUMPHREYS, J.: I agree.

CROOM-JOHNSON, J.: I agree, for the reasons given by my Lord.

Rule discharged with costs.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Hatten, Asplin, Jewers & Glenny*, Barking, Essex (for the applicant); *Duthie, Hart & Duthie* (for the respondents).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

FABBRI v. MORRIS

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Lewis, JJ.
December 12, 1946.)]

Highways—Wilful obstruction of footway—Business not carried on in normal manner—Selling from window of, and not inside, shop—Liability of shopkeeper—Highway Act, 1835 (c. 50), s. 72.

A shopkeeper sold ice-cream from a window of her shop, which the justices found was not the ordinary manner of conducting her business. A crowd assembled which obstructed the highway, and the shopkeeper ignored a suggestion made by the police that the sale be made within the shop.

HELD: as the obstruction could have been avoided by the shopkeeper selling the ice-cream inside the shop in the ordinary way and not through the window, the obstruction was wilful and the shopkeeper was liable.

Dwyer v. Mansfield, [1946] 2 All E.R. 247, distinguished.

[FOR S. 72 OF THE HIGHWAY ACT, 1835, see HALSBURY'S STATUTES, Vol. 9, pp. 86-89.]

Case referred to:

(1) *Dwyer and another v. Mansfield*, [1946] 2 All E.R. 247; [1946] K.B. 437; 175 L.T. 61; Digest Supp.

CASE STATED by Birkenhead justices.

The appellant sold ice-cream from the window of her shop with the result that people were attracted in considerable numbers and an obstruction of the highway was caused. A police constable drew her attention to the obstruction and suggested that she should sell inside the shop in the ordinary way. The justices found that the obstruction would have been avoided had she complied

with this suggestion and that by her failure so to do she wilfully caused an obstruction. They, therefore, convicted the appellant of wilfully obstructing the passage of the footway, contrary to s. 72 of the Highways Act, 1835. The appellant appealed.

Kennan for appellant.

H. G. Garland for respondent.

LORD GODDARD, C.J.: This is a Case Stated by the Birkenhead justices who convicted the appellant of an offence under the Highway Act, 1835, s. 72. The appellant is a manageress of shop premises which have a frontage of 30ft. consisting of two interconnected shops with a narrow recess, 27ins. deep and 9ft. wide in front of the shop window, the recess being no part of the highway. The appellant had a machine inside the shop for making ice-cream, which she sold to persons on the street, not in her shop, but through the window. No doubt, when persons were actually buying the ice-cream they were standing in the recess which is no part of the footway, but, as such an unusual commodity as ice-cream was being supplied, people who were anxious to purchase it collected in considerable numbers on the pavement and that caused an obstruction. Apparently, these people did not form a queue, but gathered round the window. Attention was called by a police constable to the fact that this obstruction was being caused by the fact that people were being supplied through the window and not in what would be the ordinary way, inside the shop, and it was suggested that the appellant should sell in the shop and open both doors so that the people could come in at one door and go out at the other. The justices, whose local knowledge is valuable in these cases, found that there was without doubt an obstruction and that it could have been avoided had the appellant sold the ice-cream inside the shop premises and not through the window.

If a person is selling in the ordinary way from a shop, he cannot be held responsible because a queue forms in the street of people anxious to go into the shop and buy. If he is carrying on business in the ordinary way, no offence is committed, as was recently pointed out by ATKINSON, J., in *Dwyer v. Mansfield* (1). In that case the shopkeeper was a greengrocer, and at the time in question he was selling potatoes of which there was a scarcity. People in the neighbourhood, learning that potatoes were for sale, "queued up," and the queue obstructed the highway because it extended in front of other shops and impeded the free passage of people into them. ATKINSON, J., held, after a review of the cases, that the shopkeeper could not be held responsible because he was carrying on his business in a normal and ordinary way. In that case the shopkeeper was selling in the shop, and I think counsel for the respondent is right in pointing out that, if it had been held that the shopkeeper could in no event be responsible, it would have been open to any shopkeeper, instead of supplying the public in his shop, to supply them on the highway. I cannot think that the mere fact that there is in the present case a small recess in front of the shop so that persons can just step into it makes any difference. The justices are of opinion, knowing, as they do, the premises and the neighbourhood, that there would not have been an obstruction if the appellant had opened the door and supplied people in the shop. That is a matter that the justices are entitled to find, and in view of that finding it seems to me that they were justified in saying that the appellant, having been informed of the crowd that was assembled and having been requested to open both doors of the shop and having failed to do so, wilfully caused an obstruction. I think, therefore, that the appeal must be dismissed.

HUMPHREYS, J.: I am of the same opinion. I would only add that, as I understand it, the decision of this court is given on the particular facts of this case.

LEWIS, J.: I agree. If the appellant had been carrying on business in a normal and proper manner there could have been no offence.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co.*, agents for *Berkson & Berkson*, Birkenhead (for appellant); *Robins, Hay & Waters*, agents for *D. P. Heath*, Birkenhead (for respondent).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

Re DICKER (deceased)

[CHANCERY DIVISION (Vaisey, J.), January 16, 17, 29, 1947.]

Will—Construction—Gift to a class of children or an only child—Illegitimate child.

By her will, dated Apr. 20, 1940, the testatrix gave legacies to various named relatives and one "to my nephew J.X." She then directed that her residuary estate (subject to a life interest in her sister Mrs. X., who predeceased her) should be divided into four equal shares. As to three of such shares no question arose, but the fourth share was given on trust to divide the capital and income thereof equally between the children of Mrs. X., living at her death if more than one, and, if only one, to that child absolutely. J.X. was the only child of Mrs. X., he being illegitimate. The evidence of what the testatrix knew of the facts went no further than to show that she was aware that J.X.'s status as the legitimate child of Mrs. X. was open to doubt.

HELD : (i) the mere description of J.X. as the nephew of the testatrix in one clause of the will would not of itself entitle him to count as a child of her sister under another clause: *Re Hall* (3) followed.

(ii) "child" in the absence of a clear controlling context or plainly rebutting circumstance means legitimate child: see *Hill v. Crook* (4); *Dorin v. Dorin* (5); *Re Pearce* (6).

(iii) the testatrix expressed an intention to benefit either (a) a class of children, or (b) an only child, and there was no ground for holding that she meant the class of children to include any illegitimate child, and, therefore, an illegitimate child could not come in as an only child, with the result that the share in question was undisposed of by the will.

But *aliter* if the gift had been to Mrs. X.'s "child" (without any mention of "children"): see *Re Eve* (7).

[AS TO INCLUSION OF ILLEGITIMATE CHILDREN, see HALSBURY, Hailsham Edn., Vol. 34, pp. 292-296, paras. 344-347; and FOR CASES, see DIGEST, Vol. 44, pp. 807-817, Nos. 6603-6685.]

Cases referred to :

(1) *Re Deloitte, Griffiths v. Deloitte*, [1926] Ch. 56; 95 L.J.Ch. 154; 135 L.T. 150; 37 Digest 149, 752.

(2) *Re Blake, Berry v. Geen*, [1938] 2 All E.R. 362; 107 L.J.Ch. 173; 54 T.L.R. 703; *sub nom.*, *Berry v. Geen*, [1938] A.C. 575; 159 L.T. 122; Digest Supp.

(3) *Re Hall, Branton v. Weightman* (1887), 35 Ch.D. 551; 56 L.J.Ch. 780; 57 L.T. 42; 44 Digest 819, 6703.

(4) *Hill v. Crook* (1873), L.R. 6 H.L. 265; 42 L.J.Ch. 702; 44 Digest 808, 6614.

(5) *Dorin v. Dorin* (1875), L.R. 7 H.L. 568; 45 L.J.Ch. 652; 33 L.T. 281; 39 J.P. 790; 44 Digest 809, 6616.

(6) *Re Pearce, Alliance Assurance Co., Ltd. v. Francis*, [1914] 1 Ch. 254; 83 L.J.Ch. 266; 110 L.T. 168; 44 Digest 810, 6627.

(7) *Re Eve, Edwards v. Burns*, [1909] 1 Ch. 796; 78 L.J.Ch. 388; 100 L.T. 874; 44 Digest 812, 6646.

ADJOURNED SUMMONS to determine whether, when the testatrix had given a specific legacy to a named nephew and her residuary estate on trust to divide the capital and income thereof equally between a class of children if more than one, and, failing one, to that one absolutely, the nephew, who was the only child of the testatrix's sister and illegitimate, could take under it.

H. A. Rose for the plaintiff.

A. J. Belsham, McMullan & Jopling for the several defendants.

Cur. adv. vult.

Jan. 29. VAISEY, J., read the following judgment. The question which I have to decide is whether the first defendant, John Edward X. (whom I will call "John X."), is entitled to the one fourth share of her residuary estate which the testatrix, Henrietta Sophia Dicker, by her will directed (in effect) to go to the children of her sister, Beatrice Harriet X. (whom I will call "Mrs. X."), equally, if more than one, or, if there should be only one such child, then to that one child absolutely.

The difficulty arises in the following circumstances. John X was born in 1900 and was the child of Mrs. X. by the man to whom she was married some three years later in South Africa. John X. does not, and, presumably, cannot, claim to have been legitimated either under English or South African

law by the subsequent marriage of his parents, because his father was at the time of his birth married to a third person. He, therefore, was and is, in fact, illegitimate. Mrs. X. never had any other child. She died on June 2, 1941, predeceasing her sister, the testatrix, whose death occurred on Apr. 28, 1943.

The testatrix was the elder of the two. She made her will on Apr. 20, 1940, she being then more than 80, and Mrs. X. being more than 77 years of age. Among other legacies to various relatives named and described as such is the following: "To my nephew John X. £300." She directed that her residuary estate, subject to a life interest in Mrs. X., who, as I have said, died before her, should be divided into four equal shares. As to three of such shares no question arises. The fourth is given, ungrammatically, on trust to divide the capital and income thereof equally between the children of Mrs. X. living at her death, if more than one, and, if only one, to that child absolutely.

The evidence which has been filed of what the testatrix knew of the facts which I have mentioned goes no further than that she was aware that John X.'s status as a legitimate child of Mrs. X. "was open to doubt," and that in conversation she would refer to him as "Beatrice's child" or as "my nephew." I am not told that she knew, or even believed, that he was Mrs. X.'s only child, and I should have had the greatest difficulty in crediting her with any such knowledge or belief in the face of the reference in her will to her sister's children or child. That reference plainly implies that she thought when she made her will that there were, or might be, two or more children of Mrs. X. then in existence, for I dismiss as absurd the suggestion that this old lady of over 80 can possibly have had in her mind the idea that her sister of over 77 might thereafter have another child, nor, in my judgment, am I thereby offending against any principle laid down in *Re Deloitte* (1), or in *Re Blake, Berry v. Geen* (2).

It is well settled that the mere description of John X. as the nephew of the testatrix in one clause of her will would not of itself entitle him to count as a child of her sister under another clause: see *Re Hall* (3). This is because the word "child," in the absence of a clear controlling context or plainly rebutting circumstance, means legitimate child: see *Hill v. Crook* (4), *Dorin v. Dorin* (5), and *Re Pearce* (6). No such context and no such circumstance is to be found here. The testatrix in the relevant clause of her will expresses her intention to benefit either (a) a class of children or (b) an only child. I can see no possible ground for holding that she meant the class of children to include any illegitimate children or child, and, therefore, I fail to see how an illegitimate child can possibly come in as an only child. If the gift had been to Mrs. X.'s "child" (without any mention of "children") the case would have been different: see *Re Eve* (7).

I confess that I should like to have found some reason for deciding this matter in John X.'s favour because I strongly suspect that the verbiage of the clause in question was introduced into it by the draftsman in conformity with the wording of the clauses relating to two of the other three fourth shares. The unnecessary allusion to children in the plural would usually have been innocuous. My suspicion may be wrong, and, in any case, I have to construe the will as it stands. If, as is probable, the testatrix was fully aware of all the facts and had intended John X. to take the share if he survived his mother, she could so easily have said so in plain terms. I am bound to declare that the share in question is undisposed of by the will of the testatrix and devolves as under her partial intestacy. The costs of all parties as between solicitor and client must be raised and paid out of the estate in due course of administration, which means, I suppose, that they will come primarily out of the said share.

Declaration accordingly.

Solicitors: *Bannister & Fache* (for plaintiff); *Fine & Hawkins*; *Church, Adams & Co.*; and *Ince & Co.* (for defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

BUCHLER v. BUCHLER

Order of LORD GREENE, M.R., at p. 20, applied. BARTHOLOMEW v. EDWARDS. [1952] 2 All E.R. 1035. L (Lord Greene, M.R., Asquith, L.J., and Vaisey, J.), 10, 11, 12, 13, 1946, January 24, 1947.]

Divorce—Desertion—Constructive desertion—Need to prove both factum and animus on part of respondent—Conduct equivalent to expulsion of other spouse—Inference of intention to end consortium—Husband's association with male servant—Persistence despite wife's threat to leave matrimonial home.

Where the desertion alleged in a petition for divorce on the ground of desertion is constructive desertion, it is important to see that the circumstances necessary to constitute that offence are present before the final step of dissolving the marriage is taken by the court. Incompatibility of temperament or unhappiness in the marital relationship which is not caused by cruelty are not by themselves grounds of divorce, nor by themselves do they entitle the spouse affected to leave the matrimonial home and then to claim that the other spouse, even if he or she is alone to blame for the ill-success of the marriage, has been guilty of the grave matrimonial offence of desertion. It is as necessary in cases of constructive desertion as it is in cases of actual desertion to prove both the *factum* and the *animus* on the part of the spouse charged with the offence of desertion. The spouse charged must be shown to have been guilty of conduct equivalent to "driving the other spouse away" from the matrimonial home and to have done so with the intention of bringing the matrimonial *consortium* to an end. In each case the intention may be inferred if the circumstances are such as to justify the inference. The acts alleged to be equivalent to an expulsion of the complaining spouse must be of such gravity and so clearly established that they can fairly be so described. If they do not satisfy this test, not only is expulsion in fact not proved, but it is not legitimate to infer an intention to desert. A man may wish that his wife would leave him, but such a wish, unless accompanied by conduct which the court can properly regard as equivalent to expulsion in fact, can have no effect whatever. Conversely, where the conduct of the required nature is established, the necessary intention is readily inferred, since no one can be heard to say that he did not intend the natural and probable consequences of his acts. The acts sufficient to satisfy this test must be of a serious and convincing nature, but conduct short of an actual matrimonial offence may be sufficient. The conduct, however, must, from the very nature of the offence of desertion, obviously be of a grave and convincing character. Whether in any given case this requirement is fulfilled is a question of fact on which a jury would require to be carefully directed.

A husband formed an association with one of his male farm-hands which, while in no way sexually improper, was persisted in by the husband to the exclusion of his wife and to such an extent as to cause her great distress and to arouse comment among friends and neighbours and villagers who would be likely to think it had a homosexual basis. The wife continually objected to the husband's conduct, and ultimately stated that she would leave the matrimonial home unless it ceased. The husband replied that, if the wife did not like it, she could "clear out," and he persisted in the association, with the result that she left him. On the wife's petition and the husband's cross-petition for divorce on the ground of desertion:—

HELD: while the husband's conduct, no doubt, caused the wife intense unhappiness and was such that no decent man would have been guilty of it, it did not justify her in treating it as a dismissal from the *consortium* and in leaving the matrimonial home.

[As to CONSTRUCTIVE DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, p. 655, para. 964; and FOR CASES, see DIGEST, Vol. 27, pp. 315, 316, Nos. 2930-2939.]

Cases referred to:

- (1) *Leng v. Leng*, [1946] 2 All E.R. 590; 175 L.T. 517; 110 J.P. 395.
- (2) *Boyd v. Boyd*, [1938] 4 All E.R. 181; 108 L.J.P. 25; 159 L.T. 522; Digest Supp.
- (3) *Sickert v. Sickert*, [1899] P. 278; 68 L.J.P. 114; 81 L.T. 495; 27 Digest 315, 2930.

APPEAL from a decision of WALLINGTON, J., dated July 5, 1946 (reported, 110 J.P. 335).

In consolidated suits the wife, who had left the matrimonial home on Oct. 7, 1942, petitioned for divorce on the ground that the husband's conduct had obliged her to leave home, and the husband in his cross-petition alleged that the wife was guilty of deserting him. WALLINGTON, J., granted a decree to the wife and rejected the prayer in the petition of the husband who appealed. The facts appear fully in the judgment of LORD GREENE, M.R.

Sir Valentine Holmes, K.C., and Harold Brown for the husband.
Beyfus, K.C., and Leslie Brooks for the wife.

Cur. adv. vult.

Jan. 24. The following judgments were read :

LORD GREENE, M.R. : In these consolidated suits in which each of the parties was asking for a decree of divorce on the ground of desertion by the other for the statutory period WALLINGTON, J., granted a decree to the wife and rejected the prayer of the husband's petition. The desertion of which the judge found the husband guilty was what is known as "constructive" desertion. The wife left the matrimonial home on Apr. 1, 1941. The circumstances relating to her departure might, as the judge thought, be treated as to some extent equivocal and, with the concurrence of both sides, he treated Oct. 7, 1942, as the crucial date, that being the date of a letter to her husband in which she said : "I have decided after a great deal of thought during a very long time now that I am not returning home." After his wife left him on Apr. 1, 1941, the husband never made any attempt to induce her to return to him and apparently had no desire even to discuss the matter. As the judge very naturally confessed, the case was one which gave him considerable anxiety and from time to time his mind wavered and fluctuated. He felt oppressed by the fact that it was the first case of the kind in the books, for he was, as he said, confronted with a set of circumstances without precedent. It is manifest, therefore, that this appeal demands, as it has received, the most careful consideration.

Now that desertion for the statutory period of three years is by itself a ground for divorce, that particular matrimonial offence has assumed a greater practical importance than it had before. Where the desertion alleged is constructive desertion, it is important to see that the circumstances necessary to constitute that offence are present before the final step of dissolving the marriage is taken by the court. It would, I venture to think, be unfortunate if under the guise of alleged constructive desertion a new cause for divorce should imperceptibly creep into our law : see the language of LORD MERRIMAN, P., in *Leng v. Leng* (1) ([1946] 2 All E.R. 590, at p. 593). Incompatibility of temperament and unhappiness in the marital relationship which is not caused by cruelty are not by themselves grounds of divorce, nor by themselves do they entitle the spouse affected to leave the matrimonial home and then to claim that the other spouse, even if he or she is alone to blame for the ill-success of the marriage, has been guilty of the grave matrimonial offence of desertion. It is as necessary in cases of constructive desertion as it is in cases of actual desertion to prove both the *factum* and the *animus* on the part of the spouse charged with the offence of desertion. The practical difference between the two cases lies in the difference in the circumstances which will constitute such proof. In actual desertion the spouse charged must be shown to have abandoned the matrimonial *consortium* in fact and to have done so with the intention of deserting. In constructive desertion the spouse charged must be shown to have been guilty of conduct equivalent to "driving the other spouse away" : *per* BUCKNILL, J., in *Boyd v. Boyd* (2) ([1938] 4 All E.R. 181, at p. 183); from the matrimonial home and to have done so with the intention of bringing the matrimonial *consortium* to an end. In each case the intention may, of course, be inferred if the circumstances are such as to justify the inference. In the case of actual desertion the mere act of one spouse in leaving the matrimonial home will in general make the inference an easy one. In the case of constructive desertion where there is no such significant act as a departure by the spouse who is alleged to be in desertion, the acts alleged to be equivalent to an expulsion of the complaining spouse must be of such gravity and so clearly established that they can fairly be so described. If they do not satisfy this test, not only is expulsion in fact not proved, but it is not legitimate to infer an intention to desert. A man may wish that his wife will leave him, but such a wish, unless accompanied by conduct which the court can properly regard as equivalent to expulsion in fact,

can have no effect whatever. Conversely, where the conduct of the required nature is established, the necessary intention is readily inferred since no one can be heard to say that he did not intend the natural and probable consequences of his acts: *Sickert v. Sickert* (3) ([1899] P. 278). The crucial matter for consideration, therefore, is the nature of the conduct relied on as equivalent to an expulsion of the complaining spouse.

A It must, I think, be accepted that the acts sufficient to satisfy this test must be of a serious and convincing nature. Counsel for the husband submitted that nothing short of a matrimonial offence such as cruelty or adultery would suffice, and he pointed out that, even in the case of adultery, some more flagrant conduct beyond the mere commission of adultery had always been present in the reported cases, but he eventually found himself compelled to agree that conduct short of an actual matrimonial offence might be sufficient. In this I agree with him, but the necessary conduct must, from the very nature of the offence of desertion, obviously be of a grave and convincing character. Whether in any given case this requirement is fulfilled is a question of fact on which a jury would require to be carefully directed. It would be for the judge to say whether the facts were capable of being regarded as equivalent to an expulsion from the matrimonial home.

C I now turn to the facts of this case. There is no suggestion of cruelty or of any other matrimonial offence. The wife's case is based entirely on the allegation that the husband's association with a man in his service, named Harris, was conducted in such a manner and with such lack of consideration for the wife's feelings as to cause her unhappiness and a sense of humiliation over a period of years. In her own words, the marriage "gradually deteriorated until there was no marriage whatsoever."

D The marriage took place on June 14, 1928. On the death of his father on Jan. 1, 1932, the husband gave up his business in London and became manager for his mother of his late father's farm near Reigate. Harris "about whom," as the judge said, "the whole of the difficulty in this married life had arisen," had been engaged by the father shortly before his death as pigman, and he continued in that employment under the husband's management. Later, he was promoted to the position of bailiff. Not long after the death of the father the husband began to form a friendship with Harris which developed into a very close and remarkable association. As the judge found, the friendship was a perfectly clean one, and there was no foundation for any suggestion that the relationship was of a homosexual or other degrading character. Before us counsel for the wife not only accepted that finding, but strenuously disclaimed having made any such suggestion at any time in the course of the case. This disclaimer, of course, I accept. He did, however, make a great point of the suggestion that people would inevitably think that the relationship between the two men was a homosexual one. The judge accepted this suggestion, and it formed one of the main grounds of his decision. One may perhaps wonder to what extent a man should allow his actions to be affected by scandalous gossip of this kind—if, indeed, it existed in the present case. The judge's view seems to have been that the husband ought to have given way to it and abandoned the friendship. There is nothing in the evidence to suggest that, at any rate on the side of the husband, this friendship was other than a genuine and deep-rooted attachment. The wife, however, ascribed the friendship on her husband's side to the fact that he was very easily flattered. As regards Harris, although the wife did throw out a suggestion that he was a "schemer" concerned only with the material benefits which the relationship conferred on him, there is no other evidence to this effect and the suggestion—surely an unworthy one in the case of a "very honest fellow"—can, I think, only be ascribed to the strong dislike which the wife felt for Harris and his association with her husband. H The friendship was, no doubt, an unusual one in the sense that the two parties to it differed so widely in regard to class and education, but to treat this circumstance as in any way affecting the sincerity of the friendship or the value which the husband attached to it is to give an entirely wrong colour to the situation. The wife regarded the friendship as "unnecessary." Things which the husband did with or for Harris were in her view "unnecessary." The judge went so far as to say that, if the husband had had any real sense of his duty to his wife, he would have given up this friendship with Harris

"which was not vital to him in any business or social sense" when he realised that it was distressing her. Some people might think this to be a strange view of friendship and might prefer to think "The friends thou hast, and their adoption tried, grapple them to thy soul with hoops of steel." Opinions on such a subject may differ, but to say that a considerate and self-sacrificing husband should give up his friend to please his wife is one thing. It is quite a different thing to treat a valued friendship as a thing to be lightly discarded because it is not vital in a business or social sense.

The husband evidently thought that his wife's objections to the friendship were unreasonable and due to snobbery, and he refused to give it up or to modify his behaviour in relation to it. His affection for her had, undoubtedly, cooled. He ceased to take the same pleasure in her company as he had taken in the early years of their marriage and I am prepared to accept the view that he deliberately refused to fall in with his wife's wishes and give up his friendship for Harris, well knowing that it distressed her. I am also satisfied that there were many respects short of giving up or weakening his friendship in which he might have acted with greater regard for his wife's feelings. He was rude and inconsiderate. He, so to speak, flaunted his liking for Harris in the face of his wife and that of the neighbourhood in a way which, to his knowledge and not unnaturally, was distressing and humiliating to her. I must not be thought to fail in appreciating the blameworthy nature of his behaviour, but it is not suggested that these defects in his conduct amounted to cruelty. The question is: Was his conduct such as to amount to turning his wife out of doors, or was it the sort of conduct, blameworthy though it was, which one spouse may, under the obligations of the married state, be called on to put up with throughout, perhaps, the whole of married life, in spite of the fact that great and continuing unhappiness is suffered? Speaking broadly, one would have thought that the risk of such things occurring is one of the risks that a man or woman takes on entering into the condition of matrimony. The legislature has not thought fit to make the continuous unhappiness of one spouse caused by the unkindness, the lack of consideration, the selfishness, or even the drunken degradation of the other spouse, a ground for obtaining a dissolution of the marriage. I say "speaking broadly" merely to emphasise the distinction which, however lacking it may be in precise definition, unquestionably exists between those actions, such as cruelty, adultery, desertion, which the legislature regards as good grounds for a dissolution, and that type of unhappiness which, however deplorable it may be, one spouse is, as the law stands, bound to endure at the hands of the other. But, as I have already said, in cases of alleged constructive desertion it is essential to examine the actual facts to see whether the conduct of the spouse who is to blame can fairly and clearly be said to have crossed the borderline which divides blameworthy conduct causing unhappiness to the other spouse from conduct equivalent to expulsion from the matrimonial home. This leads me to examine a little more closely the conduct of the spouses in relation to the friendship and its manifestations of which the wife complains.

One thing is clear from the wife's own evidence. From the earliest days before what she called the "gradual deterioration" of the marriage—and she emphasised the gradual nature of the change—could have proceeded very far, she set herself to break up the friendship which was developing between her husband and Harris. She had at one time a suspicion—some people might perhaps think it an unworthy one—that there was an improper sexual relationship between them. There can, I think, be little doubt that this suspicion, although she discarded it, did, so long as it existed, influence her attitude, and she was, no doubt, affected by her belief that people in the neighbourhood did entertain a similar suspicion. The judge, in some rather cryptic passages, expressed the view that these suspicions were current in the neighbourhood, but counsel for the wife was unable to call our attention to any passage in the evidence which could support such a view. The position of the wife, believing, as she said, that other people were saying (what she herself knew to be untrue) that her husband was guilty of an infamous crime was an extremely painful one. She can scarcely be blamed for wishing that her husband would give up a friendship which led, as she thought, to such abominable gossip, or for doing everything that she could to induce him to do so. On the other hand, the husband, knowing himself to be innocent, would not unnaturally resent the imputation (if she

told him of it as she said that she did) and it would be no more than human on his part to refuse to allow his conduct to be in any way influenced by it. It might, perhaps, be thought too much to have expected from the wife that she should stand by her husband in the face of such slanders and show by her behaviour both to her husband and to Harris that she knew that they were untrue, but the mere existence of these alleged slanders is put forward by the wife and regarded by the judge as one of the more important of the circumstances which go to build up the case that the husband was engaged in turning his wife out of doors. Although, however, this was, undoubtedly, one of the reasons which led the wife to attempt to destroy the friendship, her motives, like many human motives, were, no doubt mixed. She objected to many other things in his conduct in relation to Harris. It is difficult to eliminate altogether a certain class feeling—snobbishness is, perhaps, too hard a word—and her husband's growing preference for the society of Harris—a man of little education—must have been extremely humiliating to a woman of her upbringing, but she did, I think, fail to realise that her husband had found a real friend whose company was congenial to him. The word "unnecessary" which in her evidence she repeatedly used to describe the association, and the expression, "this man Harris," which she used more than once, appear to me to throw some light on her attitude. They seem rather out of place when used in relation to a close and genuine friendship. From her point of view they were, perhaps, just, but from the husband's point of view they could scarcely be described as apt or sympathetic.

As I have already said, the wife from the earliest days set out to break up the friendship. It was a friendship in which she was from the first clearly incapable of sharing and she not unnaturally disliked it, but her attempts to bring the friendship to an end all met with failure. Rather they seem to have produced a result opposite to that intended. The husband was clearly much annoyed at being made the subject of such a campaign—indeed, a selfish and obstinate man, as he appears to have been, might well be annoyed.

I must now turn to the circumstances on which the wife principally relies. She does not rest her case on the existence of this friendship as such, but on the fact, as she alleges, that by degrees, over a period of years, it so absorbed her husband's time and interest that she was, in effect, deprived of that association which one spouse is entitled to expect from the other. There can be no doubt that, as the friendship developed and absorbed more and more of her husband's time and interest, she suffered increasing unhappiness and felt very acutely the humiliation of seeing herself, so to speak, displaced in favour of Harris. For a woman to feel that her husband has lost interest in her company and conversation is a misfortune which calls for sympathy and pity. Such cases do, unfortunately, occur—a flagrant example is, of course, that of a husband who degrades himself with drink. The judge's findings of fact are conveniently set out in his judgment (110 J.P. 335, at pp. 337-339). Speaking generally and with certain reservations, counsel for the husband was prepared to accept them. His case was that, even if all of them are accepted, they are far from sufficient to make the husband guilty of the matrimonial offence of desertion. It cannot be disputed that, as the judge found, the reason why the wife left her husband was "her continuous and increasing objection to her husband's association with Harris," or that the husband knew of her objection. The judge also found that he must have known her attitude to be that some day he would have to choose between Harris and her. No doubt, she used expressions of this kind, but the judge appears to have taken the view not merely that the husband ought to have taken them seriously, not merely that he ought to have acceded to her wish that he should give up the friendship (a wish that the husband regarded as unreasonable), but that, by refusing to do what she asked, he was guilty of conduct which in law amounted to turning her out of doors. This view the judge supported by his finding that "on more than one occasion the husband used language of this kind: 'If you do not like it, you know what you can do. You can clear out, and go and live with your mother.' " Now, the very occasional remarks of this kind are, in my opinion and with all respect, given much too much emphasis by the judge. What was the position? The husband had formed what to him was obviously a valued and cherished friendship. His wife was objecting to it for reasons which he considered snobbish and unreason-

able and from the first conducted a carefully designed campaign to break it up. It appears to me that in all the circumstances it was to be expected that the husband would express his annoyance in some such phrase. Let me not be misunderstood. A man of refined susceptibilities would, I should hope, have done what his wife asked him, regardless of the sacrifice to himself, but we are not concerned to pass a moral judgment on the husband's conduct as a man. We are concerned, and concerned only, with the question whether his conduct amounted to desertion, and I cannot attach such weight to angry expressions of this kind as to treat them as serious invitations by the husband to his wife to leave the matrimonial home.

The judge then proceeds to find that the husband's conduct with regard to Harris was of such a character as to justify the wife's objection. If the word "justify" is intended to mean (as I think it is) that the conduct of the husband justified the wife in leaving him and thus amounted to desertion on his part it is the crux of the case and it is important to note the reasons given by the judge for taking this view. He says:

The constant association of the husband with Harris not only had the effect of depriving the wife of the full *consortium* to which she was entitled. Though this of itself would not give her any such rights as she now claims, it was accompanied by an exhibition by the husband to the rest of the farm servants, to the population of the village, and to all the friends and acquaintances of the parties, of a most unusual and unnatural friendship with one of his own servants. By unnatural I do not mean anything sexually improper. There can be no doubt—I entertain no doubt—that this association was, as I have said, the subject of general gossip and adverse comment in the village and that this fact was known to the wife and communicated by her to the husband with the result that I have already stated. I find that this friendship cast a serious social reflection on the wife, not only in itself but also because it was accompanied by a manifest private and public preference by the husband for the company and companionship of Harris to the increasing and serious exclusion of the wife. I need only pose this question to indicate what I mean. What would the friends and acquaintances, the people of the village and the country around, say if (as I am satisfied was the fact) they saw the husband always with Harris and, as time went on—not long after 1935 if not even before then—he was never to be seen about with his wife. What would they say and think? It is not for me to supply the answer.

Counsel for the wife agreed that this cryptic reference to talk in the neighbourhood was intended by the judge to mean that, in his view, people in the neighbourhood must have regarded the husband and Harris as homosexuals and was an answer to the question which the judge propounded as being important for him to decide. After saying that there was no impropriety in the association, he went on:

It does not follow that people in the village might not think this was so odd a relationship between master and servant, carried to such an extent in public and of so constant a character, that it might be due to some such quality as that. Therefore, it is not unimportant for the purpose of this case to be satisfied that there was no such quality about it, but also to be satisfied one way or the other whether its external manifestations might not give rise to that sort of idea in the mind of persons without any prurient minds at all but looking at human nature and contemplating it as one knows it as one lives.

It is, I think, clear that the existence of gossip of this kind (which the judge thinks must have existed although, as I have said, there was no real evidence of it) formed a most important factor in leading him to the conclusion that the husband had publicly humiliated his wife. I have already made some observations on the subject of the choice between giving way to and standing up to gossip and of how a wife might or might not behave in face of such atrocious gossip affecting her husband. That, no doubt, is a matter of temperament, but we are not discussing temperament. We are discussing the question whether the husband by his conduct turned his wife out of doors, and in so far as his conduct in giving ground for gossip (assuming that it did) is relied on—and it is most strongly relied on by the wife in her evidence, by the judge in his judgment, and by counsel in argument—as one of the matters justifying the wife in regarding herself as having been deserted by her husband, I find it impossible to agree. I attach very little or no importance to this aspect of the case so far as regards what we have to decide, however foolish, obstinate and inconsiderate we may reasonably consider the husband to have been.

If this unpleasant element is excluded from the judge's reasons there remains the finding that the constant association of the husband with Harris deprived the wife of the full *consortium* to which she was entitled, but this circumstance, the judge agrees, would not justify an allegation of desertion without the public exhibition of what in the passage cited he calls "a most unusual and unnatural friendship with one of his own servants," a phrase which I must admit puzzles me. It is what he calls "the social reflection" on the wife which, to the judge's mind, was the determining factor, coupled with what I have already mentioned, namely, the wife's warnings to her husband of what she would do and his retorts that she could go away if she liked. I need not go through the detailed findings about the manner of the husband's association with Harris—the holidays for which he took him in preference to his wife; his entertainment of Harris at the house "almost as one of the family when family guests were being entertained"; the frequent invitations to Harris to call at the house after dinner, both when there were and when there were not guests; the time spent with Harris in the evenings at the house, leaving the wife to entertain the guests; the evenings spent with Harris in public-houses playing darts and ping-pong and drinking; the insistence on Harris sleeping in the house (a thing which the wife, as a matter of fact, encouraged as part of her plan of campaign); taking Harris to theatres in the neighbourhood without giving his wife the opportunity of accompanying him instead of Harris; taking Harris to the motor show (he always paid two visits, taking his wife on one and Harris on the other); taking Harris to the launching of the "Queen Mary"; taking Harris on one occasion to the stalls in a London theatre, having refused to go to a theatre with his wife and others—these findings were not criticised by counsel for the husband. All these matters the judge found to have been the cause of great humiliation and distress to the wife. One finding was, however, criticised and rightly so, namely, that "as time went on—not long after 1935 if not even before then—he was never to be seen about with his wife" The judge cannot have had in mind the number of times when the husband and wife went for holidays together or the frequent occasions when they had friends or relations staying in the house.

On a careful consideration of the case and a study of the whole of the evidence I am forced to the conclusion that the facts relied on were not of sufficient gravity to justify a finding that the husband deserted his wife. That they caused her intense unhappiness I have no doubt, but they were not, in my opinion, such as to justify her in treating them as a dismissal from the *consortium* although the husband, I agree, behaved to his wife in a manner in which no decent man ought to have behaved. If I am right in this, she could not concert them into such a justification by announcing her intention of leaving her husband if he did not change his conduct. If conduct is not a justification for one spouse to leave another, it cannot be made so by threats of this kind. Moreover, if the conduct in question is in its nature insufficient, a statement that, if she did not like it she could go, even if taken at its face value, could not, in my opinion, give to that conduct the character of desertion in fact. As I indicated earlier in this judgment, constructive desertion requires both *factum* and *animus*, and an indication by the husband to the wife that she may leave him if she likes (*animus*) is not enough unless the conduct is such as to amount to an expulsion (*factum*). This is not, in my opinion, affected by the doctrine that a person must be taken to intend the probable consequences of his acts, for, if the acts are not such as to justify the wife in treating herself as expelled from the matrimonial home, no inference can be drawn from those acts of an intention to expel her. Mere wish to expel, even if it exists, without acts equivalent to expulsion is, in my opinion, insufficient to constitute constructive desertion. Accordingly, I am of opinion that the husband's appeal against the decree must be allowed. He also appeals against the judge's refusal to grant him a decree. Counsel for the wife agreed that, if the husband's conduct was not such as to justify her in treating herself as a deserted wife, she must be regarded as having deserted him and that he would be entitled to a decree. In this counsel was, in my opinion, clearly right. A decree must be granted to the husband.

ASQUITH, L.J. : I agree and will only add a few sentences. The law applicable to this case is, I feel, somewhat simpler than it has been made to appear at certain

stages of the argument. In the first place, it is common ground and a commonplace that the spouse who leaves the matrimonial roof is not necessarily the deserter. Constructively the deserter may be the party who remains behind, if that party has been guilty of conduct which justifies the other party in leaving. Secondly, to afford such justification the conduct of the party staying on need not have amounted to a matrimonial offence, such as cruelty or adultery. But, thirdly, it must exceed in gravity such behaviour, vexatious and trying though it may be, as every spouse bargains to endure when accepting the other "for better or worse." The ordinary wear and tear of conjugal life does not in itself suffice. Where the judge seems to have erred is in supposing that on the evidence before him conduct complying with this last test had been established.

It is difficult to deduce from the decided cases any principle of law by reference to which it can be determined in every case on which side of this line the case falls. To say that the petitioner must establish conduct by the respondent which has made it "practically impossible for the parties to live properly together," or which "drove the petitioner out," is to propound a criterion too vague to be very helpful. It is, I think, possible to say of certain courses of conduct that they could not amount to constructive desertion, and of certain other courses that they could not fail to do so. This would appear to be a question of law, involving, as it does, the issue whether there was any or no evidence to support the judge's conclusion. But between the extremes indicated there is obviously a no man's land where the issue is one of fact. This does not debar an appellate tribunal from disturbing the judge's findings if, in the view of that tribunal, they are plainly wrong.

What was the course of conduct on the part of the husband in this case which the judge held sufficient to justify the wife in leaving him, or, having left for other reasons, in deciding not to return? My lord has analysed it in detail and what I venture to add is purely by way of summary. First, it is said that he contracted a strange, but, admittedly, quite innocent, friendship for a farmhand in his employment, a man named Harris, belonging to what is vulgarly, but conveniently, called a different social class. Secondly, it is said that the husband preferred the company of Harris to that of his wife, that he made that preference obvious, and that this was humiliating to her. In the judgment there are nine findings of fact, relating to incidents alleged to involve neglect of and humiliation to the wife, and none of these particular findings is challenged on behalf of the husband. Thirdly, it is said, and the judge has found, that, innocent as was, in fact, the association with Harris, friends and acquaintances of the parties and the villagers (not only the prurient among them) would be likely to think it had a homosexual basis, and that it was wrong of the husband to act in a manner which was calculated to convey that impression and provoke gossip of this order however baseless. These three elements in the husband's conduct in their combination were held by the judge sufficient to justify the wife in leaving, and, accordingly, to convict the husband of constructive desertion.

I agree with the Master of the Rolls that they did not so suffice. As to the first head of complaint, association with what it is fashionable to call a social inferior is not on any view legally or morally wrong in itself and may well be a virtue in so far as it helps to break down senseless social barriers and class prejudices. If, of course, the association of two men with such different backgrounds could only be explained on the assumption of a homosexual tie, the case would be different, but that supposition is expressly disclaimed by the wife. As to the second head of complaint, the husband cannot be absolved from neglect and want of consideration for his wife, but this is a charge which thousands of spouses could prefer against each other with abundant justification, but without any hope or prospect of securing legal relief on the ground of constructive desertion or otherwise. It may, no doubt, be galling—or, in some sense of the word, humiliating—for a wife to find that the husband prefers the company of his men friends, his club, his newspaper, his games, his hobbies, or indeed his own society, to association with her, and a husband may have similar grievances regarding his wife, but this is what may be called the reasonable wear and tear of married life, and, if it were a ground for divorce, a heavy toll would be levied on the institution of matrimony. None of the cases cited in my view comes near to deciding that conduct such as that of this husband entitles the wife to

the relief claimed. Habitual drunkenness (unless accompanied with a certain degree of violence or threats of violence), persistent nagging and insult, even incest, forgiven but followed by an indecent assault on a girl of thirteen, to mention nothing else, have been held not to suffice.

A There remains the third ground of complaint—that the husband's association with Harris, however innocent in fact, must or should have been known to him to be likely to encourage gossip and the suggestion of homosexuality. No witness has, in fact, come forward to say, either that he was led by the husband's behaviour to suppose he was a homosexual or to testify to the existence of gossip to that effect. The judge is not concerned with the effect the husband's conduct actually had on local public opinion, but on the effect which, in the judge's view, it was calculated to have, but let it be assumed that this type of gossip did arise from a misconception (for it would have been misconception) of conduct in fact perfectly innocent on the part of the husband, though, perhaps, B defiantly persisted in and paraded. I entirely agree with the Master of the Rolls in feeling that this would tend to rally the average wife to the defence of her husband when he was grossly traduced rather than to impress her as a sufficient or contributory ground for leaving him. Neither singly nor in combination with the other matters complained of does this factor seem to me to establish a constructive desertion by the husband. I agree that, as the result of this appeal, the wife's petition fails and the husband's succeeds. I agree C that a decree must be granted to the husband.

VAISEY, J.: I agree. If the contest had been as to which of the two spouses had most to put up with from the other, and to which of them the unhappiness which subsisted during the latter part of their married life was chiefly due, I apprehend that we should have laid the blame on the husband, but the issue is of a different character, and what we have to decide is whether D the separation between them which began on Apr. 1, 1941 (or, at any rate, on Oct. 7, 1942) is to be attributed to a desertion on the part of the wife, by her actual abandonment of her husband and the matrimonial home, or to a notional or, as it is called, "constructive," desertion of the wife by the husband. I would only add to what my Lords have said as to the nature and limits of this doctrine of constructive desertion that the misconduct on which a case of such desertion would be founded would nowadays rarely if ever amount to a matrimonial offence, because such an offence, if it existed, would itself give the other spouse a right to relief and obviate the necessity for any application of the doctrine. E

It is clear that the husband displayed eccentricities of behaviour which were very galling and irritating to the wife. He was not, I think, ill-natured, but rather stubborn, and certainly lacking in the finer perceptions. He was simple, F perhaps rather silly, and had become somewhat bucolic in his ways and manner. As to the wife, she seems to me to be deserving of some sympathy, though her "plan of campaign" strikes me as being rather cold-blooded and it was certainly ill-contrived and futile. The question is whether the conduct or misconduct of the husband was such as to compel her to leave him, and was intended or must be presumed to have been intended to bring about that result. Or the matter may be put thus—whether, having regard to that conduct or misconduct, it was within the wife's rights and consistent with her duties as his G wife to leave him. For myself, I think that, so far from being entitled to leave him, she was under a strong positive obligation not to do so. Believing, as she did, that the eccentricities to which I have alluded had created, or were creating, in the minds of their neighbours and others the suspicion that her husband's association with the man Harris was of a criminal, or, at any rate, degrading, nature, and convinced, as she was, that the suspicion was baseless, H she took the one step that was best calculated (and she should have known it) to confirm the unjust suspicion, if it existed, and to redouble the gossip and scandal to which it must inevitably have given rise. We do not know how far the existence of the suspicion was real or imaginary, nor for this purpose does it matter. Believing, as she did, and convinced, as she was, I think it was her duty not to forsake her husband, but to protect his good name by her continued presence in the matrimonial home, and not less so because his need for her protection was, in her view at least, due to his own stupid folly and indiscretion. I should have thought that it was an elementary obligation of a wife to support

and countenance a husband accused or suspected, whether justly or not. Here the wife believed that the husband was suspected unjustly, and yet she left him.

I would acquit the wife of anything like a conscious or deliberate dereliction of her duty, and would account for what she did by her having become so obsessed with her wrongs and grievances that she persuaded herself that they justified her in taking a step which she thought would secure for her comfort and peace of mind, without reflecting at all on the probable or possible serious consequences of it to the husband. I cannot believe that he meant to expel her from their home, or that she ever thought that he meant to do so, and I cannot hold that his behaviour in their matrimonial relationship ought to be regarded as the equivalent of an actual or intended expulsion of her. I think that she found herself unable to tolerate him any longer, and so she left him, that is to say, she deserted him, with the result that he is entitled to a decree.

Appeal allowed. Decree nisi granted to husband.

Solicitors: *Mawby, Barrie & Letts* (for the husband); *Ingledeu, Brown, Bennison & Garrett* (for the wife).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

LUDDITT AND OTHERS v. GINGER COOTE AIRWAYS LTD. C

[JUDICIAL COMMITTEE OF THE PRIVY COUNCIL (Lord Macmillan, Lord Wright, Lord Porter, Lord Simonds and Lord Uthwatt), November 7, 8, 11, 12, 1946, February 5, 1947.]

Carriers—Carriage of passengers—General duty to carry with due care—Special contract excluding liability—Validity—Canadian Transport Act, 1938 (c. 53), s. 25 (1).

The liability at common law of a carrier of passengers is to carry with due care, but that general duty may be enlarged, diminished, or excluded by a special contract, e.g., a condition in the contract of carriage that the passenger travels "at his own risk against all casualties." A specific contract to carry at a reduced fare is not invalidated if the passenger is not given an option either to retain his full rights against the carrier at the higher fare or to waive them at the lower fare, nor is the position of the carrier in this respect affected by the provisions of a statute laying on him the obligation to afford "to all persons all reasonable and proper facilities for the conveyance of passenger traffic," those words referring, not to the terms of any special contract or their reasonableness, but simply to external physical and mechanical facilities.

[AS TO CARRIERS AND SPECIAL TERMS OF CONTRACT WITH THEM, see HALSBURY, Hailsham Edn., Vol. 4, pp. 71-76, paras. 108-113; and FOR CASES, see DIGEST, Vol. 8, pp. 97-105, Nos. 651-697.] F

Cases referred to:

- (1) *Readhead v. Midland Ry. Co.* (1869), L.R. 4 Q.B. 379; 38 L.J.Q.B. 169; *sub nom. Redhead v. Midland Ry. Co.*, 9 B. & S. 519; 20 L.T. 628; 8 Digest 71, 480.
- (2) *Peek v. North Staffordshire Ry. Co.* (1863), 10 H.L.C. 473; 3 New Rep. 1; 32 L.J.Q.B. 241; 8 L.T. 768; 8 Digest 57, 58, 381. G
- (3) *Grand Trunk Ry. Co. of Canada v. Robinson*, [1915] A.C. 740; 84 L.J.P.C. 194; 113 L.T. 350; 8 Digest 104, 694.
- (4) *Great Northern Ry. Co. v. L.E.P. Transport and Depository, Ltd.*, [1922] 2 K.B. 742; 91 L.J.K.B. 807; 127 L.T. 664; Digest Supp.
- (5) *Clarke v. West Ham Corpn.*, [1909] 2 K.B. 858; 79 L.J.K.B. 56; 101 L.T. 481; 73 J.P. 461; 8 Digest 7, 14.

APPEAL from a decision of the Supreme Court of Canada. H

On Nov. 29, 1940, the three plaintiffs were being carried as passengers for reward on an aeroplane operated by the respondent company which was flying from the city of Vancouver to Zeballos on Vancouver Island. During the flight the aeroplane caught fire. Owing, as was not now contested, to the negligence of the respondents' servants, each of the appellants was injured. The appellants severally brought action in the Supreme Court of British Columbia claiming damages for the injury which they had sustained. They succeeded in their

claim before the trial judge and damages were assessed under the judgment in their favour dated June 25, 1941, but that judgment was set aside by a majority of the judges of the Court of Appeal for the province of British Columbia. On an appeal from that judgment to the Supreme Court of Canada, that court in its turn by a majority affirmed the decision of the Court of Appeal. From that judgment the present appeal was brought before the Board pursuant to special leave.

- A The express contract of carriage was embodied in a single trip ticket from Vancouver to Zeballos dated Nov. 28, 1940, which was issued by the respondents to each of the appellants, the fare being 25 dollars for the carriage. Each passenger signed the ticket before a witness and the most material provision is as follows :

- B This ticket is expressly subject to the conditions below . . . In consideration of the Ginger Coote Airways, Ltd. of Vancouver, B.C., permitting me, at my own risk against all casualties, to fly as a passenger in any aircraft owned or operated by the said Ginger Coote Airways, Ltd., I hereby agree with the Ginger Coote Airways, Ltd., that such flight is and shall be at my own risk against all casualties to myself or my property and that I take all risk of every kind, no matter how caused, and I hereby release and discharge the Ginger Coote Airways, Ltd., and indemnify it of and from all actions claims and demands of every nature and kind whatsoever, which I, or my heirs, executors, administrators or assigns may now, or may or can at any time hereafter, have against the Ginger Coote Airways, Ltd., for or on account of any loss, damage or injury to me, C my person or property while so flying, and whether in or on any such aircraft or getting to or from, into or off, or in or out thereof, or in any manner in connection with or in consequence of such flight, and whether any such loss, damage or injury be caused by negligence, default or misconduct of the Ginger Coote Airways, Ltd., itself, servants, agents or members, or otherwise howsoever.

- D *Pritt, K.C., Kenneth Diplock and Paul D. Murphy* (of the Canadian Bar) appeared for the plaintiff.

Sir D. Maxwell Fyfe, K.C., H. G. Robertson and Patrick Browne for the defendant.

The Board took time for consideration.

Feb. 5. LORD WRIGHT read the following judgment of the Board.

- E There is now no dispute on the facts or as to the amount of damages. The sole question is whether an express condition contained in the ticket issued to each of the appellants which exempted the respondent company from liability is valid so as to exonerate that company from any obligation to compensate the appellants for their injuries, or whether it is illegal and void. The answer to the question depends on the express terms of the ticket, the general law, and the relevant conditions of the Canadian Transport Act, 1938, (c. 53), and the orders of the Board of Transport Commissioners established under s. 3 of the Act, which has for one of its purposes the control of contracts of this type. F

- It is not suggested that the appellants and each of them had not sufficient notice of this condition when the tickets were signed. The condition itself is clear and unambiguous. Nevertheless the judge in the first court and the dissenting judges in the Appellate Courts in Canada have held it illegal and void. Their Lordships dissent from this view and agree with the decisions of the majority of the judges in the Provincial Court of Appeal and in the Supreme Court of Canada that the condition is valid and enforceable for the reasons which they will now state. G

- It will be convenient in the first place to explain what is the general law on the subject before discussing the special legislative provisions which are relevant. The liability of a common carrier of passengers was settled by the decision of the Exchequer Chamber in 1869 in *Readhead v. Midland Ry. Co.* (1). H It was there held that the liability of a general or public or common carrier of passengers is more limited than that of a common carrier of goods. By the custom of the realm a common carrier of goods was at common law "bound to answer for the goods at all events . . . The law charges this person thus entrusted to carry goods against all events but acts of God, and of the enemies of the King" (L.R. 4 Q.B. 379, at p. 382). The carrier of passengers is not subjected to a duty so stringent. His obligation at common law, as was held in the leading case just cited, is to carry "with due care." One reason for the distinction, no doubt, is that the carrier of goods is a bailee of the goods which

he carries, whereas a carrier of passengers is not a bailee of his passengers. Both classes of carriers, however, are subject to the obligations which arise from their exercising a public profession which requires them to carry for all and sundry subject to the obvious limiting conditions.

The common carrier of goods was, nevertheless, at common law free to limit his stringent obligations by special contract. He still remained a common carrier, and was bound to carry for all according to his profession, but he could all the same insist on making his own terms and refuse to carry except on those terms, provided that there were no statutory conditions limiting his right. The classical exposition of this principle is to be found in the language of BLACKBURN, J., in advising the House of Lords in *Peck v. North Staffordshire Ry. Co.* (2). The issue in that case was as to the effect of s. 7 of the Railway and Canal Traffic Act, 1854, which imposed certain conditions on railway companies seeking by special contract to limit their liability in respect of goods which they carried as common carriers. Under these statutory conditions such contracts were only valid if they were in writing and were just and reasonable, but, apart from the Act, the general freedom possessed by carriers was unimpaired and the Act clearly had no reference to the conveyance of passengers. It was, therefore, only with reference to carriers of goods that BLACKBURN, J., observed (10 H.L.C. 473, at p. 511), that "a condition exempting the carriers wholly from liability for the neglect and default of their servants was *prima facie* unreasonable." When making that observation the learned judge was discussing the effect of s. 7 of the Act which, as already stated, contained an express enactment that the terms of the special contract should be reasonable, and it was in that connection that he went on to say that an offer to carry at a lower rate than the normal rate might be reasonable for purposes of the Act. He added (10 H.L.C. 473, at p. 511) :

For the terms of a special contract entered into by a person who has the option of employing the carrier on the terms of the contract, or on the terms of his undertaking the common law liability, are necessarily reasonable as regards the person having that option.

But this principle, stated in regard to a railway company as a carrier of goods and in regard to the operation of the Railway and Canal Traffic Act, has no bearing on the position of a carrier of passengers whose complete freedom at common law to make such contracts as he thinks fit has not been curtailed by the Act of 1854. What limitations on this freedom result from the relevant legislation for the control of the carriage of passengers by air will be examined later, but light is thrown on the common law position of carriers of passengers by the decision of this Board in *Grand Trunk Railway Company of Canada v. Robinson* (3). The main question in that case was whether a passenger carried at half fare under what was called a "livestock special contract" was bound by a term of the contract giving the carrier complete exemption from liability even when caused by the negligence of the railway company. A subsidiary question was whether the passenger who went on the train to look after a horse during the transit was bound by the special contract which his employer had made on his behalf. The subsidiary issue, which was decided against the man, is not material in this case, but the general law was stated by VISCOUNT HALDANE, L.C., delivering the judgment of the Board in the following terms ([1915] A.C. 740, at p. 747) :

There are some principles of general application which it is necessary to bear in mind in approaching the consideration of this question. If a passenger has entered a train on a mere invitation or permission from a railway company without more, and he receives injury in an accident caused by the negligence of its servants, the company is liable for damages for breach of a general duty to exercise care. Such a breach can be regarded as one either of an implied contract, or of a duty imposed by the general law, and in the latter case as in form a tort. But in either view this general duty may, subject to such statutory restrictions as exist in Canada and in England in different ways, be superseded by a specific contract, which may either enlarge, diminish, or exclude it. If the law authorises it, such a contract cannot be pronounced to be unreasonable by a court of justice. The specific contract, with its incidents either expressed or attached by law, becomes in such a case the only measure of the duties between the parties, and the plaintiff cannot by any device of form get more than the contract allows him.

Their Lordships accept this statement of general principle, and, therefore, must now consider the effect in this case of such statutory restrictions as exist in Canada in order to determine whether they qualify or supersede the exemption of liability for negligence which is clearly set out in the contract agreed to and signed by each of the appellants.

The legislative provisions to be considered are to be found in the (Dominion) Transport Act, 1938, in certain regulations made thereunder by the Board of Transport Commissioners for Canada, and in certain "schedules" containing its tariffs and regulations, which were drawn up by the respondent company under powers conferred on it by the regulations of the Board. The general effect of the Transport Act, 1938, so far as concerns matters arising in the present case, is to lay on every operator licensed to operate aircraft the obligation to afford to all persons all reasonable and proper facilities for the conveyance of passengers and goods traffic; further, to oblige operators to file "standard tariffs" of their charges, which themselves are subject to the approval of the Board; and, lastly, to empower operators to file, in addition to their standard tariffs, "special tariffs" lower than their standard tariffs. All the material provisions of these instruments have been elaborately analysed by the Chief Justice of the Supreme Court of Canada and need not be repeated in detail. It should, however, be observed that by the Transport Act the Board of Railway Commissioners for Canada as constituted under the Railway Act (R.S.C., 1927, c. 170) are designated to act as the Board of Transport Commissioners for Canada and are vested with the duties of licensing aircraft to transport passengers between various points in Canada and of approving tolls to be charged or made in connection with the transport of passengers. The respondent company had obtained and at all material times held the necessary licence permitting it to transport passengers on its aircraft between Vancouver and Zeballos.

Part IV of the Transport Act contains a code of provisions relating to traffic, tolls and tariffs to which all licensees under the Act must adhere. The provisions of this part so far as they are relevant to this appeal are to be found in ss. 16, 17, 19, 20, 21, 22, 24, 25, 26, 32 and 33. In pursuance of the powers conferred by this part of the Act, the Board of Transport Commissioners have issued two general orders (numbers 580 and 584, dated respectively Dec. 16, 1938, and Mar. 23, 1939), containing regulations:

... governing the construction and filing of air transportation tariffs.

When entering on their duties under the Act the Board were taking under their control a wide variety of existing services, and, accordingly, special attention is drawn to the "Foreword" forming part of general order 580 in which the Board announces its decision not to exercise its powers by imposing forthwith a pre-conceived plan for the detailed control of air services but to impose on the traffic arrangements of individual carriers such modifications or restrictions as experience may show to be necessary. In the third paragraph of the "Foreword," the Board laid down the following general rule as to initial tariffs or schedules:

All initial tariffs or schedules filed will be deemed to comply with the law relative to filing, unless and until they are rejected by the Board with directions to file other tariffs or schedules in lieu thereof.

The respondent company duly filed with the Board a special passenger and goods tariff incorporating by reference a tariff of rules and regulations which were drawn up by it on the same date and specified that passengers were carried only in accordance with the terms and conditions of the respondents' passenger ticket. The fare of 25 dollars paid by each appellant was that prescribed by the special passenger tariff just referred to, and some question arose whether the fare was a special or standard fare within the tariff filed. Special tariffs were defined as those specifying a toll or tolls lower than the standard tolls, but there was no evidence that any other toll than 25 dollars for the journey had been filed or that it had been approved by the Board. If, however, it was a special tariff no approval was required, and in any case their Lordships agree with the conclusion of the Supreme Court that there is no ground for holding that the provisions of the Act were not satisfied. In particular, there is no ground for holding that the fare charged and the terms of the contract, which were either actually or by sufficient reference before the Board, were not duly

approved. There was thus no reason to hold that statutory restrictions had been infringed and no reason under the statute to set aside or refuse to give effect to a specific contract which the law authorises. Such a contract cannot be pronounced unreasonable, invalid or illegal by a court of justice. The contrast between the provisions of the Canadian Transport Act and s. 7 of the English Railway and Canal Traffic Act is that, whereas the former requires an administrative decision of the Board to be complied with, the latter leaves it to the court to determine whether its provisions have been carried out. It follows in their Lordships' judgment that there is no valid reason against holding the appellants and each of them bound by their contract.

In their Lordships' opinion, the view they have expressed provides an answer to the contention so strenuously urged that, if the passenger is not given an option either to retain his full rights against the carrier at the higher fare or to waive them in whole or in part at the lower, the specific contract must be invalid. As their Lordships have pointed out, BLACKBURN, J., in *Peek's* case (2) merely said that such a contract may (not must) be invalid, and he only said that in reference to the construction of s. 7 of the Railway and Canal Traffic Act. Indeed, even if the carrier were obliged to comply with the conditions imposed by s. 7, it might be considered that a carrier of passengers by air could reasonably, if he thought fit, refuse to carry anyone save at the passenger's own risk. It does not matter for this purpose whether the carrier was a common or a general carrier. His duty to carry for all and sundry according to his profession is something different from the terms on which he so carries. A carrier of goods or of passengers may or may not be a common carrier. In the words of MAULE, J., quoted by ATKIN, L.J., in *G.N. Ry. Co. v. L.E.P. Transport and Depository, Ltd.* (4) ([1922] 2 K.B. 742, at p. 771):

I deny the truth of the position that a man who is not an insurer is therefore not a common carrier. A common carrier who gives no notice limiting his responsibility, is an insurer; but, if he gives notice that he will contract only to a limited extent, and with respect to articles of a given value, he ceases to be an insurer beyond that, though in all other respects he remains a common carrier.

In this passage MAULE, J., is speaking of carriers of goods, but the same principle is true, *mutatis mutandis*, of a carrier of passengers who in law is neither an insurer nor precluded from making a special contract with his passengers. From this aspect it is not material whether he is a common carrier or not—nor is his position altered by the terms of s. 25 (1) of the Transport Act, 1938, which require the carrier to afford to all persons and companies all reasonable and proper facilities for the receiving, forwarding and delivering of traffic, inasmuch as this provision does not in their Lordships' judgment relate to the particular terms of any special contract or their reasonableness but simply to external physical and mechanical facilities.

Finally, it may be observed that their Lordships do not regard the decision of the Court of Appeal in *Clarke v. West Ham Corporation* (5) as giving any real help or guidance in the decision of the present appeal. While they do not think it necessary to give any opinion on the correctness of much that was said in that case or of the actual decision, the judgment at least of the majority in the Court of Appeal turned largely on the construction of the statutes regulating the tramways operated by the corporation for the carriage of passengers. These statutory regulations were substantially different from those in question in this appeal. For all these reasons their Lordships will humbly advise that the appeal in their judgment fails and should be dismissed. The appellants will pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Gasquet, Metcalfe & Walton* (for the plaintiffs); *Beaumont & Son* (for the defendant).

[Reported by RICHARD PHILLIPS, ESQ., Barrister-at-Law.]

OLSEN v. MAGNESIUM CASTINGS & PRODUCTS, LTD.

[COURT OF APPEAL (Lord Greene, M.R., Bucknill and Asquith, L.JJ.), January 22, 23, 27, 28, 1947.]

Negligence—Defence—Acceptance of compensation under Workmen's Compensation Acts—Onus of proof—Workmen's Compensation Act, 1925 (c. 84), s. 29 (1).

A Where, in defence to an action by a workman claiming damages for negligence resulting in his suffering personal injury, an employer pleads under the Workmen's Compensation Act, 1925, s. 29 (1), that the workman has accepted compensation under that Act with the knowledge of his common law right to recover damages for negligence, the burden of proving those facts is on the employer.

B [AS TO ALTERNATIVE REMEDIES, see HALSBURY, Hailsham Edn., Vol. 34, pp. 961-966, paras. 1318-1325; and FOR CASES, see DIGEST, Vol. 34, pp. 490-492, Nos. 4063-4071. See also WILLIS'S WORKMEN'S COMPENSATION, 37th Edn., pp. 529-538.]

Case referred to :

(1) *Young v. Bristol Aeroplane Co., Ltd.*, [1946] 1 All E.R. 98; [1946] A.C. 163; 115 L.J.K.B. 63; 174 L.T. 39.

APPEAL from CROOM-JOHNSON, J.

C The plaintiff, a maintenance electrician employed by the defendant company, fell from a ladder while at work on the defendants' premises and was injured. He claimed damages from the defendants alleging that they had been guilty of breaches of the Electricity Regulations, 1908 (S.R. & O., 1908, No. 1312), and of their duty to provide a safe system of working or reasonably safe plant and equipment. CROOM-JOHNSON, J., held that the defendants were not guilty of the breaches alleged and that the plaintiff was guilty of contributory D negligence, and gave judgment for the defendants. The plaintiff appealed.

Beney, K.C., and *John Thompson* for the plaintiff.

Nelson, K.C., and *R. Marven Everett* for the defendants.

E LORD GREENE, M.R. : In this case the workman claimed damages from his employers in respect of an alleged breach of electricity regulations, and also at common law for an alleged breach of the employers' duty to provide a safe system of working, or, alternatively, for failure to provide a reasonably safe plant and equipment. I will get rid at once of one question that was raised, namely, whether, under s. 29 (1) of the Workmen's Compensation Act, 1925, the plaintiff workman was precluded from bringing his action by reason of the fact that he had received certain payments which purported to be workmen's compensation payments. The case in that regard is the not unfamiliar one of a F workman being invited to sign a form applying for workmen's compensation and acknowledging receipt of payments. In the past, we have had occasion to criticise that procedure on the part of employers, which, I suppose, is imposed on them by the terms of their insurance policy. We have described as not very desirable the practice of an employer offering a man in the position of a workman G compensation without telling the workman that he has, or may have, an alternative claim, and that, if he accepts workmen's compensation payments, he may be unable to prosecute his alternative claim, especially in view of the very natural ignorance of workmen of the niceties of the distinction between workmen's compensation and common law liability. The point made here is that we ought to hold on the evidence that the workman had accepted payment under the Workmen's Compensation Act, 1925, knowing that he had, or might H have, a common law right, and that, in view of that knowledge, the receipt of those payments operated as an exercise by him of the option which the sub-section gives him in accordance with the opinions of the majority of the House of Lords in *Young v. Bristol Aeroplane Co., Ltd.* (1). I can find no evidence which would justify the conclusion that the workman, when he received those payments, knew of the existence of his common law right. The facts which counsel for the employers put before us seem to me to be all consistent with the workman's having no knowledge of his common law right. He swore (and in spite of a careful and continued cross-examination on the point he stuck to his story) that he never knew about his common law right at the time when

he received the payments in compensation. The judge found it rather difficult to believe his denials of knowledge, but I must confess I do not feel any such difficulty. Perhaps, my mind is liable to be influenced by the circumstance that, in my experience, ignorance of this kind in cases which have come before this court is the commonest thing in the world among workmen, who show a surprising lack of interest in the rights which the law gives them. I find no ground for disbelieving the workman in this respect, and I do not interpret the judge's decision as involving any such disbelief. What he did say was that, even if he did not accept what the workman said, the onus of proof would still remain undischarged by the employers. I think the judge was right in taking the view that the onus of proof was on the employers. This is a statutory defence given by the sub-section, and it seems to me that, unless the employers established all the facts necessary to bring that statutory defence into operation they must necessarily fail.

[HIS LORDSHIP then dealt with the evidence and found that the system of working was not in accordance with the employers' common law duty, that the employers had been guilty of a breach of reg. 1 of the Electricity Regulations, that the workman had not been guilty of contributory negligence, and that the appeal must be allowed.]

BUCKNILL, L.J. : I agree.

ASQUITH, L.J. : I agree.

Appeal allowed.

Solicitors : *Rowley, Ashworth & Co.* (for the workman) ; *Carpenters* (for the employers).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

BULL v. VAZQUEZ AND ANOTHER

[COURT OF APPEAL (Lord Greene, M.R., Bucknill and Asquith, L.JJ.), January 22, 23, 1947.]

Libel and Slander—Slander—Statement actionable per se—Words reflecting on a man in his profession—Publication at a time when pursuing that profession—Army officer—Indefinite Parliamentary leave.

Libel and Slander—Slander—Damages—Assessment—Judge sitting without jury—Right to award heavy damages—Grounds on which Court of Appeal will interfere with award.

The plaintiff in a slander action alleged that at all material times he was a commissioned officer in the army, and that, on June 16, 1945, the second defendant spoke and published of him in relation to his office or profession as an officer in the army the following words : " Personally I do not believe he was wounded. It is my opinion he was sent home for drinking too much spirits." The defendant denied that the words were actionable *per se*.

In 1940, the plaintiff, then a member of Parliament, joined the army for the duration of the war and was commissioned a first lieutenant. After being wounded on active service he went abroad on a mission for the Ministry of Information for a year, after which he rejoined his unit. From the end of 1943 up to the time of the alleged slander in June, 1945, and later, until his demobilisation in Oct., 1945, he was continuously on indefinite Parliamentary leave, but he was subject throughout to military law and was liable at any moment to be recalled to his unit for active service. The trial judge assessed the amount of damages for slander at £1,000 which the defendant asserted was an amount fixed only as " a gesture " because the judge knew that the defendant could not pay.

HELD : (i) the words complained of were spoken of the plaintiff in the way of his profession of a commissioned officer in the army.

(ii) at the time of the alleged slander he was pursuing that profession.

(iii) the Court of Appeal would not reverse the decision of the trial judge on the amount of damages as it was not satisfied either that the judge acted on some wrong principle of law or that the amount awarded was so extremely large as to make it an entirely erroneous estimate of damage.

Per LORD GREENE, M.R. : The judgment in *Rook v. Fairrie* (2) cannot be read as suggesting that where a judge expresses in his spoken judgment his opinion of the libel, and the conduct of the person uttering it, he is thereby in some way disentitled from awarding heavy damages.

[As to STATEMENTS ACTIONABLE *per se*, see HALSBURY, Halsham Edn., Vol. 20. pp. 385-386, 412-421, paras. 460, 496-506; and FOR CASES, see DIGEST, Vol. 32, pp. 31-59, Nos. 233-866.]

A Cases referred to :

- (1) *Hopwood v. Muirson*, [1945] 1 All E.R. 453; [1945] K.B. 313; 114 L.J.K.B. 267; 172 L.T. 231; 61 T.L.R. 312; 89 Sol. Jo. 224, C.A.; Digest Supp.
- (2) *Rook v. Fairrie*, [1941] 1 All E.R. 297; [1941] 1 K.B. 507; 110 L.J.K.B. 319; 165 L.T. 23; 57 T.L.R. 297; 85 Sol. Jo. 297, C.A.; Digest Supp.
- (3) *Flint v. Lovell*, [1935] 1 K.B. 354; 104 L.J.K.B. 199; 152 L.T. 231; Digest Supp.

B APPEAL by defendant from a decision of CHARLES, J., dated April 8, 1946. The judge found that the words complained of were spoken and published by the defendant at the time alleged, and he assessed the damages at £1,000. The defendant appealed on the grounds that (1) the words complained of were not spoken of the plaintiff in relation to his profession or office as a commissioned officer in the army, and (2) the damages were fixed by the judge at a high level simply as "a gesture" because he knew that the defendant could not pay. The facts appear in the judgment of ASQUITH, L.J.

Eddy, K.C. and *J. R. Ogilvie Jones* for the defendants.
Beresford, K.C. and *L. I. Horniman* for the plaintiff.

LORD GREENE, M.R. : ASQUITH, L.J. will deliver the first judgment.

D ASQUITH, L.J. : This is an appeal against a decision of CHARLES, J., awarding the plaintiff £1,000 damages for an alleged slander.

That a slander may qualify as actionable *per se* because spoken of a man in the way of his office or profession, two separate conditions have to be fulfilled. In the first place, it must be shown that the words reflect on him as a professional man or in his office, and, in the second place, it must be shown that the slander was published at a time when he held that office or pursued that profession. So far as the first requirement is concerned, speaking for myself, I think it was abundantly satisfied. It seems to me quite unarguable that these words did not refer to the plaintiff in his character as a soldier. *Hopwood v. Muirson* (1) was cited by counsel for the defendants as supporting the contrary argument, but that was a very different case in which the act of a solicitor, which was the subject-matter of the slander, was not performed by him in his character as a solicitor at all and there was no reflection on him as being incompetent or unfit to exercise the duties of a solicitor. I, therefore, consider that case is not in point.

F Most of the argument of counsel for the defendants, however, was directed to what I have called the second requirement, that is that the plaintiff must occupy the office or pursue the profession in question at the time when the slander is published. That brings me to the facts of this case. They are not now in substance contested. The plaintiff was called to the Bar in 1928 and he became a member of Parliament in 1935 and remained in Parliament for ten years. Both before and after his election to Parliament he practised to some extent at the Bar. In 1939 he joined the colours, and was commissioned a first lieutenant and posted to the 3rd battalion of the Coldstream Guards. In Dec., 1940, he was fighting in the African Campaign and was badly wounded at Sidi Barrani. He spent seven and a half weeks in hospital, after which he had sick leave and he returned to his unit. In Jan., 1942, he was seconded to the Ministry of Information for a mission in connection with public relations to the

G Middle West of America and he was absent on that work for almost exactly a year. On returning to England in Dec., 1942, he at once rejoined his unit at the Regent's Park Barracks. During the year 1943, subject to a certain amount of Parliamentary leave in March and April, he was on duty with his unit. From the end of 1943 until the time of the slander in June, 1945, and later he was continuously on what is called indefinite Parliamentary leave. Finally, he was demobilised in Oct., 1945.

On those facts we are invited by counsel to reverse the judge's conclusion that the plaintiff was pursuing the profession of a commissioned officer in June, 1945.

Counsel does not deny that he was at that time a commissioned officer. Indeed, it is admitted on the pleadings that at all material times he was, but counsel says that, whatever may have been the case in 1940 and 1941, in June, 1945, he was not pursuing the profession of a commissioned officer. I find it difficult to apprehend this distinction. It would appear that in advancing his argument counsel has in mind that throughout 1942 the plaintiff was seconded for this work in America and that from the end of 1943 until the date of the slander he was on Parliamentary leave. This does not seem to me to involve the consequence that his profession, which in 1940 and 1941 was unquestionably that of a soldier, had changed in the interval. He had joined the colours for the duration of the war. He was subject throughout to military law. He was liable at any moment to be recalled to his unit for active service from the leave on which he had been from time to time. He might, as my Lord has pointed out, the day before this slander was uttered, have been sent to Japan on active service. Is it suggested that this slander would in that event have become actionable *per se*, not being so otherwise? This does not seem to me reasonable, nor does it seem to me to follow that because he had been for some time a member of Parliament politics were his profession to the exclusion of the profession of arms. A man may conduct several professions simultaneously. For those reasons I am unable to persuade myself that he was not pursuing the profession of a commissioned officer in the army at the time of the slander, and, if that is right, it becomes unnecessary to consider whether he was occupying an office of profit or an office at all, because, if counsel for the defendants fails *quoad* the argument relating to "profession," it avails him nothing to succeed *quoad* the argument relating to "office." If it had been necessary to decide the point I should be inclined to the view that he was at all times until his demobilisation in Oct., 1945, exercising an office and an office of profit *qua* commissioned officer in His Majesty's Army.

The only other point raised on the appeal is that of damages. It is clear that the sum of £1,000 contains a very strong punitive or exemplary element and, therefore, it is not conclusive to point out that the slander was only published to two people, neither of whom apparently believed it or acted upon it. The reason why this substantial figure was arrived at was clearly that the judge thought this a peculiarly wicked slander, and in that opinion I personally concur. The principles on which damages can be varied by an appellate tribunal have been cited from *Rook v. Fairrie* (2). That case, though directed in part to another point, expressly affirmed the principles laid down by GREER, L.J., in *Flint v. Lovell* (3), when he said that the Court of Appeal will not reverse the decision of the trial judge on the question of the amount of damages unless it is satisfied either that the judge acted on some wrong principle of law or that the amount awarded was so extremely large or so very small as to make it an entirely erroneous estimate of damage. That principle was held to be applicable to actions for libel and, therefore, also presumably for slander. I cannot see any ground for thinking that the judge acted on any wrong principle of law or that the amount, having regard to the gravity of the slander, was "so extremely large as to make it an entirely erroneous estimate." The judge speaks of awarding these damages as "a gesture" and it is suggested that that means that he only fixed the figure at this high level because he knew that the defendant could not pay, but I think he makes it clear that he assessed the damages at this high level because he thought the slander was a particularly heinous one. For these reasons I think the appeal ought to be dismissed.

BUCKNILL, L.J. : I agree.

LORD GREENE, M.R. : I entirely agree, and only wish to say one word on the subject of what was said in *Rook v. Fairrie* (2). In that case the question arose whether it was open to a judge sitting alone in assessing damages to have regard to the fact that, unlike a jury, he was able in his spoken judgment to express his opinion of the seriousness of the libel. This court held that the judge there had not misdirected himself in holding that he was entitled to take that circumstance into account. All I wish to say is that that judgment cannot be read as suggesting that where a judge expresses in his spoken judgment his opinion of the libel and the conduct of the person uttering it, he is thereby in some way disentitled from awarding heavy damages. The position, as I understand it,

is that the whole matter is at large and the judge is entitled, though not bound, to take into account what he has been able to say in his spoken judgment. In one case he may think that that is sufficient and that damages may be on the low side in consequence. In another case he may think that that is not sufficient and he may award heavy damages as well as expressing his opinion in his judgment. The case certainly cannot be taken as suggesting for a moment that once a libel action is heard by a judge alone it is not competent to him to award the damages which he would have awarded if he had not been in a position to express his opinion in words. I agree that the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors : *Cliftons* (for the defendants) ; *Pennington & Son* (for the plaintiff).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

Followed. MARSH v. MOORES. [1949]
2 All E.R. 27.

JOHN T. ELLIS, LTD. v. HINDS

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Lewis, JJ.),
January 17, 22, February 7, 1947.]

C *Street and Aerial Traffic—Motor vehicle—Insurance against third-party risks—Permitting vehicle to be used on road without a policy of insurance being in force—Exception if vehicle driven by unlicensed driver—Need for policy to cover driver's liability—Knowledge of owner—Constructive knowledge—Road Traffic Act, 1930 (c. 43), s. 35 (1).*

D A motor vehicle owned by the appellants and driven by their servant M., aged 17, collided with a motor omnibus. The appellants' vehicle was insured at the time of the accident, but M. did not hold and never had held a driving licence and, by reason of his age, was not qualified to obtain one, facts of which the appellants had no express knowledge, but which would have been disclosed by a request to M. to produce his licence and an investigation of his statement that he held a licence and had driven for other firms, one of which was named. By an exceptions clause in the appellants' insurance policy the insurance company was exempted from liability "in respect of any claim arising whilst such vehicle is . . . being driven with the general consent of the insured or of his representative by any person who to the knowledge of the insured or of such representative does not hold a licence to drive such vehicle" unless such person had held, or was not disqualified for holding or obtaining, such a licence. The appellants were convicted under s. 35 (1) of the Road Traffic Act, 1930, of unlawfully permitting the use of the vehicle on a public road when there was not in force in relation to the user of the vehicle by the person using it such a policy of insurance as complied with the requirements of pt. II of the Act.

F HELD : (i) s. 35 of the Act did not require that there should be in force a policy which covered M.'s liability (*Sutch v. Burns* (3) criticised); and, though M. was not entitled to be treated as insured under the policy, if at the material time the appellants themselves were within the cover of the policy in respect of the driving of the vehicle by M., there would be in force a policy in relation to the user of the vehicle by M., and no offence would have been committed by the appellants.

G (ii) the exceptions clause in the policy, which should be construed strictly, did not place any duty on the appellants to inquire whether a person driving the vehicle held a driving licence, so that, if they made no such inquiry and the driver, in fact, had no licence, they must be taken to have constructive knowledge of that fact. The appellants, therefore, were within the cover of the policy and no offence had been committed by them.

[FOR THE ROAD TRAFFIC ACT, 1930, s. 35, see HALSBURY'S STATUTES, Vol. 23, p. 636.]

Cases referred to :

- (1) *London General Insurance Co. v. General Marine Underwriters Assn.*, [1921] 1 K.B. 104; 89 L.J.K.B. 1245; 124 L.T. 67; 36 T.L.R. 887; 15 Asp. M.L.C. 94; 26 Com. Cas. 52; 29 Digest 167, 1237.

- (2) *London Joint Stock Bank v. Simmons*, [1892] A.C. 201; 61 L.J.Ch. 723; 66 L.T. 625; 56 J.P. 644; 41 W.R. 108; 8 T.L.R. 478; 36 Sol. Jo. 394; 6 Digest 139, 917; H.L.
- (3) *Sutch v. Burns*, [1944] 1 All E.R. 520 n.; [1944] 1 K.B. 406; 113 L.J.K.B. 407; *revsq.*, [1943] 2 All E.R. 441; Digest Supp.

CASE STATED by the Amounderness, Blackburn and Leyland Quarter Sessions who dismissed an appeal by the appellants against a conviction by a court of summary jurisdiction under the Road Traffic Act, 1930, s. 35 (1), of unlawfully permitting the use of a vehicle on a public road when there was not in force in relation to the user of the vehicle by the person using the vehicle such a policy of insurance as complied with the requirements of pt. II of the Act. The facts appear in the judgment of LORD GODDARD, C.J.

Harold Lever for the appellants.

B. L. A. O'Malley for the respondent.

Cur. adv. vult.

Feb. 7. The following judgments were read.

LORD GODDARD, C.J.: This is a Special Case stated by Amounderness, Blackburn and Leyland Quarter Sessions, who dismissed an appeal by the appellants against a conviction by a court of summary jurisdiction for unlawfully permitting the use of a certain motor vehicle on a public road when there was not in force in relation to the user of the vehicle by the person using the vehicle such a policy of insurance as complied with the requirements of the Road Traffic Act, 1930.

The facts of the case are that on June 18, 1943, a motor vehicle owned by the appellants and driven by their servant, a lad named McDonald, came into collision with a motor omnibus. This motor vehicle had been insured by the appellants with the Alliance Assurance Co. under a policy dated Oct. 8, 1942, which was current at the date of the accident. At the time of the accident McDonald was in fact under 17 years of age and did not hold and never had held a driving licence, and by reason of his age he was not qualified to obtain one. The quarter sessions found that the appellants had no express knowledge of the fact that McDonald was unlicensed or was not qualified to obtain a licence. He had told them that he held a licence, that he had already driven for several firms, including one that he named. They also held that a request to McDonald to produce his licence and an investigation of his statement would have revealed the fact that he did not hold a licence, and they found that the appellants recklessly omitted to make those enquiries. They give as their opinion (a) that McDonald was not himself entitled to be treated as insured under the policy of insurance; (b) that if at the material time the appellants themselves were within the cover of the said policy of insurance no offence would have been committed by them, even though McDonald was not entitled to be treated as insured thereunder; (c) that the appellants ought to have asked to see the licence and ought to have enquired into the truth of his statements, and, having recklessly failed to do so, must be taken to have known what such request and enquiries would have revealed, namely, that McDonald was unlicensed; (d) they further held—and this and the last preceding findings are clearly matters of law—that by reason of such knowledge on the part of the appellants they were not within the cover of the policy of insurance in respect of the circumstances of this case, and that there was not in force such a policy of insurance in relation to the circumstances of this case as complied with the requirements of pt. II of the Road Traffic Act, 1930.

With regard to findings (a) and (b), this court is of opinion that quarter sessions were right and the real question in the case, therefore, is whether at the material time the appellants were protected by an existing policy of insurance taken out in respect of the vehicle.

It was not disputed in this case that had there been an accident causing death or personal injury by negligence while the car was being driven by the servant of the company, unless the exceptions clause applied, their liability was covered by the policy, but counsel for the respondent argued that it was necessary for there to be in force a policy which would also have covered the liability of the driver. Admittedly, there was no such policy and, therefore, he contended that the appellants had not complied with s. 35 of the Act, and were guilty of an offence on that ground.

The section provides that it shall not be lawful to use or to cause or permit any other person to use a motor vehicle on the road unless there is in force in relation to the user of the vehicle by that person or that other person as the case may be such a policy of insurance as complies with the Act. It is to be observed that the section says nothing about driving; it refers to the use of the vehicle. No doubt, the owner of a car who drives himself uses the vehicle, but so he does if it is driven on his account by his servant. Where the statute deals with matters relating to driving, for instance in ss. 5, 9 and 15, it uses the word "drives." A person who rides in his car while it is being driven by someone else, or who sends his driver out with his motor vehicle on business, uses, but does not drive, the vehicle. In the latter case clearly he causes his driver to use the vehicle. If, when the owner is driving or the car is being driven by a servant on the employer's business so that the owner would come under a liability if death or personal injury is caused to a third person by the negligence of the driver, and the liability of the owner is covered by insurance, in our opinion, it is clear that there is in force in relation to the user of the vehicle whether by the owner or driver a policy of insurance. The appellants in this case were using the vehicle which was being driven by their servant. If their liability for accidents was covered, there was in force a policy in relation to the user of the vehicle by another person although that person's separate liability would not be covered. If the owner of a car who has covered his own liability by a policy lends it to a friend he will commit an offence unless either his own policy extends to cover liability incurred by the friend while driving or the friend has a policy which will indemnify him while he is driving another person's car. It is not unusual for an owner to effect a policy which covers only liability incurred either by himself alone or by himself and another named person. In such a case use of the car by any other person would not be covered by the policy.

We must now refer to the judgment of ATKINSON, J., in *Sutch v. Burns* (3) with which, with all respect, we are unable to agree. The facts of that case appear to be that a company called Convoys Ltd., owned a motor lorry which was driven by one of their men. He took a load of goods to the premises of Mono Containers Ltd. So far he was acting within his employment by Convoys Ltd. The foreman of Mono Containers, Ltd., asked him, apparently as a favour, to take some of their goods to another branch of their business and while he was doing so an accident happened. The injured person sued both Convoys, Ltd., and the driver. WROTTESELY, J., who tried that action, entered judgment against the driver and dismissed the action against Convoys, Ltd., obviously for the reason that the driver was not acting as their servant while he was doing this work for Mono Containers Ltd. ATKINSON, J., held that the underwriters ought to have granted Convoys, Ltd., a policy which would have insured their driver while he was doing this work for Mono Containers Ltd.—at least, that is how we understand the judgment. With this we cannot agree. A company which employs men to drive their vehicles must take out a policy which will cover the user of the vehicles by their servants, but only while they are being driven on their business, because, if the company's servants are driving on their own account or are using their masters' vehicles without authority, the master has neither caused nor permitted the use of the vehicles. If we understand the judgment aright it would mean that the owner of a car was bound to have a policy which would cover the liability of his chauffeur who had taken out his master's car for what is commonly called a "joy ride" and caused personal injury to a third party while so doing. If a driver, the results of whose negligence would be covered by his master's policy when driving for him, drives in circumstances which absolve the master from liability, he commits an offence against the section, but the master does not. We desire to make it clear that we differ from the judge because it seems to us clear that WROTTESELY, J., must have held that the employers of the driver were not liable because he was not driving on their business when the accident occurred. We can see no ground, therefore, on which the employers would be bound to have a policy which would have insured him (the driver) in those circumstances, since they had not permitted him to drive, and if they had, their own policy would have covered the accident.

The question whether the appellants were unable to rely on the protection of

the policy by reason of their having recklessly failed to make the enquiries referred to or require the production of the licence depends on the terms of the policy. If the insurance company would have been entitled to refuse to indemnify the appellants, the offence was committed. If they were not, no offence had been committed. The matter turns entirely on an exceptions clause in the policy. By that clause the company is exempted from liability while the vehicle is being driven with the general consent of the insured or of his representative by any person who, to the knowledge of the insured or of such representative, does not hold a licence to drive such vehicle unless such person has held and is not disqualified for holding or obtaining such a licence.

Quarter sessions have held that, in fact, the appellants had no knowledge that McDonald was not licensed. In holding that they recklessly omitted to make enquiries, I understand them to mean no more than that the court considered that they were extremely careless in not making the enquiries. If they meant more than that, it would have been the duty of quarter sessions to state it in plain terms. If a man deliberately shuts his eyes to the obvious, he has as much knowledge as if he were expressly told the fact to which he has closed his eyes, but it is quite another thing to say that because a man has means of knowledge of which he does not avail himself, therefore, he has knowledge. In matters relating to the law of negligence, where the alleged negligence depends on the state of mind or knowledge of a person, knowledge and means of knowledge may often have the same result. If a person does not know of something which it is his duty to know, and which he, therefore, ought to have known, he cannot plead his lack of knowledge, but it is fallacious to say that in all cases knowledge and means of knowledge are the same thing. It will be observed that this clause is an exception clause, and exceptions clauses always receive a strict construction. It is true that in some cases on the law of insurance relating to non-disclosure of material facts it has been held that, if an applicant for insurance ought in the ordinary course of his business to have known certain facts material to the proposed risk and ought to have known those facts before making his application, he must be treated for the purposes of disclosure as having known the facts in question, and he cannot rely on his ignorance of the facts due to the negligence of himself or his servants in the conduct of his business : see, for instance, *London General Insurance Co. v. General Marine Underwriters* (1). So, too, if an intending assured answers certain questions which it is agreed shall form the basis of the contract and gives an unqualified answer which turns out to be untrue, it is no answer for him to say : "I did not know it." That is because he has given an unqualified answer which is made the basis of the contract, and, if it is untrue, it matters not whether he could have found that out or not. The untruth is fatal though he did not know it to be untrue.

But, in my opinion, entirely different considerations arise when we are dealing with an exceptions clause. It is always for the underwriters to prove the necessary facts to establish an exception, and to escape liability on this policy they would have had to prove that the appellants knew that McDonald was unlicensed. They do not prove that by proving that, if the appellants had made some enquiries, they would have known that he was unlicensed. The exceptions clause does not, in my opinion, place any duty on the assured to make enquiries the absence of which would enable the insurers to take advantage of the exceptions clause. Of course, if the court finds, as I have already said, a wilful shutting of the eyes to the obvious, that only means that they find that, in fact, the assured did know the facts. I can find no case in which it has ever been held that an insurer could take advantage of an exceptions clause in these circumstances. It would, of course, be open to an insurer to insert in his policies a clause which would enable him to take advantage of the exception if the assured knew or might by reasonable enquiry have ascertained that the driver was not insured, but I am certainly not inclined to read into this clause any such provision. What quarter sessions have really held in this case is that the assured would be estopped as against the insurance company from denying that they knew a fact because they might have discovered it if they had made enquiries. There is nothing here to suggest that quarter sessions intended to find that the assured did not act honestly. An honest man may often believe a liar although a person equally honest, but wiser, would have made further enquiries which would

have disclosed the untruth. I am not prepared to hold that for the purpose of this exceptions clause means of knowledge is the same as knowledge. To do so would be to open the door to doctrines with regard to constructive notice being incorporated into the law of insurance.

It would, I think, be as disastrous in the case of policies as it would be in the law of negotiable instruments, and I may quote the words of LORD HERSCHELL, in *London Joint Stock Bank v. Simmons* (1) ([1892] A.C. 201, at p. 221), where he said :

A I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith. Let me say in parenthesis that with regard to bills of exchange it is expressly provided that a thing is deemed to be done in good faith where it is, in fact, honestly done, whether it is done negligently or not : Bills of Exchange Act, 1882, s. 90. LORD HERSCHELL continues :

B If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further inquiry.

C I can see nothing which would justify it being held—and quarter sessions have not held—that there was anything in this case to excite suspicion in the minds of the appellants. It is satisfactory to know that the insurance company in this case did not seek to take advantage of the exception clause because I have no doubt they recognised that it did not apply to the facts of this case. The consequence is that the appeal is allowed and the conviction is quashed. The appellants must have their costs of this appeal.

D HUMPHREYS, J. : On the first point taken by counsel for the respondent I entirely agree with the judgment of my Lord which has just been read. The driver of the motor vehicle, McDonald, was unlicensed and uninsured. He was driving the vehicle on a road, and was employed for that purpose by the appellants. In my opinion, the appellants would have had no defence to a charge under s. 4 (1) of the Road Traffic Act, 1930, of having so employed him while he was unlicensed.

E The question in this Case as stated is whether the appellants also committed an offence against s. 35 (1), in permitting him to use the vehicle on the road while he was not covered by insurance. He was, undoubtedly, one of the persons falling within the expression “persons using the vehicle on the road.” It is, I think, manifest that not everyone using such a vehicle is required to be covered by insurance. A mere passenger may be said to use the vehicle while he is being given a lift ; a person to whom the owner lends his car for the day, with the services of his driver, is one, at least, of the users of the vehicle on that day. F If the driver and owner are insured, no one would contend that the borrower in that case also requires to be covered. The reason, as I think, is that it is not any particular person who uses the vehicle who is required by s. 35 to be insured. What is required is that the user on the road by the person or persons in fact using should be covered by insurance in respect of third party risks.

G In the present case, the appellants, as the owners, had a policy which indemnified them against any liability which might be incurred by them in respect of death or bodily injury to any person arising out of the use on the road of the vehicle. The policy was, therefore, one which complied with the requirements of s. 36 (1) of the Act. The contention of counsel for the respondent is that something further is required by s. 35, namely, an insurance indemnifying the driver, McDonald. I find nothing in the section to support that contention. I think the true view of the section is that what must be covered by insurance H in respect of third party risks is the use on the road of the vehicle by the driver. On the facts stated in the Case, McDonald was driving the vehicle as the servant of the appellants, and was acting in the scope of his authority. The appellants, therefore, were plainly liable for the consequences of any negligence displayed by McDonald in the course of his driving, and no such question arises as that which ATKINSON, J., purported to decide in *Sutch v. Burns* (3). If that learned judge is to be taken as having held that in every case of a motor vehicle on the road driven by a servant of the owner, both the driver and the owner must be covered by insurance, I respectfully differ from his view. As my Lord has pointed out,

no insurer, when insuring the owner of a vehicle to be driven by servants, agrees to cover those servants when driving on their own account, or using the vehicle without authority, as was the case in *Sutch v. Burns* (3). To give effect, therefore, to the judgment of ATKINSON, J., it would be necessary to construe s. 35 as requiring every driver of such a vehicle to take out a policy of insurance in precisely the same way as he is required by s. 4 to take out a licence to drive, and I cannot agree that such is the effect of the section.

The second point seems to me to turn upon the meaning of the word "knowingly" in the exceptions clause, the words being : A

The company shall not be liable in respect of any claim arising (1) whilst such vehicle is . . . (c) being driven with the general consent of the insured or of his representative by any person who to the knowledge of the insured or such representative does not hold a licence to drive such vehicle.

And then there is an exception which is not material. The absence of express knowledge is plainly not conclusive. Knowledge may be implied from circumstances. During the argument I was much impressed by the contention of counsel for the respondent that quarter sessions had found knowledge on the part of the appellants that their servant was not insured, and they found that on evidence sufficient to support that inference from the facts. They, in fact, found that the appellants were reckless in their failure to make enquiries. I take the view that the word "reckless" means a great deal more than negligence, and in this class of case one may turn to ss. 11 and 12 of the Road Traffic Act, 1930, to see what great differences there may be to a person as the result of his either having driven a motor car negligently, that is, without due care and attention, or recklessly, since in the latter case he is liable to infinitely more serious penalties than in the former. B

That is their finding. They have not, however, found in terms that there was knowledge, and both my Lord and, as I understand, LEWIS, J. (who are far more familiar with insurance law than I am) are of opinion that the principle of the doctrine of constructive notice, which in this case might be said to be constructive knowledge, ought not to be applied to the exceptions clause in the policy. The finding that the appellants must be taken to have known would, I think, in other circumstances, be equivalent to a finding that they did know, but in this case I do not think the appellants should be convicted unless the court has made an unequivocal affirmative finding that they had the requisite knowledge. For that reason I agree with the result proposed by my Lord. C

LEWIS, J. : I have had an opportunity of considering the two judgments which have been read. I agree with them and have nothing to add. D

Appeal allowed with costs.

Solicitors : J. H. Milner & Son, agents for Arnold Lever & Co., Blackpool (for the appellants); Gibson & Weldon, agents for T. L. Child, Kirkhampton (for the respondent). E

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

Distinguished. BANNISTER v. BANNISTER. [1948] 2 All E.R. 133.

BUCK v. HOWARTH

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Lewis, JJ.), January 24, 1947.] G

Landlord and Tenant—Small tenement—Possession—Oral permission to occupy for life—Licence or tenancy—Law of Property Act, 1925 (c. 20), s. 54—Small Tenements Recovery Act, 1838 (c. 74), s. 1.

The respondent and his wife occupied a freehold dwelling-house, the property of the wife. By her will, the wife devised the house to her son, who told the respondent that he could live in the house until he died. The respondent paid no rent to the son, and the son paid the rates. By deed of gift dated Dec. 21, 1945, the son gave the property to the appellant, who likewise received no rent from the respondent and also paid the rates. In proceedings under the Small Tenements Recovery Act, 1838, s. 1, for a warrant for possession, H

Held : the respondent was given an uncertain interest in the premises and the law would presume a tenancy at will, and, therefore, proceedings to obtain possession of the property under the Act of 1838 could be taken.

[As to DISTINCTION BETWEEN LEASE AND LICENCE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 8-10, para. 5; and FOR CASES, see DIGEST, Vol. 30, pp. 501-510, Nos. 1598-1657.]

As to TERM DEFINED BY REFERENCE TO DETERMINING EVENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 148-150, para. 161; and FOR CASES, see DIGEST, Vol. 30, pp. 462-466, Nos. 1245-1292.

FOR THE LAW OF PROPERTY ACT, 1925, s. 54, see HALSBURY'S STATUTES, Vol. 15, p. 235; and FOR THE SMALL TENEMENTS RECOVERY ACT, 1838, s. 1 see *ibid*, Vol. 10, pp. 324-326.]

Cases referred to :

- (1) *Anderson v. Midland Railway Co.* (1861), 3 E. & E. 614; 30 L.J.Q.B. 94; 3 L.T. 809; 25 J.P. 405; 7 Jur. N.S. 411; 121 E.R. 573; 30 Digest 390, 537.
- (2) *Doe d. Hull v. Wood* (1845), 14 M. & W. 682; 15 L.J. Ex. 41; 6 L.T.O.S. 102; 9 Jur. 1060; 153 E.R. 649; 31 Digest 53, 2010.
- (3) *Richardson v. Langridge* (1811), 4 Taunt. 128; 128 E.R. 277; 31 Digest 36, 1825.
- (4) *Lace v. Chantler*, [1944] 1 All E.R. 305; [1944] K.B. 368; 113 L.J.K.B. 282; 170 L.T. 185; Digest Supp.

Case stated by Bury (Lancashire) Justices.

The appellant applied to the justices for a warrant for possession of a house within the Small Tenements Recovery Act, 1838, s. 1. The justices refused a warrant on the ground that the occupier had been granted a tenancy for life and the appellant appealed. The facts appear in the judgment of LORD GODDARD, C.J.

A. S. Orr for the appellant.

The respondent did not appear.

LORD GODDARD, C.J., delivered the following judgment of the court. This is a Case stated by magistrates to whom the appellant applied for a warrant for possession under the Small Tenements Recovery Act, 1838. The tenement in question was formerly owned by the wife of the respondent, and by her will she devised the property, which was freehold property, to her son, Ernest Buck. The will having been proved, Ernest Buck told the respondent that he could live in the house until he died. The respondent paid no rent to Buck and Buck has paid the rates in respect of the tenement. By deed of gift, dated Dec. 21, 1945, Buck gave the tenement to the appellant, who thus became the owner of the property. He likewise received no rent from the respondent, and he paid the rates on the house. The justices found that the respondent was a tenant for life, but that is not a finding that can be supported in law. The only question which has been troubling the court is whether the court could imply more than a licence, for, if there had been only a licence, the difficulty would have been that proceedings under the Small Tenements Recovery Act cannot be taken where the relationship of the parties is that of licensor and licensee and not landlord and tenant.

The Law of Property Act, 1925, s. 54, and *Anderson v. Midland Railway Co.* (1), seem to clear the matter up. On the facts as found by the justices the respondent was given an uncertain interest in the premises, and in those circumstances the law will presume a tenancy at will. Therefore, there is a tenancy here.

I may say that the other case to which reference should be made is *Doe d. Hull v. Wood* (2), which refers to the case of *Richardson v. Langridge* (3). In that case, PARKE, B., said (14 M. & W. 682 at p. 687) :

Richardson v. Langridge correctly lays down the law on this subject, viz., that a simple permission to occupy creates a tenancy at will, unless there are circumstances to show an intention to create a tenancy from year to year.

I think we can reverse the decision of the magistrates and order that a warrant should issue. In a case of this sort neither side really understood their rights. The case would have been much better brought in the county court, and we shall not give any costs in this appeal.

Appeal allowed.

Solicitors : Sharpe, Pritchard & Co., agents for Pickstone & King, Radcliffe, Lancashire (for the appellant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

SOCHACKI v. SAS AND ANOTHER

[KING'S BENCH DIVISION (Lord Goddard, C.J.), January 29, 30, 1947.]

Negligence—Fire—Outbreak—Lodger leaving fire in grate during absence—Doctrine in Rylands v. Fletcher—Res ipsa loquitur.

An outbreak of fire, the probable cause of which was a spark from a lodger's fire, caused damage to the house. There was no evidence of negligence on the part of the lodger.

HELD: neither the rule in *Rylands v. Fletcher* (1) nor the doctrine of *res ipsa loquitur* applied, and the lodger was not liable.

[AS TO THE RULE in *Rylands v. Fletcher*, see HALSBURY, Hailsham Edn., Vol. 24, p. 46, para. 83; and FOR CASES, see DIGEST, Vol. 36, pp. 187-189, Nos. 311-316.

AS TO *res ipsa loquitur*, see HALSBURY, Vol. 23, pp. 671-675, paras. 956-958; and FOR CASES, see DIGEST, Vol. 36, pp. 88-92, Nos. 539-607.]

Cases referred to:

- (1) *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L. affg. S.C. sub nom. *Fletcher v. Rylands* (1866), L.R. 1 Exch. 265; revsg. (1865) 3 H. & C. 774.
- (2) *Musgrove v. Pandelis*, [1919] 2 K.B. 43; 88 L.J.K.B. 915; 120 L.T. 601; 36 Digest 54, 339.
- (3) *Vaughan v. Menlove* (1837), 3 Bing. N.C. 468; 3 Hodg. 51; 4 Scott, 244; 6 L.J.P.C. 92; 36 Digest 21, 95.
- (4) *Filliter v. Phippard* (1847), 11 Q.B. 347; 17 L.J.Q.B. 89; 10 L.T.O.S. 225; 11 J.P. 903; 36 Digest 54, 334.
- (5) *Tubervill (Tubervil) v. Stamp* (1697), Holt K.B. 9; Carth. 425; Skin. 681; Comb. 459; 1 Com. 32; 1 Ld. Raym. 264; 12 Mod. Rep. 152; 1 Salk. 13; 2 Digest 66, 418.
- (6) *Grayson (H. & C.) v. Ellerman Lines, Ltd.*, [1920] A.C. 466; 89 L.J.K.B. 924; 123 L.T. 65, H.L.; affg., S.C. sub nom. *Ellerman Lines, Ltd. v. Grayson (H. & C.)*, [1919] 2 K.B. 514, C.A.; 36 Digest 116, 780.
- (7) *Job Edwards, Ltd. v. Birmingham Navigation*, [1924] 1 K.B. 341; 93 L.J.K.B. 261; 130 L.T. 522; 36 Digest 214, 575.
- (8) *Brooke v. Bove*, [1928] 2 K.B. 578; 97 L.J.K.B. 511; 139 L.T. 376; Digest Supp.
- (9) *Honeywill & Stein, Ltd. v. Larkin Bros. (London's Commercial Photographers), Ltd.*, [1934] 1 K.B. 191; 103 L.J.K.B. 74; 150 L.T. 71; Digest Supp.
- (10) *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.*, [1914] 3 K.B. 772; 83 L.J.K.B. 1352; 111 L.T. 198; 78 J.P. 305; 36 Digest 189, 315.
- (11) *Read v. J. Lyons & Co., Ltd.*, [1946] 2 All E.R. 471; 175 L.T. 413.
- (12) *Powell v. Fall* (1880), 5 Q.B.D. 597; 49 L.J.Q.B. 428; 43 L.T. 562; 45 J.P. 156; 36 Digest 431, 1501.
- (13) *Gunter v. James* (1908), 72 J.P. 448; 26 Digest 431, 1502.

ACTION for debt with counterclaim for damage caused by fire in a lodger's room. The facts appear in the judgment of LORD GODDARD, C.J.

Gallop, K.C. for the plaintiff.

B. B. Stenham for the defendants.

LORD GODDARD, C.J.: In this action, *inter alia*, the question arises whether the plaintiff is responsible for damage done to the defendants' property and nursery school business through a fire starting in the room which he occupied as a lodger in the defendants' house.

The plaintiff occupied a bed-sitting-room on the second floor of the house. He paid no rent, but in return for the board and lodging which he got, he kept the books and acted as a business adviser to the defendants. His position in law as a lodger was that of a licensee. One afternoon he went out leaving a fire burning in his room. There is no suggestion that he made his fire in any unusual way or built up any enormous fire. While he was out, a fire took place in the room, the most probable cause of which was that a spark jumped from the fire and set fire to the floorboards. There was no fire guard, and there does not seem to have been an iron fender. I say at once that I cannot find any evidence of negligence on the part of the plaintiff. The fire spread to the room next to the plaintiff's room in which there was stored a lot of furniture, which was for use in the school, and caused a considerable amount of damage.

The question which I have to determine is whether or not the plaintiff is responsible for damage caused by the fire in the absence of any evidence of negligence. In my opinion, he is not. I do not think the doctrine in *Rylands v. Fletcher* (1) applies to a case of this sort. He was using his room in the

ordinary, natural way in which the room could be used. It is not the case of a fire starting on one owner's premises and spreading to the premises of an adjoining owner. If a fire is negligently or improperly started by a person on his land, as, for instance, lighting a bonfire which spreads, he may be liable, not merely to an adjoining owner who suffers damage, but to any other person who suffers damage. If I happen to be on somebody else's land at a time when a fire spreads to that land and my motor car or property is destroyed, I have just as much right against the person who improperly allows the fire to

escape from his land as the owner of the land on which I happen to be. I do not doubt that for a moment, but here the fire was being used by a man in a fireplace in his own room. There was an ordinary, natural, proper, everyday use of a fireplace in a room. The fireplace was there to be used. The plaintiff was using it with the assent of the defendants. There is no necessity for him to show that the defendants said in so many words: "You may have a fire." They licensed him to be the occupier of a room at a time when it was natural and proper for a man to have a fire. If a person goes into lodgings where the landlady provides a fireplace, and he uses it for a fire in a proper way, the landlady, in my opinion, has no claim against that person if a fire happens to take place in his room unless there is negligence on his part. The consequence of holding otherwise would certainly be remarkable, because it seems to me that, if I gave effect to counsel's argument, it would follow that, if a man living in a house lit a fire in his room, and, owing to the construction of the fireplace or some defect in a fire-brick, a fire took place, he would be responsible, because, it is said, if one lights the fire, one is responsible for keeping the fire in. I do not think that is the law. If a person living in a house does no more than light a fire in a fireplace, and through some unhappy accident a fire occurs, he is certainly not liable under *Rylands v. Fletcher* (1), a very hard-worked case, which the House of Lords said recently should not be extended. Therefore, in the absence of evidence of negligence, there is no ground for holding the plaintiff liable on the counterclaim.

Counsel for the defendants argued that I am bound to apply the doctrine of *res ipsa loquitur*, but I do not think this is a case of *res ipsa loquitur*. Everybody knows fires occur through accidents which happen without negligence on anybody's part. There is nothing here to show that the plaintiff left any improper fire in his room, any larger fire than usual, a fire which was too large for the grate, or anything like that. There was a fire burning in his room. He left his room for two or three hours. I do not consider that the doctrine of *res ipsa loquitur* could possibly apply to a case such as this. I come to the conclusion here that there is no evidence of negligence against the plaintiff in this case, and without evidence of negligence there is no liability on the plaintiff for the fire. Consequently, there will be judgment for the plaintiff against both defendants, with costs.

Judgment for plaintiff.

Solicitors: *H. Davis & Co.* (for the plaintiff); *Booth & Blackwell* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re MIDDLETON'S SETTLEMENT, COTTESLOE v. H.M. ATTORNEY-GENERAL.

[CHANCERY DIVISION (Roxburgh, J.), January 27, 28, 1947.]

Estate Duty—Sale of land situated in Ireland and arising out of strict settlement—Investment of proceeds in United Kingdom—Whether investments "situate out of United Kingdom."—*Finance Act, 1894* (c. 30), s. 2 (2).

The proceeds of the sale of land situated in Ireland and arising under a strict settlement were invested in the United Kingdom, and on the death of the settlor estate duty was claimed in respect of such investments.

HELD: the investments were not property situated out of the United Kingdom within the meaning of the *Finance Act, 1894*, s. 2 (2), but were liable to estate duty.

[AS TO DUTIES ON FOREIGN PROPERTY, see HALSBURY, Hailsham Edn., Vol. 13: pp. 246-248; and FOR CASES, see DIGEST, Vol. 21, p. 17, Nos. 89-96.]

Cases referred to :

(1) *Re Stoughton*, [1941] Irish Reports 166.

(2) *Re MacKenzie*, [1940] 4 All E.R. 310; [1941] Ch. 69; 110 L.J. Ch. 28; 164 L.T. 375; 57 T.L.R. 107; 84 Sol. Jo. 670; Digest Supp.

ADJOURNED SUMMONS to determine whether estate duty was payable upon certain capital moneys invested in the United Kingdom, being the proceeds of a sale of lands in Eire under a strict settlement.

N. C. Armitage for the trustees.

J. H. Stamp for the Attorney-General.

Denys B. Buckley for the tenant for life.

A

ROXBURGH, J. : The short, but important, question which I have to decide in this case is whether capital moneys invested in the United Kingdom, being the proceeds of sale of land in Ireland and arising under a strict settlement, are situate out of the United Kingdom within the meaning of s. 2 (2) of the Finance Act, 1894, because they are capital moneys arising under a strict settlement of Irish land. The sub-section provides :

B

Property passing on the death of the deceased when situate out of the United Kingdom shall be included only, if, under the law in force before the passing of this Act, legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes.

Looking at the sub-section without regard to any other consideration, it is difficult to see how such investments could be said to be situate out of the United Kingdom, because the plain fact is that they are not, and the Act does not say "situate or deemed to be situate" or anything of that sort, but, of course, there is the well-known provision with regard to capital moneys arising in such circumstances which I will read, for a reason which will presently appear not from the present Settled Land Act but from s. 22 (5) of the Settled Land Act, 1882 :

C

Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

D

A converse case to the present arose in Ireland and is the subject-matter of a decision, *Re Stoughton* (1). In that case a testator died in England on Dec. 6, 1885. By his will, dated Nov. 6, 1868, he left all his lands in England, Wales and Ireland to trustees in trust for various persons. The domicile of the testator both at the date of the will and at the date of his death was English; the will was prepared by English solicitors and the trustees and beneficiaries resided in England. The testator's wife died on June 19, 1924, but some years prior to her death she, as tenant for life under the Settled Land Acts, sold the land in Ireland under the Land Acts to the occupying tenants. Part of the proceeds of sale amounting to £36,076 was invested by the trustees in securities in England; the balance was invested in land in England. On the death of the testator's nephew in 1936, the revenue commissioners claimed that estate duty was payable on these securities.

E

For the most part that case turns upon matters which are not relevant to the matter which I have to decide today, but there is no doubt that one ground of the decision is relevant. Towards the end of his judgment HANNA, J., first of all held that the Settled Land Act of 1882 was an Irish Act. He then read s. 22 (5), which I have already read. He then read s. 16 (1) (d) of the Irish Land Act, and about that he said this : ([1941] I.R. 166 at p. 181)

F

the provisions of s. 16, sub-s. 1 (d), secure that all claims as from the date of the vesting order as against the land, shall attach to the purchase money in like manner as immediately before the date of the order they attached to the land.

G

He then continued as follows :

H

I am of opinion that the effect of these sections is to give a complete answer to the argument of the petitioners and to establish not only that the English securities are notional Irish land but that the claim of the Revenue Commissioners to have the estate duty charged upon the proceeds falls upon them. The succession of William Anthony Stoughton was, in my opinion, a "devolution" within the meaning of the words in s. 22, sub-s. (5) of the Settled Land Act, 1882, under the will, and also one of a series of successions made by the "disposition" thereunder. This brings the

securities within one or other, or both, of the words in s. 22, sub-s. (5) of the Settled Land Act. These words cannot refer to the barest legal meaning to be applied to the terms and would, in my opinion, carry with them the legal incidents or obligations such as estate duty attached thereto by statute or otherwise.

Mr. Buckley concedes that no English Settled Land Act can be applicable to the present case in present circumstances; but his argument is that I must have regard to the Irish settled land legislation, and that, having regard to that legislation and to this judgment, I must hold that, contrary to all appearances, the investments in question, which are in fact in England, are in the eye of the revenue law property situate outside the United Kingdom.

The *ratio decidendi* of *Re Stoughton* (1) causes me no little difficulty, but I do not think that I need pursue that question further, because I feel bound to accept Mr. Stamp's submission in reply. Mr. Stamp's submission is this, that the meaning of s. 2 (2) of the Finance Act, 1894, as applied to the present case is quite plain, and that I am not entitled to control that meaning by any statute which is not an English statute, and I cannot see the answer to that point.

Moreover, I have found assistance in a judgment of MORTON, J., in *Re MacKenzie* (2). The legislation which he had to consider was different, but in his judgment he said, ([1941] Ch. 69, at p. 72):

The property being situate in this country, I should have had to find, in some other Act, clear words transposing notionally its position to enable me to hold that it escaped the taxation which is levied by the Finance Act, 1894, s. 2.

By "some other Act" I think he means some other English Act.

In my judgment, in the present case, so far from there being any English Act which in clear words notionally transposes the position of these investments, there is no other English Act applicable at all; and even if, contrary to my judgment, and I think to Mr. Buckley's admission, I had got to construe s. 22 (5) of the Settled Land Act, 1882, I should have very great difficulty in holding that by clear words it notionally transposes the position of the investments in question, being capital moneys, for the purposes of estate duty. Accordingly, in my judgment, the claim of the Crown succeeds.

Solicitors: *Warrens* (for the trustees and the tenant for life); *Solicitor of the Inland Revenue* (for the Attorney-General).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

claim of DENNING, J., at p. 348,
MINISTER OF PENSIONS
HIGHAM. [1948] 1 All E.R. 863.

STAYNINGS v. MINISTER OF PENSIONS

[KING'S BENCH DIVISION (Denning, J.), January 23, 1947.]

Royal Forces—Pension—Mercantile marine—War injury—Abnormal conditions on board ship—Service in cable ship on Iceland station—Complaint of tinned food and bad living conditions—Pensions (Mercantile Marine) Act, 1942, (c. 26) s. 1 (2) (d).

The appellant served in a cable ship during the war and eventually suffered from duodenitis. Between Oct., 1942, and Oct., 1943, the ship was based on Iceland, and the appellant claimed that his illness was caused by the climatic and other conditions under which he worked during that period. He alleged that his quarters were bad, and that his diet consisted mostly of tinned food and there were no fresh vegetables.

HELD: the appellant's condition was not "attributable to... the existence on board ship of any... conditions arising out of [the] war... which would be abnormal in time of peace," within s. 1 (2) (d) of the Pensions (Mercantile Marine) Act, 1942, and, therefore, he was not suffering from a "war injury" entitling him to a pension.

[FOR THE PENSIONS (MERCANTILE MARINE) ACT, 1942, s. 1, see HALSBURY'S STATUTES, Vol. 35, pp. 317-318; and FOR THE WAR PENSIONS (NAVAL AUXILIARY PERSONNEL) SCHEME (S. R. & O., 1944, No. 499) see BUTTERWORTH'S EMERGENCY LEGISLATION SERVICE, title Pensions [31]]

Case referred to:

(1) *Re Saffell*, [1945] 1 All E.R. 321; [1945] K.B. 259; 114 L.J.K.B. 513; 172 L.T. 183; 61 T.L.R. 208; Digest Supp.

APPEAL from a decision of a pensions appeal tribunal dismissing the appellant's claim for a pension under s. 1 (2) (d) of the Pensions (Mercantile Marine) Act, 1942. The facts appear in the judgment.

C. H. Crispin for the appellant.

Stephen Chapman for the respondent.

DENNING, J.: The appellant who was serving during the war in a cable ship and eventually suffered from stomach trouble, claims a pension under the Scheme in favour of naval auxiliary personnel, (S.R. & O., 1944, No. 499). He says that the ship was based on Iceland for a year from October, 1942, to October, 1943, and it was because of the conditions there that he suffered with this stomach trouble. The Minister and the tribunal have rejected the claim, and he appeals to me.

Questions of law arise over the interpretation of the Act and Scheme relevant to the matter. It is material to trace the history. At the beginning of the war in 1939 an Act was passed giving merchant sailors and naval auxiliary personnel pensions in respect of "war injuries," which were physical injuries caused by enemy action or the like. Other injuries suffered by merchant seamen and naval auxiliary personnel were left to be dealt with under the Workmen's Compensation Acts. In 1942, however, the Pensions (Mercantile Marine) Act was passed, which extended the pensions payable by the government to "war risk injuries," which were defined by s. 1 (2) of that Act. They include physical injuries attributable to a number of defined war perils, which are specified in paras. (a), (b) and (c) of s. 1 (2), and include perils due to sailing in convoy, to the absence of lights at sea, or to cargo being loaded above the Plimsoll line, and then para. (d) provides for injuries attributable to:

... the existence on board ship of any other conditions arising out of [the] war ... which would be abnormal in time of peace.

The injuries covered include "tuberculosis and any other organic disease:" see s. 5. If they are attributable to the specified causes, they are subject to rights of pension, but other injuries such as, for instance, falling down a ladder on board ship, are still left to be dealt with under the Workmen's Compensation Acts. Section 1 (3) provides that the injury is to be treated as attributable to those causes only if they "substantially increased the risk of the peril occurring which caused the injury." For instance, sailing in convoy might substantially increase the risk of collision, and so would the absence of lights, while the carrying of excessive cargo might substantially increase the risk of stranding. If an injury was caused by that increased risk, the man was entitled to a pension but not otherwise. If, for instance, a ship was overloaded owing to war conditions and an injury occurred not due to that overloading but to bad navigation, the man's claim would be a matter for proceedings under the Workmen's Compensation Acts.

The question I have to determine is: What is the meaning of the words, "the existence on board ship of any other conditions arising out of [the] war ... which would be abnormal in time of peace." In construing that paragraph I look to the other paragraphs in s. 1 (2) because those words: "any other conditions" warrant me in so doing. I also have regard to the words: "on board ship" and "abnormal in time of peace." On the proper construction of this enactment I am of opinion that the fact that a ship goes into northern waters or other waters where there are bad climatic conditions, or goes on a long voyage, or is out for a long period of time from home, or is subjected to gales or severe weather of any kind, is not an existence on board ship of conditions which would be abnormal in times of peace. Nor, indeed, the fact that the men have to work very hard or for long hours. In such respects there is no norm. A sailor is subjected to rigours and hardships as part of his normal life in times of peace. What is covered by para. (d) is something *ejusdem generis* with the preceding paragraphs such as alterations in the physical conditions existing on board ship. For example, in *Re Saffell* (1), there was on board ship a closer atmosphere from fuel oil in the engine room than would be normal in time of peace, exactly as the blacking out of port holes or shutting out air or such like conditions in the ship would not be normal in time of peace.

In the present case the question is whether the conditions come within the

test I have mentioned. The commanding officer in his report said this :

During the whole of this period [i.e., the Iceland period] the ship was never involved in any incident in respect of damage by enemy action, nor any near misses, but very heavy storms were encountered in Iceland. War time conditions are at all times more exacting, especially in a cable ship. Conditions in Iceland were grim, but food and good food was plentiful. The ship for nearly twelve months was almost completely devoid of minor ailments and sickness of any kind. The full crew that left England in the ship returned to England in the ship without exception. Every man was far healthier

A

than when he left England. I have no record, nor can I remember at any time of this rating complaining of stomach trouble.

Taking what he says there, "heavy storms were encountered in Iceland," but that is not a condition which comes within the paragraph. "Conditions in Iceland were grim." No doubt, conditions in that climate would be grim, but that does not come within the paragraph. It is not a condition on board ship ; it is the sort of condition which a merchant sailor encounters in the course of his employment. Then : "War time conditions are at all times more exacting, especially in a cable ship." As I understand it, he is saying there that in war time the general conditions, such as the time the ship is at sea, the amount of work to be done, and so forth, are more exacting, but not that there is any condition on board the ship itself arising out of the war which could be said to be abnormal.

B

C

The appellant's case is that he was :

serving in the cable ship under extreme conditions, mostly tinned food, extremely bad living quarters. There was secondary heating, one Valor stove per six men, while the ship was periodically under repairs. While serving all this period in Iceland, fresh vegetables nil.

Taking the last sentence : "While serving all this period in Iceland, fresh vegetables nil," that is not one of the conditions on board ship. It is a condition in Iceland. In any case tinned food and absence of fresh vegetables is the sort of condition which arises in time of peace with sailors who are on voyages in certain parts of the world. "Extremely bad living quarters." That may be, but it does not mean that they were abnormal in time of peace. In some ships there are bad living quarters in time of peace. The tribunal found as a fact that the conditions on board ship were not such as could be considered abnormal in time of peace and I see no ground for saying they were wrong in law.

D

E

It seems to me that, applying the test I have mentioned, this is not a case which comes within the provision of s. 1 (2) (d). It is a case in which a man suffered from a disease, it may be owing to the fact that the voyage took him to Iceland, it may be owing to the conditions in Iceland being grim, but none of those was the existence "on board ship" of conditions arising out of the war which would be abnormal in time of peace. The claim fails on that ground.

F

Appeal dismissed.

Solicitors : *Culross & Trelawny* (for the appellant) ; *Treasury Solicitor* (for the Minister).

[*Reported by W. J. ALDERMAN, ESQ, Barrister-at-Law.*]

*tinguished. Re VISCOUNT GALWAY'S
L TRUSTS. [1949] 2 All E.R. 419.*

G

Re HARVEY, PUBLIC TRUSTEE v. HOSKIN AND OTHERS

[CHANCERY DIVISION (Vaisey, J.), January 23, 29, 1947.]

Wills—Ademption—Gift of undivided shares in land—Will made in 1912—Statutory trusts imposed in 1926—Conversion of undivided shares into personally—Codicil made in 1927, containing reference to will but not to gift—Law of Property Act, 1925 (c. 20), s. 35, sched. I, pt. IV, para 1.

H

By his will, made in 1912, the testator gave all his "parts or shares" in certain estates to his trustee on trust for one of his daughters for life with remainder to her issue. At the date of the will, the testator was entitled to undivided shares in the estates in question. By the Law of Property Act, 1925, sched. I, pt. IV, para. 1, the statutory trusts declared by s. 35 were imposed on undivided shares in land, and on Jan. 1, 1926, those shares were converted into personal property. The testator, who died in 1929, made a codicil to his will in 1927 which was described as a "further codicil" to the will of 1912, but which merely placed on record the cancellation and

destruction of an earlier codicil and contained no reference to the contents of the will. This codicil was admitted to probate with the testator's other testamentary documents. The question to be determined was whether the gift of the undivided shares in land had been adeemed by the imposition of the statutory trusts:—

HELD: since the codicil made in 1927 (*i.e.*, after the imposition of the statutory trusts) expressly referred to the will, the will had been sufficiently republished thereby so as to preclude ademption: *Re Warren, Warren v. Warren* (9) followed; *Re Newman, Slater v. Newman* (8) distinguished. The absence of any express confirmation of the will was immaterial: *Re Hardyman, Teesdale v. McClintock* (15) applied.

[AS TO UNDIVIDED SHARES, see HALSBURY, Hailsham Edn., Vol. 27, pp. 629-632, paras. 1104-1106; and FOR CASES, see DIGEST, Supplement, Equity, Nos. 817A-817C. AS TO ADEPTION, see HALSBURY, Hailsham Edn., Vol. 34, pp. 127-129, para. 164; and FOR CASES, see DIGEST, Vol. 44, pp. 403-405, Nos. 2355-2372.]

Cases referred to:

- (1) *A.-G. v. Public Trustee and Tuck*, [1929] 2 K.B. 77; 98 L.J.K.B. 462; 141 L.T. 398; Digest Supp.
- (2) *Re Mellish, Clark v. Buchannan* (1927), cited in [1929] 2 K.B. at p. 82, n.; Digest Supp.
- (3) *Re Wheeler, Jameson v. Cotter*, [1929] 2 K.B. 81, n.; 141 L.T. 322; Digest Supp.
- (4) *Re Price*, [1928] Ch. 579; 97 L.J.Ch. 423; 139 L.T. 339; Digest Supp.
- (5) *Richards v. A.-G. of Jamaica* (1848), 6 Moo. P.C.C. 381; 42 Digest 782, 2114.
- (6) *Frewen v. Frewen* (1875), 10 Ch. App. 610; 33 L.T. 43; 44 Digest 404, 2367.
- (7) *Re Kempthorne, Charles v. Kempthorne*, [1930] 1 Ch. 268; 99 L.J.Ch. 107; 142 L.T. 111; Digest Supp.
- (8) *Re Newman, Slater v. Newman*, [1930] 2 Ch. 409; 99 L.J.Ch. 427; 143 L.T. 676; Digest Supp.
- (9) *Re Warren, Warren v. Warren*, [1932] 1 Ch. 42; 101 L.J.Ch. 85; 146 L.T. 224; Digest Supp.
- (10) *Pows v. Mansfield* (1837), 3 My. & Cr. 359; 7 L.J.Ch. 9; 44 Digest 379, 2133.
- (11) *Oakes v. Oakes* (1852), 9 Hare 666; 44 Digest 413, 2438.
- (12) *Re Slater, Slater v. Slater*, [1907] 1 Ch. 665; 76 L.J.Ch. 472; 97 L.T. 74; 44 Digest 405, 2378.
- (13) *Re Smith, Bilke v. Roper* (1890), 45 Ch.D. 632; 60 L.J.Ch. 57; 63 L.T. 448; 44 Digest 370, 2042.
- (14) *Berkeley (Countess) v. R. G. W. Berkeley*, [1946] 2 All E.R. 154; [1946] A.C. 555; 115 L.J.Ch. 281; 175 L.T. 153.
- (15) *Re Hardyman, Teesdale v. McClintock*, [1925] Ch. 287; 94 L.J.Ch. 204; 133 L.T. 175; 44 Digest 385, 2196.

ADJOURNED SUMMONS to determine whether a gift in a will made in 1912 of undivided shares in land had been adeemed by the conversion of the undivided shares into personalty by the Law of Property Act, 1925, s. 35, and sched. I, pt. IV, para. 1. The testator, who died in 1929, made a codicil in 1927, described as a codicil to the will of 1912 but containing no reference to the gift in question. The facts appear in the judgment.

C. V. Rawlence for the Public Trustee.

J. Pennycuik for the first three defendants.

A. J. Belsham for the remaining defendants.

Cur. adv. vult.

Jan. 29. VAISEY, J., read the following judgment. In this case, the testator, Samuel Harvey, made his will on Nov. 7, 1912, and thereby disposed of some undivided shares in real estate. The question which I have to decide is whether the disposition was invalidated and the gift adeemed by operation of law, that is to say, by the coming into force of the Law of Property Act, 1925, in his lifetime. He died on Mar. 30, 1929. He had made five codicils to his will, of which four were admitted to probate, the fifth (being the second in order of date) having been revoked, as I will presently mention. The first codicil is dated Oct. 7, 1919, and contains an express confirmation of his will. All that I know of the second is that it was dated Jan. 9, 1922, made some provision for a servant of the testator, and was cancelled and destroyed by him with the intention of thereby revoking it when she left his service. The third codicil is dated June 15, 1922, and confirmed the will and two preceding codicils. The fourth codicil is dated June 17, 1924, and contains no express confirmation of the will or any preceding codicil. The fifth and last codicil was made after the

Law of Property Act, 1925, came into force, being dated Jan. 15, 1927. It contains no disposition of any kind, nor does it confirm any preceding testamentary document, but merely places on record the cancellation and destruction of the second codicil, in order, no doubt, to obviate any difficulty that might arise from the allusion to it in the third codicil. It is described as a "further codicil" to the will, the date of which it mentions.

- I now turn to the will. After appointing the Public Trustee to be the sole
A executor and trustee thereof, the testator, among other dispositions, devised Sea View House, in which he resided, upon trust for his wife (who, in fact, predeceased him) for her life, and after her death for one of his daughters, whom I will call Miss Harvey, for her life, and after the death of the survivor of them upon the trust thereafter declared with respect to the hereditaments therein after devised for the benefit of another daughter of his, whom I will call Mrs. Hoskin, and her issue. The testator then gave, devised and bequeathed unto
B his trustee a sum of £2,000 local loans stock or an equivalent in money, and also his live and dead farm stock on his farms in the parish of Sancreed, Cornwall, and also, quoting the words of the will, "all my parts or shares in the estates or farms of Derval Chegwiddden Vean and Ennismanen and all other my lands in the said parish of Sancreed," and also, after the death of the survivor of his wife and Miss Harvey, the Sea View property upon trust for sale and investment of the proceeds. He then directed his trustee to hold his said estates and lands
C or "parts or shares of estates and lands" at Sancreed and the said stock or money equivalent and the said farm stock or the proceeds thereof in trust (subject to successive life annuities of £60 to his wife and Miss Harvey) for Mrs. Hoskin for life, and subject thereto for her issue as therein mentioned. He gave the residue of his estate to his wife and Miss Harvey equally. By the third codicil, he revoked the annuity given to Miss Harvey, and gave her in lieu
D thereof the half share in residue which he had given to his wife. By the fourth codicil, he gave, after the death of Mrs. Hoskin, the property of which she was life tenant to her two sons equally.

- At the date of his will, the testator was entitled to eight undivided fifteenth shares of Derval and Chegwiddden Vean Farms and to eight undivided tenth shares of Ennismanen farm, but he did not at any material time own any other land in the parish of Sancreed. Under the transitional provisions of the Law
E of Property Act, 1925, the three farms became vested in the Public Trustee upon the statutory trusts, and they have, in fact, recently been sold. On and after Jan. 1, 1926, the testator, it is said, ceased altogether to own any parts or shares in the farms and acquired instead of those parts and shares corresponding fractional interests in the proceeds of the sale of them under the statutory trust for sale. The quality and whole nature of his property was, it is said, fundamentally changed, so that that which he purported to dispose of by his
F will had previously to his death been taken away from him, or, in other words it was adeemed, and his new substituted statutory interest did not, it is said, pass by the disposition of his previous interest, but fell into his residuary estate.

- Apart from authority, I think that a very strong case could be made against the suggested ademption. I would, myself, hesitate to draw fine distinctions between such expressions as "parts or shares in," "parts of or shares in,"
G "parts or shares of," "right title and interest to or in," and other similar variants. The questions I would propound to myself are whether, after the Act came into force, the owner of an undivided share in land had or had not still his part of the land, or his part in the land, or his share in the land, or his share of the land, or his right or title to the land, or his interest in the land, and if to each and every of these questions either a plain affirmative or else a plain negative answer must be given, it might well be thought that the affirmative would be nearer to the truth. After all, the object of the Act, in this regard, was to provide improved
H machinery, and not to affect, more than necessary, the beneficial interests of landowners. I may observe that the testator uses the two expressions "parts or shares in" and "parts or shares of." I agree, of course, that my questions, if put to a conveyancer, would have a technical significance, and that they, or some of them, would be answered by him in the negative. I venture to think, however, that, on a matter such as this, the testator's language ought to be taken in its popular rather than in any technical sense. True it is that his will was probably prepared by a lawyer, but I can hardly attribute to the latter

in 1912, any sort of prescience of the legislation of 1925.

Until recently all the parties in this case have proceeded without regard to a possible ademption, but this, of course, can in no way affect my decision of the point. I must now refer to the authorities, and see how far I am obliged to follow them, and what guidance they afford me.

The point appears to have arisen first in connection with the incidence of estate duty. In *A.-G. v. Public Trustee* (1) ROWLATT, J., followed the decisions of EVE, J., in *Re Mellish* (2), and TOMLIN, J., in *Re Wheeler* (3), by holding that there was for that purpose no change in the nature or quality of the property which remained real estate. In *Re Mellish* (2), before EVE, J., the words were "all my share and interest in" a certain estate, and in *Re Wheeler* (3), before TOMLIN, J., "all my real estate and undivided shares of real estate in the county of York." Then, in *Re Price* (4) CLAUSON, J., surveyed the new Acts, as they then were, and said ([1928] Ch. 579, at p. 589):

The result of this survey of the new Acts seems to show that on Jan. 1, 1926, Thomas John Price ceased to have any estate in the fourteen acres or any part of it and became entitled to an equitable interest in the proceeds of sale of the fourteen acres—namely, such interest as might be requisite for giving effect to his rights as a person interested in the land. In my opinion such an interest is an interest in personal estate. By the statutory imposition of a trust for sale the land has, so far as beneficiaries are concerned, been converted into money, and Thomas John Price has an interest in the money. This view of the effect of the Act seems to me not only to be sound in principle but to accord with such decisions as *Richards v. A.-G. of Jamaica* (5) and *Freven v. Freven* (6), which recognise that the usual consequences of conversion follow whether the conversion is effected by agreement or compulsorily by Act of Parliament. The provisions with which I have to deal which turn a copyhold estate into a beneficial right in a fund arising under a trust for sale seem to me to be analogous to the provisions which notionally converted, in the one case cited, slaves, and in the other case cited, an advowson, each real property, into a money claim for compensation.

I come next to *Re Kempthorne* (7), the headnote of which is as follows ([1930] 1 Ch. 268):

By his will dated Dec. 2, 1911, a testator devised to his brother Charles "all my freehold and copyhold property," and gave all his leasehold property and personal estate and effects, subject to payment of his funeral and testamentary expenses, debts and legacies upon trust for division amongst his brothers and sisters as therein mentioned. The testator died on Aug. 15, 1928, and was at his death entitled (subject to the effect of the provisions of the Law of Property Act, 1925) to two equal ninth shares of certain freehold property comprised in his father's residuary estate, and to one equal fourth part of certain freehold minerals purchased by him. He also owned the entirety of certain other freehold property. The residuary gift of personalty lapsed as regards three equal seventh parts owing to the death of two legatees in the testator's lifetime: Held: (1) that as the land held in undivided shares was by the Law of Property Act, 1925, sched. I, pt. IV, para. 1 and s. 35, subjected to a trust for sale as from Jan. 1, 1926, the testator's interest in undivided shares of freehold property was then converted into personal property and passed on his death under the gift of personal property.

On this point, MAUGHAM, J., and the Court of Appeal were in agreement. They approved and followed *Re Price* (4), and distinguished *Re Wheeler* (3) and *Re Mellish* (2). MAUGHAM, J., after reading the passage which I have just quoted from the judgment of CLAUSON, J., in *Re Price* (4), expressed the view ([1930] 1 Ch. 268, at p. 275) that he was bound to follow the decision in that case. In the Court of Appeal, RUSSELL, L.J., said (*ibid.*, at p. 293):

I desire to add nothing to the judgment of CLAUSON, J., in *Re Price* (4), which was adopted and approved of by MAUGHAM, J., in his judgment in the present case. As regards the two other cases which Mr. Grant relied upon, the cases before EVE, J., and TOMLIN, J., they are in my opinion distinguishable. So far as *Re Mellish* (2), the case before EVE, J., is concerned, the terms of the disposition contained in the will under consideration were such as to cover the interest, whether it was freehold property or whether it was personal estate. The gift there was of "all the testator's share and interest" in a certain estate. In *Re Wheeler* (3), the case before TOMLIN, J., the distinguishing feature, in my opinion, was that although the testator's devise was of all his real estate and undivided moiety of his real estate in the county of York, he had, after the Act had been passed, made a codicil by which he confirmed his will; so that his testamentary disposition had to be treated as one made at the date of the codicil. The learned judge must necessarily have taken the view that, when the testator used that language, he must have been intending to apply it to the interest, whatever it was, which he had in the real estate or undivided share of real estate in

the county of York. Those two cases are in my opinion distinguishable; but if they do by any chance conflict with the decisions of CLAUSON, J., in *Re Price* (4) and of MAUGHAM, J., in the present case, I prefer their views to any views inconsistent with them, which may be involved in the decisions in the other two cases.

I now come to *Re Newman* (8). In that case, the testator made his will on May 15, 1922, and devised all his "moiety or equal half part or share and all other" his "share in" certain hereditaments to his brother John, they being then tenants in common of the property in equal undivided moieties. The effect of the Act was, of course, on Jan. 1, 1926, to vest the entirety of the hereditaments in the testator and John as joint tenants on the statutory trusts. The testator died on Jan. 29, 1929, without having either altered or confirmed his will, and it was held by FARWELL, J., that the specific devise was adeemed by the imposition of the statutory trusts so that John took nothing thereunder. FARWELL, J., said ([1930] 2 Ch. 409, at p. 417):

The result is this. If the testator uses language that can only be construed as a devise of real estate, and, notwithstanding the imposition of the statutory trusts, he dies without altering or confirming his will, the conversion effected by the statutory trusts adeems the devise, because there is nothing left for that devise to operate on. If on the other hand the testator uses language wide enough to carry any interest in the property whether it be in law real or personal property, the conversion is immaterial. I have therefore to determine the true construction of the testator's language in the present case. It is in my judgment not apt to pass anything but a moiety of real estate, and as there is no real estate left the devise does not operate. It may well be that this result is not in accordance with what the testator would have intended if he had considered the matter, but I am not concerned with that. I am only concerned with his language, *i.e.*, his expressed intention. The whole devise therefore fails.

The point next came before MAUGHAM, J., in *Re Warren* (9). There, by a will made in 1923, a testatrix devised her "share in" certain land (actually, an undivided fourth share) to a named devisee. By a codicil made in 1927 (*i.e.*, after the imposition of the statutory trusts) she made certain alterations in her will and, subject thereto, she confirmed it. The codicil did not refer to, nor did it in any way affect, the devise. It was held that there was no ademption, and that the interest of the testatrix in the proceeds of sale went absolutely to the devisee. MAUGHAM, J., said ([1932] 1 Ch. 42, at p. 46):

It is not correct to say that the testatrix was entitled only to a share of the proceeds of sale. She had certain other rights. Apart from the recent legislation, there can be no question but that the devise was an effective devise to Mr. Warren; and the question for decision is whether, as the result of the recent legislation, the devise has been adeemed by operation of law. In considering that question it is important to note that the legislature has not deprived the testatrix of all interest in the land. The "statutory trusts" (the meaning of which expression is set out in s. 35 of the Law of Property Act, 1925) are shortly to sell and hold the net proceeds on such trusts as may be requisite for giving effect to the rights of the persons interested in the land. Then by an amendment in the schedule to the Law of Property (Amendment) Act, 1926, it is enacted, in substitution for s. 26 (3) of the Act of 1925, that "trustees for sale shall so far as practicable consult the persons of full age for the time being beneficially interested in possession in the rents and profits of the land until sale and shall, so far as consistent with the general interest of the trust, give effect to the wishes of such persons, or, in the case of dispute, of the majority (according to the value of their combined interests) of such persons, but a purchaser shall not be concerned to see that the provisions of this sub-section have been complied with." Having regard to the provisions of that sub-section, it is clear that trustees for sale would be acting wrongly, in general, in selling, if undivided beneficial owners required them not to sell. There is no doubt that, since the coming into force of the Law of Property Act, 1925, the position of undivided owners is different from what it was before. That Act, for the purpose of simplifying the law, has introduced provisions for undivided shares, and has made partition actions unnecessary and obsolete. But in substance the beneficial interests of the undivided owners in regard to enjoyment so long as the land remains unsold have not been altered, and it is true to say that the ordinary layman possessed of an undivided share in land would be quite unaware of any alteration in his rights as the result of the Act.

After referring to *Re Newman* (8) MAUGHAM, J., said (*ibid.*, at p. 50):

I should be disposed to follow that decision in a case that was like it. But I think it right to say that I attribute weight in these cases to the consideration that the result of the statutory trusts is not wholly to deprive the person previously entitled

to an undivided share of all interest in the land; and the language of the testator may well be such that that consideration may result in the decision that there is no ademption.

For myself, I am satisfied that MAUGHAM, J., was reluctant to follow, and anxious to distinguish, *Re Newman* (8), a reluctance and an anxiety which I feel and share in the present case. He was not, I think, convinced of the accuracy of that decision, nor, if I may respectfully say so, am I. He found himself able to come to the opposite conclusion in *Re Warren* (9) by differentiating it from *Re Newman* (8) by reason of the existence of the post-1925 codicil. This he did after considering *Powys v. Mansfield* (10), *Oakes v. Oakes* (11) and *Re Slater* (12). A

But for the existence of a post-1925 codicil in the present case, I should have felt constrained to disregard any doubts I may entertain as to its correctness, and to follow the decision of FARWELL, J., in *Re Newman* (8), but the difficulty that I feel is that the fifth codicil here is, as I have already indicated, of a very tenuous character. All that it does is to place a certain fact on record, a thing that might have been done with equal efficacy by a statutory declaration or other non-testamentary document. On the other hand, it does contain an express reference to the will, suggesting that the testator must have been looking at it, though, perhaps, only for the purpose of refreshing his memory as to its date. The fact remains, however, that it calls itself a codicil, was executed as such, and has been admitted with the testator's other testamentary documents to probate. Now, as I understand the matter, a codicil described as a codicil to a particular will republishes that will: see and distinguish *Re Smith* (13), and see the observations of LORD PORTER ([1946] 2 All E.R. 154, at p. 163) in *Berkeley v. Berkeley* (14). *Re Hardyman* (15) is also, I think, in point. The headnote states ([1925] 1 Ch. 287): B

A testatrix, by her will made in 1898, bequeathed a legacy of £5,000 "in trust for my cousin his children and his wife failing his children upon his death and that of his wife or until she marries again the said sum of £5,000 to be divided" in manner therein mentioned. The cousin of the testatrix was, at the date of the will, married to his first wife and she died in January, 1901. In November, 1901, the testatrix, with knowledge of the death of her cousin's first wife, made a codicil to her will, in which she made a bequest of a sum of stock and appointed a residuary legatee. The codicil contained no reference to the bequest of £5,000. In 1903 the cousin of the testatrix remarried. He died in 1924. There was no issue of either marriage. This summons raised the question whether the second wife was entitled to benefit under the bequest of £5,000: *Held*: that the will and codicil must be read together, and that the second wife was entitled to an interest in the £5,000 for her life or until remarriage. C

The absence of any express post-1925 confirmation of the will does not, in my judgment, affect the matter, and it is to be observed that the codicil in *Re Hardyman* (15) did not confirm the will. D

I have come to the conclusion that the fifth codicil sufficiently republishes, constructively, as it is said (see JARMAN ON WILLS, 7th ed., p. 184) the testator's will so as to prevent or preclude ademption. I shall, therefore, declare that the gift in question was not adeemed. Out of the testator's share in the proceeds of the sale of the farms, or out of any of the other property devolving therewith, the costs of all parties, taxed as between solicitor and client, must be raised and paid. This is not a case in which the costs should fall on the residue, even if there were any still in the trustees's hands, which is probably not the case. E

Declaration accordingly.

Solicitors: *Bird & Bird*, agents for *Borlase & Venning*, Penzance (for the Public Trustee); *Hatchett Jones & Co.*, agents for *Wolferstan, Snell & Turner*, Plymouth (for the first three defendants); *Winter & Co.* (for remaining defendants). F

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.] G

H

PEGLER v. GREAT WESTERN RAILWAY CO.

[COURT OF APPEAL (Lord Greene, M.R., Bucknill and Asquith, L.JJ.),
January 30, 31, February 3, 14, 1947.]

Railways and Canals—Railways—Amalgamation—Employee's position worsened—Compensation from amalgamated company—Claim—Limitation—"Cause of arbitration" equivalent to "cause of action"—Date from which time runs—Railways Act, 1921 (c. 55), sched. III, para. (3)—Limitation Act, 1939, (c. 21), ss. 2 (1), 27 (1) (6).

The claimant entered the employment of the T. railway on Oct. 24, 1913, and worked in the locomotive running department. On Apr. 14, 1919, he was appointed a fireman. On July 1, 1923, the T. railway was absorbed into the Great Western group under a scheme pursuant to the Railways Act, 1921, and the claimant was transferred to the service of the respondents. Under the practice of the T. railway, seniority for the purposes of promotion from fireman to driver was calculated from the date of entry into the company's locomotive running department, but the practice of the respondents at the date of transfer (July 1, 1923) was to calculate such seniority from the date of the employee's engagement as a cleaner, or, if he had not been a cleaner, then from the date when he became a fireman. As the claimant had never been a cleaner, his seniority under the respondent's system dated only from Apr., 1919, as compared with Oct., 1913, under the practice of the T. Railway. In May, 1924, the respondents' practice was changed so that the claimant became entitled to be treated for the purpose of seniority as if he had become a fireman 3 years after entry into the locomotive running department. As a result of this loss of seniority the claimant's promotion did not take place until Mar. 9, 1936, whereas a man, junior to him under the practice of the T. railway, but senior under the respondents' practice, was promoted on Apr. 3, 1933. In an arbitration begun on Mar. 2, 1942, the arbitrator held that the claim was barred by the Limitation Act, 1939, but, to avoid further references should this view be wrong, he assessed the claimant's loss at £111 14s., being the difference between the wages he had in fact received and those which he would have received if he had been promoted on Apr. 3, 1933.

HELD: (i) in effecting the application of the Limitation Act, 1939, to arbitrations which s. 27 (1) of that Act requires, the word "actions" and the phrase "cause of action" in s. 2 (1) must be interpreted so as to include "arbitrations" and "cause of arbitration," and, accordingly, under s. 2 (1), the period of limitation in the present case would run from the date when the cause of arbitration accrued and not from the date of the award.

(ii) the cause of arbitration accrued when the claimant first became entitled to complain that by reason of the transfer he had been placed in a worse position, and he became so entitled on July 1, 1923 (the date of transfer), notwithstanding that his injury did not materialise until Apr. 3, 1933.

(iii) as the arbitration was not begun before the commencement of the Limitation Act, 1939 (July 1, 1940), s. 27 (6) of that Act operated to apply the provisions of the Act to the claimant's case notwithstanding that the appropriate period of six years had (wholly or in part) expired before the operation of the Act.

(iv) the claimant's only right was to claim directly he lost his seniority for loss or injury consequent thereon, and there was, therefore, no question of his suffering a fresh loss or injury as each pay day arrived.

(v) in consequence, his claim was barred by the Limitation Act, 1939, s. 2 (1) (d).

[AS TO WHEN TIME BEGINS TO RUN, see HALSBURY, Hailsham Edn., Vol. 20, pp. 649-650, paras. 826, 827; and FOR CASES, see DIGEST, Vol. 32, pp. 327-328, Nos. 134-141.]

FOR THE LIMITATION ACT, 1939, s. 27, see HALSBURY'S STATUTES, Vol. 32, pp. 240-241.]

Cases referred to :

- (1) *Brueton v. Woodward*, [1941] 1 K.B. 680 ; [1941] 1 All E.R. 470 ; 110 L.J.K.B. 645 ; 165 L.T. 348 ; Digest Supp.
- (2) *Re Arbitration between Parker and Great Western Ry. Co.*, [1944] 1 All E.R. 400 ; *sub nom. Parker v. Great Western Ry. Co.*, 170 L.T. 284 ; Digest Supp.
- (3) *Layen v. London Passenger Transport Board*, [1944] 1 All E.R. 432 ; Digest Supp.

APPEAL of claimant from order of ATKINSON, J., dated Apr. 15, 1946.

The decision of the arbitrator is stated in the headnote. ATKINSON, J., on a Case stated by the arbitrator on the question whether the Limitation Act, 1939, applied to the matter, held that the arbitration was one within the contemplation of the Limitation Act, 1939, s. 27 (6) ; that the " cause of arbitration " was equivalent to the " cause of action " ; that the claimant's cause of arbitration arose on May 14, 1924, when his seniority was finally settled ; and that his claim was, accordingly, barred by the provisions of s. 2 (1) of the Act of 1939. The claimant appealed.

Beney, K.C., and *M. R. Nicholas* for the claimant.

Cartwright Sharp, K.C., *Fox-Andrews, K.C.*, and *B. J. M. Mackenna* for the respondents.

Cur. adv. vult.

Feb. 14. LORD GREENE, M.R., read the following judgment of the Court. For some years before July 1, 1923, the claimant had been employed in the locomotive running department of the Taff Vale Railway Co., and on Apr. 14, 1919, he had been appointed fireman. On July 1, 1923, the Taff Vale Railway Co. was absorbed into the Great Western Railway group under a scheme made pursuant to the Railways Act, 1921. In accordance with s. 5 (f) of that Act, the scheme incorporated the provisions of sched. III to the Act, and under para. 1 of that schedule the claimant, as an existing servant of the Taff Vale Railway Co., was transferred to and became a servant of the respondents, the Great Western Railway Co. Under the practice followed by the Taff Vale Railway Co., seniority for the purpose of promotion from fireman to driver was calculated as from the date of entry into the company's locomotive running department, which in the case of the claimant was Oct. 24, 1913. In the case of the respondents, however, the practice governing promotion to driver was, at the date of the transfer (July 1, 1923), to calculate seniority as from the date of the man's engagement as cleaner or, if he had never been a cleaner, as from the date when he became a fireman. In the case of the claimant, who had never been a cleaner, this latter date was Apr. 14, 1919. Accordingly, so far as his seniority for the purpose of promotion to driver was concerned, the claimant lost some five and a half years' seniority when his transfer to the respondents took place. On May 14, 1924, however, the practice of the respondents was changed and the old employees of the Taff Vale Railway became entitled to be treated for the purposes of seniority as having been made firemen three years after entering the running department, that is to say, in the case of the claimant, Oct. 24, 1916. By virtue of this change in practice, therefore, the claimant's loss of seniority was reduced from some five and a half years to three years. As a result of this loss of seniority the claimant's promotion to driver was deferred until a date subsequent to that on which he would have been promoted under the practice of the Taff Vale Railway Co. This is shown by the fact that on Apr. 3, 1933, a man formerly in the service of the Taff Vale Railway Co., who was junior to the claimant under the practice of that company but senior to him under the practice of the respondents, was appointed a driver, whereas the claimant did not receive his appointment as driver until Mar. 9, 1936. If he had been appointed as driver on Apr. 3, 1933, he would have received in wages the sum of £111 14s. 0d. more than, in fact, he did receive. By the Special Case the arbitrator awarded this sum as compensation to be paid by the respondents to the claimant if the court should be of opinion that he was wrong in holding, as he did, that the claimant's claim was barred by the Limitation Act, 1939.

It is now necessary to refer to the provisions of sched. III to the Act of 1921, under which the claimant claimed to be entitled to compensation. They are contained in paras. (3) and (4) of the schedule. It is common ground that para. (5) is not, in whole or in part, the appropriate paragraph. Under para. (3) an existing servant of an absorbed company who is transferred to the service

of an amalgamated company is not without his consent to

. . . be by reason of such transfer in any worse position in respect to the conditions of his service as a whole [including a number of specified matters] as compared with the conditions of service formerly obtaining with respect to him.

The arbitrator found that the claimant's position was worsened by reason of the transfer without his consent.

Paragraph (4) provides :

A If any question arises as to whether the provisions of [para. (3)] have been complied with, the question shall be referred to a standing arbitrator . . . and, if the arbitrator . . . consider[s] that those provisions have not been complied with, and that the officer or servant has thereby suffered loss or injury, [he] shall award him such sum to be paid by the amalgamated company as [he thinks] sufficient to compensate him for such loss or injury.

B The arbitrator found that the claimant suffered pecuniary loss by reason of the transfer to the amount of £111 14s. 0d. already mentioned. But, although the arbitrator found in favour of the claimant as regards the substance of his claim, he held that the claim was barred by reason of the Limitation Act, 1939, and the question submitted to the court is whether he was right in law in so holding. In the event of the court considering that the claim was only barred as to part, the Case is to be remitted to the arbitrator.

C It is common ground that, if the Limitation Act, 1939, applies to such a case as this, the period within which a claim must be made is six years before the date of the commencement of the arbitration. That date, in the present case, the arbitrator found was Mar. 2, 1942. He did not expressly find what was the date when the six years period began to run, but it is a necessary implication in his decision that the date was not later than Apr. 3, 1933, which was the date when the claimant would have been appointed driver if the

D practice of the Taff Vale Railway Co. had been followed. ATKINSON, J., thought that the period began on May 24, 1924, when the respondent company finally settled its practice. The respondents contend primarily that it began on July 1, 1923, when the claimant was transferred to their service and became subject to their practice as it then existed. The claimant contends, in the first place, that, if the statute applies (which he denies), it did not begin to run until the award was actually made, that being the first time that any cause of action arose. Alternatively, he contends that the correct date was the date when "the question" arose, or, in the further alternative, was Apr. 3, 1933, and not earlier. If the latter is the correct date, the claimant contends that the statute would not affect his rights in respect of any payment which he ought to have received less than six years before Mar. 2, 1942, the commencement of the arbitration.

E The first questions for consideration are whether the statute applies, and, if so, whether the period began to run before the date of the award; and, if the answer to the latter question is "Yes," whether the suggestion made by the respondents that a claim in respect of payments which he would have received during the period of six years before the commencement of the arbitration is well founded.

G The Limitation Act, 1939, is a consolidating and amending statute. It received the Royal Assent on May 25, 1939, but it did not come into operation until July 1, 1940, more than a year later. The Act incorporated the provision of the Arbitration Act, 1934, s. 16 (1), which had enacted that the statutes of limitation should apply to arbitrations as they applied to proceedings in the court (so. the High Court : see the Arbitration Act, 1889, s. 27, and the Arbitration Act, 1934, s. 21 (4).) This provision of the Act of 1934 did not, however, apply to statutory arbitrations (s. 20 and sched. II). The law in this latter respect H was altered by the Act of 1939 which, by s. 27 (1), repeats the provisions of s. 16 (1) of the Act of 1934 and provides in sub-s. (6) that the provisions of s. 27 are to apply to an arbitration under an Act of Parliament as well as to an arbitration pursuant to an arbitration agreement. Section 27 (3) and (4), which are taken from s. 16 of the Act of 1934, relate to the determination of the question when an arbitration is to be deemed to be commenced.

Logically, the first question to be considered is whether the provision of the Act of 1939, which made statutory arbitrations for the first time subject to the law of limitations, applies to a case where the time limit laid down by

the Act has expired before the Act came into force. Counsel for the claimant, indeed, argued that it did not, but he frankly admitted that he found difficulty in doing so. In our opinion, the argument cannot succeed. Unless the claimant can show that the period does not begin to run until the raising of the "question" or the making of the award, the period must on any view have elapsed (as to the whole, or on the claimant's alternative submission as to part, of his claim) before the Act received the Royal Assent. As, however, s. 33 (b) provides that the Act is not to affect any arbitration begun before the commencement of the Act, and as the Act did not commence until July 1, 1940, he had over a year in which to preserve his position by commencing the arbitration. The language of s. 27 (6) is quite general in its terms and we can see no ground for implying any such limit on its operations as is suggested. Indeed, the considerations to which we have just referred appear to us to make it impossible to read in any such implication. This was the view taken by SINGLETON, J., in *Bruton v. Woodward* (1), and by ATKINSON, J. in the present case.

The main argument of counsel for the claimant rests upon the proposition that in a case which falls under the Railways Act, 1921, sched. III, paras. (3) and (4), no cause of action arises until an award has been made since there is nothing in those paragraphs which creates a cause of action, the sole right of the complainant being a right to go to the arbitrator and obtain an award of compensation. He rejects the view that, in the application of the Act of 1939 to a statutory arbitration of this nature, what has conveniently been called the "cause of arbitration" takes the place of and corresponds to the cause of action which is the subject of a private arbitration. As ATKINSON, J., points out, the effect of this argument, if accepted, would be to deprive s. 27 (6) of the greater part of its content since it would leave the most important types of statutory arbitration in exactly the same position as they were before, *i.e.*, outside the operation of the law of limitations, but, quite apart from this, the language of s. 27 appears to us, as it appeared to ATKINSON J., to place the matter beyond doubt. Section 2 (1) provides :

The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say : . . . (d) actions to recover any sum recoverable by virtue of any enactment, other than a penalty . . .

By s. 31 (1) " 'action' includes any proceedings in a court of law " and is not, therefore, confined to such proceedings. Section 27 (1) provides :

This Act . . . shall apply to arbitrations as they apply to actions in the High Court.

It appears to us to be clear beyond argument that, in making the application to arbitrations which s. 27 (1) requires, the word "actions" and the phrase "cause of action" must be interpreted so as to include "arbitrations" and "cause of arbitration." It is to be noted also that s. 27 (3) and (4), which provide for the fixation of the date when an arbitration is to be deemed to have commenced, apply to statutory arbitrations. The only purpose of fixing the date for the commencement of the arbitration is to enable the relevant statutory period to be calculated. Yet, if the argument is right, these provisions would be entirely purposeless in the case of statutory arbitrations, save, perhaps, in the rare cases (if, indeed, any such exist) where a cause of action and provisions for statutory arbitration are combined.

The result is that, if the "cause of arbitration" in the present case accrued more than six years before the commencement of the arbitration on Mar. 2, 1943, the claim is statute-barred. When did the cause of arbitration accrue in the present case ? In our opinion, it arose when the claimant first became entitled to complain that by reason of the transfer he was placed in a worse position in respect of his service as a whole and that he had "thereby suffered loss or injury." Counsel for the claimant did suggest that the right date was that on which the "question" arose. This seems to us an impossible view. The true date, surely, is the date when the claimant became entitled to raise the question, not that on which it was actually raised.

If our reasoning so far is correct, it follows that there is no possible date later than Apr. 3, 1933, when the loss occasioned by the claimant's loss of seniority actually materialised, and, subject to the argument that, even on this basis, only part of the claim would be barred, it is not strictly necessary to determine what was the exact date. The argument in favour of choosing Apr. 3, 1933, is

based partly on convenience—it is said that a workman could not be expected to prove or an arbitrator to find loss until it had actually materialised—but mainly on the fact that in para. (4) the phrase “has thereby suffered loss or injury” is in the past tense and it is pointed out that the corresponding phrase in para. (5) “who otherwise suffers any direct pecuniary loss” is in the present tense. We do not think that there is any real weight in this argument. The phrase “loss or injury” is not, of course, limited to loss or injury due to the infringement of a legal right since it may be caused by the deprivation of some expectation based merely on practice and custom which is treated as analogous to the infringement of a legal right. In the present case the claimant never had any legal right to promotion. Where by reason of the transfer the employee suffers loss of seniority his expectation of the customary promotion is at once affected to his prejudice. It is true that this prejudice will only be quantified when the date when he would have been entitled to expect promotion arrives, but he has nevertheless suffered “loss or injury” within the somewhat loose meaning of that phrase when his name is in effect struck out of its proper place in the seniority list and is inserted lower down in the list. In the present case, therefore, it would, in our opinion, have been open to the claimant to complain that he had suffered loss or injury by his reduction in seniority and he could at once have claimed compensation. The task of the arbitrator in fixing the compensation would, no doubt, have been a difficult one, but no more difficult than many questions which arbitrators or juries are in the habit of deciding and no more difficult than a jury would have had to decide if in this case the claimant had had a contractual right to promotion according to his original seniority which the company had repudiated before the date for promotion had arrived.

A similar point was considered in this court by DU PARCQ, L.J. (as he then was), in *Re Arbitration between Parker and Great Western Railway* (2). There the employee, while in the employment of the company from which he was transferred, was subject to the practice of that company under which he would have been entitled to remain in its service so long as he was capable of performing his duties, while on transfer to the Great Western Railway he became subject to the practice of that company under which he had to retire at the age of 60. In the case of a man under 60 the question to be examined was, said DU PARCQ, L.J. ([1944] 1 All E.R. 400, at p. 403):

What does he lose by the possibility that at the age of 60 he may still be fit for work and yet have to leave his employment? If you do not know what the position is going to be when he reaches the age of 60, because you are assessing compensation in advance, you have to make the best estimate you can.

If this view is correct, the cause of arbitration accrued when the claimant was put back in the order of seniority, notwithstanding that his loss or injury did not materialise until Apr. 3, 1933. On this basis there are only two possible dates to consider: July 1, 1923, when the transfer took place, and May 14, 1924, when the respondents altered their practice and raised the seniority of the claimant to a point higher than that fixed in accordance with their practice as it existed at the date of transfer. Whichever of these two dates is the correct one the claimant's alternative argument that the claim is only barred in part must necessarily fail, and there is, strictly speaking, no necessity for us to decide between them. As, however, the question has been fully argued and ATKINSON, J., expressed a preference for the later of the two dates, it is perhaps not improper for us to express our own preference which is for the earlier date. On the transfer taking place, the claimant immediately suffered loss or injury by losing his previous seniority and could at once have claimed compensation. If the change of practice which took place on May 14, 1924, had not taken place before his compensation was awarded by the arbitrator, its subsequent adoption could not deprive him of the benefit of his award. If, however, the change of practice took place before the award, that would have been taken into account by the arbitrator as an alleviation of the loss or injury. With respect, therefore, we prefer not to accept the view of ATKINSON, J.

If, however, contrary to our view, the correct date when the loss or injury was first suffered was Apr. 3, 1933, it will be necessary to consider the alternative argument already referred to. This, in effect, is that on every pay day

after that date the claimant suffered a fresh loss or injury in that the sum in his pay-packet was smaller than it ought to have been. On this basis he would, technically at least, have the right to claim a fresh arbitration every week and a small part of the £111 14s. 0d. awarded would escape the operation of the statute. But, in our opinion, the argument is incorrect. There may, of course, be cases where an employee has had his position worsened by reason of the transfer and obtains compensation for the loss or injury suffered and then has it further worsened by some further action of the company of which it can also be said that it was by reason of the transfer. For instance, if a man who lost seniority for promotion to driver by reason of the transfer and received compensation in respect of the loss was subsequently after his promotion to driver put back to some lower position for the reason that the company as a result of economies directly attributable to the amalgamation found that it had more drivers than it needed, we apprehend that it might well be held that a new worsening of the man's position for which he could claim new compensation had occurred. But that is not the case here. The claimant's claim is in respect of only one worsening of the claimant's position, namely, that occasioned by his loss of seniority and the loss or injury alleged is confined to the loss of pay. In our opinion, directly he lost his seniority, his only right was to claim once for all for the loss or injury consequent thereon and the arbitrator would have to make the best estimate that he could of what the future loss would turn out to be. Speaking generally, it would, as it appears to us, be more advantageous both to employees and to the company for compensation for a specific worsening of conditions of service to be decided once for all and this we consider to be in accordance with the true interpretation of the language used. We are confirmed in this view by the opinion expressed by TUCKER, J. (as he then was) in *Layen v. London Passenger Transport Board* (3), a case on similar provisions in the London Passenger Transport Act, 1933 ([1944] 1 All E.R. 432, at p 434). He said, in reference to an argument similar to that addressed to us :

. . . the conclusion at which I have arrived is that it was intended to fix the compensation for this worsening of conditions once and for all at some one specific date, whatever that date may be . . . the arbitrator has to look at the position as a whole, doing the best he can to assess the loss with regard to the future, and taking into account such facts as may have occurred at the time when he makes his award.

In passing, we may refer to the fact that in that case it was not, apparently, argued on behalf of the applicant that the Limitation Act, 1939, did not apply, and there is nothing in the judgment of TUCKER, J., to suggest that he felt any doubt on the point. He used the expression "cause of arbitration" as the equivalent of "cause of action."

ATKINSON, J., was right in his opinion that the award in favour of the respondents as set out in the Special Case is correct, and this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors : *Pattinson & Brewer* (for the claimant) ; *M. H. B. Gilmour* (for the respondents).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

KIMBER v. WILLIAM WILLETT, LTD.

[COURT OF APPEAL (Lord Oaksey, Tucker and Cohen, L.J.J.), February 6, 7, 1947.]

Contract—Implied term—Work to be done in safe manner—Carpet taken up for cleaning—Floor left in dangerous condition.

A By a verbal contract, the defendants, a firm of expert carpet layers, agreed to take up and clean a carpet in the plaintiff's dining room. At the doorway of the room this carpet was attached to the hall carpet, which was tacked down to the floorboards in the hall, by being sewn to a "tongue" of the hall carpet which protruded under the door into the room. When the defendants came to remove the dining room carpet, they cut the sewing and took away the dining room carpet, but they left the "tongue" of the hall carpet protruding under the door without tacking it down. The plaintiff was, to the defendants' knowledge, in occupation of the flat at the time, and, about a fortnight later, she caught her foot in the "tongue" of the hall carpet and fell, sustaining injury. In an action in which the plaintiff claimed damages:—

B
C HELD: (i) in a contract of this kind between an ordinary householder and a firm of expert carpet layers there was an implied term that the work should be done in a workmanlike and safe manner, and, as the defendants knew that the flat was occupied at the time, leaving the hall carpet in such a condition that it constituted a danger to any one using the premises and exercising reasonable care in such user was a clear breach of the obligation to do the work in a workmanlike and safe manner.

(ii) the damages claimed flowed from the breach of the implied term in the contract and were recoverable by the plaintiff.

D [AS TO IMPLIED TERMS IN CONTRACT, see HALSBURY, Hailsham Edn., Vol. 7, pp. 322, 323, para. 451; and FOR CASES, see DIGEST, Vol. 12, pp. 607-612, Nos. 5028-5058.

AS TO DIRECTNESS OF DAMAGES, see HALSBURY, Hailsham Edn., Vol. 10, pp. 93-98, paras. 115-122; and FOR CASES, see DIGEST, Vol. 17, pp. 93-95, Nos. 101-113.]

Case referred to:

E (1) *Hadley v. Baxendale* (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 17 Digest 93, 101.

APPEAL by the defendants from a judgment of HENN COLLINS, J., dated June 6, 1946, in an action for damages for breach of an implied term of a contract, or, alternatively, for negligence. The facts appear in the judgment of LORD OAKSEY, L.J.

R. F. Levy, K.C., and T. F. Davis for the defendants.

F G. Russell Vick, K.C., and S. R. Edgedale for the plaintiff.

LORD OAKSEY, L.J.: I am of opinion that this appeal cannot succeed. It is principally a matter of fact and appreciation of the evidence, and I see no reason to think that the judgment of HENN COLLINS, J., was wrong.

G The plaintiff had a flat in Sloane Court, London, and under a verbal contract she employed the defendant company to take up and clean the carpet in the dining room of that flat. At the doorway of the dining room the carpet was of sewn to a "tongue" of the hall carpet which came under the door, the rest of the hall carpet being tacked down to the hall floor. When the defendant company came to do their work, their sub-contractor or workman, Mr. Solomon, cut the sewing, took away the dining room carpet, and left the "tongue" of the hall carpet which protruded under the door without tacking it down. It was said that it lay flat in that condition, but about a fortnight after the dining room carpet had been taken up, the plaintiff caught her foot in the "tongue" of the hall carpet, fell, and sustained serious injuries. The plaintiff's case was that it was an implied term of the contract that the work should be done in a workmanlike and safe manner, and that, in fact, it was not done in a workmanlike and safe manner, the "tongue" of the hall carpet being left in an unsafe condition. The judge took the view that the term that the work should be done in a workmanlike and safe manner was one which ought to be implied in a contract of this sort made between an ordinary householder, who is not an expert in carpet laying, and a firm of expert carpet layers, that that implied

term had been broken, and that the damage which the plaintiff had suffered was the result of the breach. He awarded her £500 damages.

Although it is a case of some difficulty and nicety, I am of opinion that this court ought not to disturb the finding of the judge. I think the view which he took of the law—that there was an implied term—was right, and that it was open to him on the evidence to find that the implied term had been broken. It seems to me that the reasonably safe thing to have done would have been to tack down the “tongue” of the hall carpet. A carpet like this hall carpet is not the same as a rug which is not tacked at all. It was tacked all over the hall, and, therefore, anybody who caught his foot in the “tongue” which protruded under the door would meet all the resistance of the nailed part of the carpet in the hall, and the effect would be quite different from catching his foot in a carpet which was moveable. In my opinion, the judge was at liberty to take that view after hearing the evidence.

It was further argued that the damages claimed did not flow from the breach of contract, and we were referred to *Hadley v. Baxendale* (1), but, in my opinion, damage such as this may arise naturally in the usual course of things. For these reasons I think that this appeal ought to be dismissed with costs.

TUCKER, L.J.: I agree. The plaintiff founded her claim partly on the breach of an implied term in the contract between the parties and, alternatively, in negligence. I am clear that it was an implied term of this contract that the work should be done in a proper and workmanlike manner. The real and only issue is: Did the defendants on the facts found by the judge do this job in a proper and workmanlike way? If they had left the carpet in a dangerous condition, I do not think they did the work in a proper and workmanlike way.

In considering whether work has been done in a proper and workmanlike way it is always material to take into consideration whether the work was being done in an empty house or an occupied house. In this case it was being done in a house which, to the knowledge of the defendants, was in use, in a room which was in use adjoining a passage. It would have been a clear breach of the obligation to do the work in a proper and workmanlike way if there had been left a state of things which constituted a danger to anybody using the premises and exercising reasonable care in the course of such user. In my view, the whole case depends on whether the carpet in the condition in which it was left did constitute such a danger. With regard to that, I find myself in complete agreement with the judge below. I am not by any means deciding that it is bad workmanship or dangerous always to leave a carpet flat and loose and untacked, but the circumstances of this case were rather peculiar. In course of time the “tongue” of the hall carpet was liable to ruck slightly as any loose carpet does when people are walking about, and then it would constitute a danger because a person would be liable to get his foot caught under the part which was tacked down. I think that that was not a proper and workmanlike way to carry out this contract, that a danger was created, and that that danger caused the accident.

To test the matter, because it is very much one of first impression, suppose that someone had a mat in the doorway of a room, 2 or 3ft. long and 18 or 21ins. wide. Suppose for some reason that that mat was at one end sewn on to the drawing room carpet and tacked down at the other end. Then the drawing room carpet is removed and the sewing is cut, but the tacks are left in the other end of that mat. Can anybody suppose that that would not be a highly dangerous thing? That, in effect, is what happened in this case, only it was the tongue of a carpet which is rather longer than the mat I have described. If this was a danger, and if it was the duty of the defendants not to leave things in a dangerous condition, I find it difficult to see why the damages which, in fact, flowed from this breach are not recoverable by the plaintiff. For these reasons I agree that this appeal fails.

COHEN, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Bulcraig & Davis* (for the defendants); *William Charles Crocker* (for the plaintiff).

[Reported by R. L. ZIAR, Esq., Barrister-at-Law.]

NASH v. HIGH DUTY ALLOYS, LTD.

[COURT OF APPEAL (Lawrence, Tucker and Cohen, L.J.J.), January 13, 14, 15, 1947.]

Factories and Shops—Dangerous machinery—Fencing—Exception—“Examination or adjustment”—Tests after tool setting operation—Need for dangerous parts to be exposed—Factories Act, 1937 (c. 67), s. 16.

A *Factories and Shops—Regulations—Breach—Registration and certification of “machine attendants”—Inclusion of tool setters—Operations at Unfenced Machinery Regulations, 1938 (S.R. & O., 1938, No. 641), regs. 1 (ii), 2.*

The plaintiff was an inspector employed by the defendants, and his task, *inter alia*, was to inspect the components produced by a press for making parts of aircraft engines. The press, which was operated by an electric motor of its own, with switch alongside, was provided for all its normal operations with a secure guard which had to be lifted for the purpose of examination or for setting the dies. The plaintiff had rejected some of the components and, after the dies had been altered by a tool maker, M., they were set in the press by a tool setter B., who had examined the press for necessary adjustments. The power, which during the setting and adjustment had not been required, was then switched on, and samples were taken while the guard was still up in the presence of B., M., F. (a charge hand), and the plaintiff. B., M. and F. had all been appointed under the Operations at Unfenced Machinery Regulations, 1938, reg. 2, as machinery attendants, but they had not been furnished with certificates of appointment indicating the limitations of their duties. The samples were rejected by the plaintiff, and during an argument whether the machine was doing its work properly M. put a master component into the press. F. and the plaintiff, following the recognised method of testing, looked underneath, and the plaintiff, having discovered some daylight showing between the component and the die, was in the act of pointing at it when M., in order to release the component, put his foot on the starting pedal, with the result that the press came down and caught the plaintiff's fingers:—

HELD: (i) the process of tool setting, which required the removal of the dies, their adjustment in the tool maker's shed, and their replacement in the machine, did not constitute “examination” or “adjustment” rendering it necessary that the dangerous parts of the machine should be exposed while in motion, so the defendants could not bring themselves within the exception in s. 16 of the Factories Act, 1937, and were, therefore, guilty of a breach of the section and were liable to the plaintiff in respect of the injuries received by him.

(ii) the effect of the second proviso to reg. 1 of the Operations at Unfenced Machinery Regulations, 1938, was to make it unnecessary for tool setters to comply with the restrictions imposed by reg. 5, but “machine attendants” referred to in reg. 2 were a class of whom tool setters formed a part, and, therefore, reg. 2 applied to tool setters equally with other machine attendants, and they should be registered and issued with the necessary certificates.

[AS TO FENCING OF MACHINERY, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594, 595, paras. 1130, 1131; and FOR CASES, see DIGEST, Vol. 24, pp. 908-911, Nos. 62-81.]

APPEAL by defendants from an order of DENNING, J., awarding damages to the plaintiff for breach, by the defendants, of statutory duty under the Factories Act, 1937, s. 16. The facts appear in the headnote and in the judgment of LAWRENCE, L.J.

Nelson, K.C., and Stuart Horner for the defendants.
Beney, K.C., and Marven Everett for the plaintiff.

LAWRENCE, L.J.: This appeal raises three points: (i) whether at the time of the accident the machinery in question was necessarily exposed, within the meaning of s. 16 of the Factories Act, 1937, for examination or for lubrication or adjustment shown by such examination to be immediately necessary; (ii) whether, if it were, all conditions laid down in the Operations at Unfenced Machinery Regulations, 1938, had been complied with; and (iii) whether the plaintiff was guilty of contributory negligence.

Section 16 of the Factories Act, 1937, provides :

All fencing or other safeguards provided in pursuance of the foregoing provisions of this part of this Act shall be of substantial construction, and constantly maintained and kept in position while the parts required to be fenced or safeguarded are in motion or in use, except when any such parts are necessarily exposed for examination and for any lubrication or adjustment shown by such examination to be immediately necessary, and all such conditions as may be specified in regulations made by the Secretary of State are complied with.

The Operations at Unfenced Machinery Regulations, 1938, are as follows :

1. Regulations 2 to 7 of these regulations shall apply to the following operations namely :— . . . (ii) the carrying out, in pursuance of s. 16 of the Act, of an examination or any lubrication or adjustment shown by such examination to be immediately necessary when parts of machinery otherwise required to be fenced or safeguarded are in motion or in use but are necessarily exposed for those operations : . . . Provided further that reg. 5 shall not apply to the setting up of a machine by a tool setter or other skilled mechanic, being a male person who has attained the age of eighteen and whose duty it is to set up such machine.

2. One or more persons shall be appointed by the occupier of the factory, by signed entry in or by certificate attached to the general register, to be machinery attendants to carry out operations to which this regulation applies, and any such appointment may be made for all such operations or may be limited to such only of those operations as may be specified in the entry or certificate. The occupier shall furnish to each person so appointed a certificate of his appointment, which certificate shall indicate the limitations (if any) specified as aforesaid.

5. No operation to which this regulation applies shall be carried out :—(a) except by a machinery attendant authorised as aforesaid to carry out the operation (b) unless every person carrying out the operation is wearing a close-fitting single-piece overall suit in good repair which (i) is fastened by means having no exposed loose ends and (ii) has no external pockets other than a hip pocket, (c) unless another person instructed as to the steps to be taken in case of emergency is immediately available within sight or hearing of a person carrying out the operation, and (d) unless such steps as may be necessary, including where appropriate and reasonably practicable the erection of a barrier, are taken to prevent any person, other than a person carrying out the operation, from being in a position where he is exposed to risk of injury from the machinery.

The plaintiff was employed by the defendants as a floor-inspector. The machine at which the accident happened was a power press which sheared off the rough edges of pressings. This was done by putting a lower die in position and an upper die fixed in to the power press. It was admittedly a dangerous machine, but it was sufficiently guarded. The dies could be put into position while a gate was open, and then the pedal operating the machine could not be put down. No accident could, therefore, happen when the gate of the guard was open. The plaintiff took exception to some of the pressings and he sent for the tool setter, whose name was Barry, so that some adjustment might be made. The tool setter made some adjustments and took some samples, but they failed to satisfy the plaintiff and he made a rectification note and left further work to be done. When he returned he was still dissatisfied. He was then asked by the tool setter to look underneath the lower die for daylight, which was an acknowledged mode of inspection. This he did, and he was still unsatisfied. After that the tool setter sent for Fisher, the charge hand of the tool setters, and the lower die was attended to by Morgan, a tool maker. Further samples having been taken, there was a conference between the four men, the plaintiff still maintaining that the die was not correct. In the course of the argument the tool maker, Morgan, put a master pressing, which was accepted by everyone as being correct, into the press. Fisher, the charge hand, and the plaintiff looked for daylight and the plaintiff pointed to a place which he said was untrue, but at the same moment Morgan put his foot on the pedal and brought the press down, catching the plaintiff's fingers.

It was held by DENNING, J., that there had been a breach of the provisions of s. 16 of the Act of 1937, and he decided the case on that ground, finding also that the plaintiff had not been guilty of contributory negligence. He found that the dangerous parts of the machine were not necessarily exposed for the purpose of examination or adjustment—lubrication did not arise—and he, therefore, found it unnecessary to deal with the further question whether the conditions laid down by reg. 2 of the Operations at Unfenced Machinery Regulations, 1938, had been complied with. Morgan (the tool maker), Barry (the tool

setter), and Fisher, the charge hand, had all been appointed under reg. 2 as machinery attendants, but they had not been furnished with certificates of appointment indicating the limitations of their duties. Morgan being a tool maker, it is suggested that it was improper for him to have been working on the job of tool setting at the machine, his duties being in the tool makers' shed.

A Counsel for the defendants contends, on the construction of s. 16, that this was a tool setting operation, that the parts of the machine were necessarily exposed for it, and so it was not necessary to have the guard down. He reads the words "examination, lubrication or adjustment" as equivalent to a tool setting operation, and as forming all one operation, and he says that, if it was necessary to raise the guard for the purpose of that operation, it was not necessary to put it down while the operation continued. Counsel for the plaintiff contend that s. 16 and the exception contained in it in terms only apply to machinery in motion or in use, and that, if the machinery is not in motion or in use, the B adjustment can be made without guards without invoking the section. Therefore, they say, neither s. 16 nor the exception had any application in this case, until the machinery was set in motion by Morgan, and that then it was not necessary for the guard to be removed.

C In my opinion, it was not in the least necessary that the parts that caused this accident should be exposed for the operation actually being done. Morgan was pushing out the master pressing, and there was no necessity for the guard to be up. The plaintiff's interpretation is supported by s. 15, the words of which throw light on the similar words in s. 16, and show that the machinery must be in motion for the purposes of s. 16. I am in agreement with DENNING, J., as to the *ratio* on which he based his judgment.

D I ought, however, to express my view on the other points—whether the plaintiff was guilty of contributory negligence and on the failure to issue certificates under reg. 2. The argument for the defendants on the latter matter is that Barry and Morgan are tool setters, and that the second proviso to reg. 1 makes it unnecessary for the employer to register or issue certificates to tool setters, because reg. 2 applies only to "machine attendants." I think "machine attendants" are a class of whom tool setters form one part. They are exempted from reg. 5, but reg. 2 applies to tool setters and other machine attendants. It is argued E for the defendants that because reg. 5 provides that "no operation to which this regulation applies shall be carried out except by a machinery attendant," and reg. 1 excludes setting-up operations from reg. 5, it is unnecessary for those engaged in such an operation to be in possession of certificates as machinery attendants. I am unable to accept that contention. If that had been the intention, it would have been said that "regs. 2 and 5 shall not apply." The effect of the proviso to reg. 1 is simply to make it unnecessary for tool setters to F comply with the restrictions imposed by reg. 5 so that they need not have close-fitting one-piece overalls, or a second person standing by, and so forth, but reg. 2 applies to tool setters equally with other machinery attendants. Section 16 of the Act makes it abundantly clear that the regulations must be complied with, and, if they are not, the exception cannot be relied on. It can only be relied on if the machinery is exposed for the purposes mentioned in the section, and if all the regulations are complied with. Here reg. 2 was not complied with, nor was the machinery necessarily exposed.

G As to contributory negligence, I agree with DENNING, J., that it was not made out. For these reasons I think the appeal should be dismissed.

H TUCKER, L.J. : I agree. It is common ground that the parts of the machine which caused the accident were dangerous within s. 14 of the Act of 1937. It is also common ground that the defendants had provided a guard. We have, therefore, a dangerous machine with a proper guard, and an obligation that the guard shall be constantly maintained. When the accident happened the guard was not maintained or kept in position and the parts required to be fenced were in motion, so the defendants are at fault unless they can bring themselves within the words of the exception in s. 16—that is, unless they can show that this machine, which was admittedly in motion and exposed, was necessarily exposed.

The final conclusion I have arrived at is that these parts were not necessarily exposed. The process of tool setting requires the removal of the dies, their adjustment in the tool makers' shed, and their replacement in the machine. That does not require the parts to be in motion. No doubt, it is usual to follow

that process by a test to see whether the operation has been successful, and it may be customary to regard that as part of the operation, but, in fact, it is the ordinary working of the machine which could be done with the guard down. The facts in the present case were very special. The use of the master pressing was not part of the usual process of tool setting, and the removal of the master-pressing did not necessarily require the parts to be exposed. It could quite well have been done with the guard down.

The defendants have failed to bring themselves within the exception in s. 16, but if they had, it would not have been enough. They would still have to show that they had complied with all the regulations. Regulation 2 had not been complied with. It must be read with reg. 1 which provides that "Regulations 2-7 . . . shall apply to . . . the carrying out, in pursuance of s. 16 of the Act, of an examination or any lubrication or adjustment shown by such examination to be immediately necessary, when parts of machinery otherwise required to be fenced or safeguarded are in motion or in use but are necessarily exposed for those operations." Counsel for the defendants, however, relies on the second proviso to reg. 1, but that merely says that reg. 5 shall not apply to tool setters, and if reg. 2 was not to apply to tool setters, as the defendants contended, the proviso, no doubt, would have said so. Therefore, even if the defendants had brought themselves within s. 16, they would still fail. This is not a mere technicality, because these stringent regulations are intended to provide for the safety of men who are obliged to work on dangerous machines with the guard up.

I agree as to contributory negligence. There was nothing to put the plaintiff on inquiry, or on his guard.

COHEN, L.J. : I agree and only desire to add one word on the second point. I think the conclusion we have arrived at may be reinforced by reference to sub-s. (3) of s. 130 of the Factories Act, 1937, which provides :

If the occupier of a factory avails himself of any special exceptions allowed by or under this Act and fails to comply with any of the conditions attached to the exception, he shall be deemed to have contravened the provisions of this Act.

The defendants are clearly availing themselves of an exception, and they have failed to carry out one condition, namely, that requiring them to issue certificates to certain attendants, *i.e.*, the tool setters concerned in the case.

Appeal dismissed.

Solicitors : *Bell, Brodrick & Gray*, agents for *Pickavance & Heron*, Barrow-in-Furness (for the defendants) ; *Barlow, Lyde & Gilbert* (for the plaintiff).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

ROBINSON v. THAMES MEAD PARK ESTATES, LTD.

[CHANCERY DIVISION (Evershed, J.), February 5, 6, 7, 1947.]

Landlord and Tenant—Building lease—Option to renew—Performance of covenants—Delay in performance—Obligation satisfied before date for renewal of lease although not at date specified in agreement—Right to renewal.

On July 22, 1941, the tenant entered into an agreement for the lease of a piece of land on which she was to build a temporary bungalow. The lease was to end on Apr. 22, 1944, but the landlord agreed that, "subject to the tenant having faithfully performed and observed all her agreements herein contained," she was to have the option of continuing the tenancy under the grant of a building lease from a date not later than Apr. 22, 1944. One of the tenant's obligations was to erect a private dwelling by July 22, 1942. This obligation had not been satisfied by July 22, 1942, but it was satisfied by Apr. 19, 1944, when the tenant wrote to the landlord asking for a renewal of the tenancy, stating, in effect, that she had performed her obligations. The landlord refused a new lease on the ground, *inter alia*, that the obligation in regard to the dwelling had not been satisfied at the time specified :—

HELD : (i) the tenant had sufficiently performed her obligations under the option for renewal if she had ended any previous breaches of covenant

or failure to perform covenants by the date when she gave her notice calling on the landlord to grant a new lease, and, therefore, she was entitled to a new lease.

Per cur.: An option of renewal of a building lease was not to be construed as strictly as an option of renewal contained in a lease granted by a landlord of his house: *Bastin v. Bidwell* (1) distinguished.

A [AS TO OPTION TO RENEW LEASE, see HALSBURY, Halsham Edn., Vol. 20, pp. 68, 69, paras. 74-76, and pp. 152-154, paras. 165, 166; and FOR CASES, see DIGEST, Vol. 31, pp. 73-75, Nos. 2202-2209.]

Case referred to:

(1) *Bastin v. Bidwell* (1881), 18 Ch.D. 238; 44 L.T. 742; 31 Digest 75, 2209.

B ACTION by a tenant to enforce an agreement by the landlord to grant her a renewal of her building lease. The defence was that the tenant was not entitled to a renewal of her tenancy because she had not fulfilled her obligations under the agreement. The facts and the relevant clauses of the agreement appear in the judgment.

Ingram J. Lindner for the tenant.

J. A. Wolfe for the landlord.

C EVERSLED, J.: The plaintiff, Mrs. Robinson, sues on an agreement which she made with the defendant company, Thames Mead Park Estates, Ltd., on July 22, 1941, relating to a piece of land at or near the tow path at Shepperton, within the jurisdiction of the Sunbury-on-Thames Urban District Council. The object of the agreement was that Mrs. Robinson should take a tenancy for a term commencing on July 22, 1941, and ending on Apr. 22, 1944. During that period she was under an obligation to erect and maintain what was well understood by both parties to the document to be a temporary structure of the character of a bungalow or dwelling-house. Mrs. Robinson was engaged in carrying on the business of a nursery gardener in the neighbourhood, and her object was to provide herself with a convenient place at which to live near the garden, but it was also an essential part of the bargain that at the end of that three years term, or, possibly, earlier, a lease for a considerable term of years should be granted to her, she undertaking to erect on the land a permanent dwelling-house. The lease was, in other words, to be what is commonly called a building lease with the small ground rent appropriate to such a transaction. The claim in the action by Mrs. Robinson is for enforcement of that part of the bargain which obliges the defendants to grant her a lease. It is necessary to read only three paragraphs of the document. The first is cl. 2 which was an agreement on the part of the tenant, Mrs. Robinson:

F To use the land only as building land and to erect thereon at her own expense during the first 12 months of the term [*i.e.*, not later than July 22, 1942] a private dwelling of a design and structure on permanent foundations and with permanent drainage to satisfy the bye-laws and regulations of Sunbury-on-Thames Urban District Council.

Clause 3 contains the further obligation:

G To produce to the landlord prior to the commencement of any building plans of the proposed private dwelling with evidence that the aforesaid council (and any other authority concerned) have approved such plans and have granted permission to her to build and that (either before or immediately after erection) the aforesaid council have licensed or will licence the building to be used for human habitation.

The landlord's obligations begin at cl. 17, and cl. 19, the penultimate clause, is as follows:

H The landlord agrees that subject to the tenant having faithfully performed and observed all her agreements herein contained the tenant shall have the option of continuing the tenancy under the grant of a building lease for a term of not less than 60 years and of not more than 99 years at a ground rent of £10 a year from a date mutually agreed upon (but which in any case shall be a date not later than Apr. 22, 1944) provided that the tenant shall then undertake to erect before a date to be agreed upon a private dwelling constructed wholly or in the main of bricks concrete or stone with tiled or slated roof to plans approved both by the local authority and the landlord of which the estimated prime cost at the time is not less than £450 such prime cost to be calculated to include the prime cost of any then existing drainage or foundations of brick or concrete which it may then be agreed upon shall form part of the new building.

It is obvious that that last clause is in some respects of a very indeterminate character, and something turns on that to which I will presently refer.

By way of implementation of her various agreements, the tenant, shortly after the date of this document, obtained a plan of the structure which she proposed to erect. The plan acquired the number, *vis-a-vis* the local authority, the Sunbury-on-Thames Urban District Council, of 2481, and it will be convenient to identify it in that way. The plan (or a copy of it) was approved by the Sunbury-on-Thames Urban District Council. This plan shows that the outfall drainage from the bathroom and kitchen flowed into an inspection chamber near the east side of the house and then proceeded in a southerly direction, the plan indicating "to sewer in road." Owing to the distance from the road and for various other reasons, that was later altered. In fact, the whole bungalow was re-sited, and a further plan, known as 2481A, showed the altered siting of the house and a substituted method of drainage in a different direction to a cesspool on the premises outside in the garden. That substituted plan was approved both by the council and by the landlord.

For various reasons—chiefly, no doubt, owing to difficulties, due to war conditions, in obtaining materials—Mrs. Robinson had not, in fact, built this bungalow within the time specified in the agreement, but had done so by Apr., 1944. On Apr. 17, 1944, the Sunbury Council officer, Mr. Clark, made an inspection of the drains. Following that inspection, a letter was written, addressed to the defendant's solicitors by or on behalf of the council, in which it is stated: "The drains and cesspool were passed as satisfactory on the 17th instant." On Apr. 19, 1944, the plaintiff, through her solicitors, wrote a letter to the defendants' solicitors which, after reciting cl. 19 of the agreement, stated:

The house has been completed to the satisfaction of the local authorities, and we shall be obliged if you will submit the draft of the lease to be granted to our client.

It seems to me, therefore, plain that before—shortly before, but still before—the expiration of the three years specified in this document of July 22, 1941, Mrs. Robinson was saying: "I have faithfully performed and observed all the agreements herein contained, and I, therefore, call on you to fulfil your obligations to me of continuing the tenancy for a period of 99 years from Apr. 22, 1944, on the terms set out in cl. 19." Counsel for the defendant company has thought it right to confine himself to one question of fact: Aye or no, were the drains and cesspool in such a condition as satisfied cl. 2 of the agreement when the letter of Apr. 19, 1944, was written, or, indeed, as he said, at any subsequent date? Although there are, as I have said, some grounds for supposing that in other respects Mrs. Robinson had not complied strictly and in due date with all her covenants, counsel for the defendants is content to let those go and to confine himself to the point as to the drains.

[EVERSHED, J., then reviewed the evidence on this point and found that on Apr. 17, 1944, the obligation of the tenant in regard to the drains had been satisfied. He continued:] The terms of cl. 2 require all that to have been done not later than July 22, 1942. The question, therefore, arises: Is the delay in satisfying that obligation fatal to the plaintiff's rights?

That question turns on the meaning to be given to the opening words of cl. 19:

... subject to the tenant having faithfully performed and observed all her agreements herein contained.

I agree that options of renewal contained in leases are normally construed as conditions, and strictly construed. Counsel for the defendants referred, by way of illustration, to *Bastin v. Bidwell* (1). It is, however, to be noted, in construing this particular document (and every document must be construed on its own merits), that this is not a case where the landlord grants a lease of his own house which he (the landlord) has erected, and gives to the tenant the privilege of renewal. In such a case plainly, as KAY, J. points out in *Bastin v. Bidwell* (1), the strict obligation is justified because the landlord may reasonably say: "I want to be quite sure that you are in all respects a scrupulous tenant before I grant you a new tenancy." : see 18 Ch.D. 238, at pp. 250, 251. This is a case where the tenant was entering into obligations as to the erection of new premises, both during the first three years' term and later. I think, in those circumstances, that the problem, which KAY, J., found

it unnecessary to decide in the case before him (*ibid.*, at pp. 252, 253), I decide in the plaintiff's favour here, namely, that it is sufficient for the purpose of this cl. 19 that the tenant, when she comes to give her notice calling on the landlord to grant the lease, has then ended any previous breaches of covenants or failure to perform covenants. I construe the words "having faithfully performed and observed" as meaning "having, at the date when she gives the notice, faithfully performed and observed," in the sense of having remedied any defects in any previous performance. I am not concerned with anything except the drains, and, on the facts as I find them, Mrs. Robinson had, on Apr. 19, 1944, satisfied—albeit at a later date than was intended—her obligations in regard to the drains. I note that the landlord had not, before Apr. 19, 1944, claimed that the obligation to grant an extension of the term had determined by reason of the tenant's earlier failure to perform her obligation in regard to the drains.

If that is so, the only question now remaining is: Is the rest of the clause of so vague and uncertain a character as to be unenforceable, with the result that to attempt so to do would be equivalent to the court making for the parties an agreement in which they themselves have failed? It is, no doubt, true that, if the parties express themselves in so uncertain and indefinite a way that the court cannot really say that they have agreed at all, then the court cannot re-form the agreement and make one where the parties have failed, but I think that here I am not compelled to come to that negative and depressing conclusion. It seems to me there is sufficient here to give certainty and to enable the court to direct, if necessary, specific performance or its equivalent.

Judgment for the plaintiff.

Solicitors: *Saunders, Sobell, Greenbury, Leigh* (for the plaintiff); *Walker, Rowe & Clark* (for the defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Re A SOLICITOR. Re TAXATION OF COSTS.

[CHANCERY DIVISION (Roxburgh, J.), January 23, 24, 1947.]

E Solicitors—Costs—Taxation—Non-contentious business—Gross or lump sum—Distinguished. Re A SOLICITOR. tion for taxation six years after payment—Discretion of every of bill—Solicitors' Remuneration Act General Order 1882, cl. 2 (a), cl. 2 (c).—Solicitors' Act, 1932 (c. 37), ss. 64, 66—Solicitors Remuneration (Gross Sum) Order, 1934 (S.R. & O., 1934, No. 548), art. 1.

On July 31, 1940, the respondent solicitors wrote to the applicant, who was in Switzerland, enclosing their receipted bill of costs and a cash account. An item in the cash account was a disbursement, "bill of costs herewith," amounting to a substantial sum. The accompanying statement of charges showed only a gross or lump sum for a large proportion of the work specified. One of the items for which the lump sum was charged was a mortgage completed, but it was not contended that it included any freehold or leasehold property within the jurisdiction. The applicant received the letter and documents in Aug., 1940. The respondents continued to act for her and she sent them many letters and cables and introduced two new clients. In a letter dated Mar. 20, 1944, she informed the respondents that she had changed her solicitors, but it was not until Jan. 4, 1946, that she raised the question of the statement of charges which had been paid by retention on July 31, 1940.

HELD: (i) the statement of charges was not a "bill" within the Solicitors' Act, 1932, s. 66.

(ii) the statement of charges fell within the Solicitors' Remuneration (Gross Sum) Order, 1934, if the only business included therein was business regulated by the Solicitors' Remuneration Act, General Order, 1882, cl. 2 (c), but, if the statement did so fall, the court would not make an order under the Solicitors' Act, 1932, s. 64, unless the proviso to the Order of 1934 with regard to the time of application had been complied with.

(iii) the mortgage in this case, not being wholly or partly of freehold or leasehold land within the jurisdiction, was not within the scale fees

set out in pt. I of sched. I, to the General Order of 1882, and, accordingly, cl. 2 (a) of the General Order was inapplicable and cl. 2 (c) covered the work.

Re Furber (1) distinguished, and dicta of KEKEWICH, J., therein criticised.

(iv) no order for taxation could be made under the Solicitors' Act, 1932, s. 66, without making an order under s. 64, because there would be no bill within the meaning of s. 66.

(v) in view of the applicant's conduct in delaying her application for taxation, and continuing to employ the respondents for several years without complaint, the court would not exercise its jurisdiction to make an order under s. 64.

[AS TO REMUNERATION OF SOLICITORS FOR NON-CONTENTIOUS BUSINESS, see HALSBURY, Halsam Edn., Vol. 31, pp. 140-157; and FOR CASES, see DIGEST, Vol. 42, pp. 232-248, Nos. 2648-2796.]

Case referred to:

- (1) *Re Furber* [1898] 2 Ch. 538; 47 W.R. 184; *sub nom. Re Furber, Ex p. Furber*, 67 L.J.Ch. 593; 79 L.T. 266; *sub nom. Re Furber, Ex p. Watkins*, 42 Sol. Jo. 718; 42 Digest 234, 2672.

APPLICATION for the delivery of a bill of costs under Solicitors Act, 1932, s. 64, or for the taxation of a bill of costs under s. 66. The statement of charges of the respondent firm of solicitors was a lump sum or gross sum and could not be a bill within s. 66 unless by the Solicitors' Remuneration (Gross Sum) Order, 1934. One of the questions to be determined was whether the business constituted in the statement of charges fell within the scope of that Order. If it did not, no order could be made under s. 66 unless an order was made under s. 64 as there would be no bill within s. 66.

James Stirling for the applicant.

Maurice Berkeley for the respondent.

ROXBURGH, J.: The application as amended is for the delivery of a bill of costs under s. 64, or the taxation of a bill of costs under s. 66 of the Solicitors Act, 1932. Section 64 provides:

(1) The jurisdiction of the High Court to make orders for the delivery by a solicitor of a bill of costs and for the delivery up of, or otherwise in relation to, any deeds, documents or papers in his possession, custody or power, is hereby declared to extend to cases in which no business has been done by him in the High Court.

Section 66 provides:

(1) On the application, made within one month of the delivery of a solicitor's bill, of the party chargeable therewith, the High Court shall, without requiring any sum to be paid into court, order that the bill shall be taxed and that no action shall be commenced thereon until the taxation is completed. (2) If no such application is made within the period mentioned in the last preceding subsection, then, on the application either of the solicitor, or of the party chargeable with the bill, the court may, upon such terms, if any, as they think fit (not being terms as to the costs of the taxation), order—(a) that the bill shall be taxed; (b) that, until the taxation is completed, no action shall be commenced on the bill, and any action already commenced be stayed: Provided that—(i) if twelve months have expired from the delivery of the bill, or if the bill has been paid . . . no order shall be made on the application of the party chargeable with the bill except in special circumstances and, if an order is made, it may contain such terms as regards the costs of the taxation as the court may think fit; (ii) in no event shall any such order be made after the expiration of twelve months from the payment of the bill.

On July 31, 1940, Mr. Baker, a member of the respondent firm of solicitors, wrote to the applicant, who was in Switzerland, as follows: "Dear Mrs. Saunders, I am enclosing my firm's receipted bill of costs together with a cash account showing various amounts paid and also retained for your credit." The letter then went on to deal with a large number of matters in respect of which Mr. Baker or his firm was or were acting in a professional capacity for the applicant. The statement of account which accompanied that letter showed a considerable sum of money credited to the applicant and the manner in which it had been disbursed. The only item of importance for the present purpose is the disbursement "bill of costs herewith" and it was a substantial sum, though, undoubtedly, the work which the solicitors had done covered a long

period and was of a detailed character and of considerable extent. The "bill" enclosed I will call a statement of charges as I think there is little doubt that it is not a "bill" within the meaning of the Solicitors Act, 1932, s. 66. The statement of charges which was enclosed in that letter begins with the following item :

Re [a certain person deceased] November, 1938, to July, 1940. To professional services rendered during this period in relation to your financial affairs and the subsequent negotiation of an advance on the security of your interest in the family trust involving . . .

There follows a long and detailed statement of the work claimed to have been done. Though that work is particularised in considerable detail no separate charge is given, at any rate, for the earlier part of it. It is just a gross or lump sum charged for the whole, and that is the point which raises the issue in this case. That item is followed by an item of disbursements which is considerable and an item for which, apparently, no charge was made, and then follows a small item for which there is a charge of three guineas. The total amount of the statement of charges is computed, and at the end appear the words : "Delivered and paid July 31, 1940." It is clear from the accompanying account which was sent to the applicant that the charges were paid by retaining the total amount out of monies which the solicitors had received on behalf of the applicant.

The applicant received those documents in Aug., 1940, and between 1940 and 1946 she made no comment. Mr. Baker, in his affidavit filed in this matter, says :

From August, 1940, when the applicant states she received my firm's bill of costs and cash account, until she instructed her present solicitors, upwards of 100 letters and cables passed between her and my firm alone, and, indeed, she appeared most satisfied, and in addition to expressing appreciation from time to time of our continuing efforts on her behalf, in two cases introduced friends of hers living in Switzerland as clients. In addition, in letters and cables dated April 25, 1942, June 1, 1942, April 20, 1943, and January 26, 1944, she asked and urged me to become a trustee of certain trusts in which she was beneficially interested.

One of those letters and two of those cables were exhibited to that affidavit. The letter, which is dated Apr. 25, 1942, is such a letter as would lead anybody receiving it to believe that the writer was entirely satisfied with the services which were being rendered by the person to whom the letter was addressed, and the same applies to the two cables. On Mar. 20, 1944, however, she wrote a letter in which she said :

Dear Mr. Evan Baker, You will, no doubt, have received a telegram from me suggesting that you should hand over our files to Ridsdals [i.e., another firm of solicitors]. I am sorry that I should find myself obliged to send you such a cable, but it seemed quite impossible to carry on as things were.

Of course, she was entirely free to change her solicitors, but there is not a word or suggestion that she had any complaint about the charges of the respondent firm. The applicant says in her affidavit :

It was always my intention to have the said bill of costs taxed as soon as I was able to give proper instructions for this to be done.

It was not until Jan. 4, 1946, that she, or, more accurately, her new solicitors, raised a question with regard to the statement of charges which had been paid by retention on July 31, 1940. If it was always the applicant's intention to challenge the bill of costs, it seems to me very unfair to have continued to invite the respondent firm to continue to act for her, not only in old matters but in new, without expressing any suggestion of dissatisfaction with the charges or of her intention to try and reopen a paid account.

I have already pointed out that the statement of charges contained what is commonly called a gross sum or a lump sum charge, and it has been conceded that a statement of charges in that form certainly was not a "bill" within the Solicitors Act, 1932, s. 66, before the Solicitors' Remuneration (Gross Sum) Order, 1934, came into operation, whatever may be the position now. That Order, on which this case mainly depends, provides :

1. Without prejudice to the power possessed by the court under the Solicitors Act, 1932, or otherwise, or to the powers conferred upon the solicitor or the party

chargeable with the bill under s. 66 of the Solicitors Act, 1932, the remuneration of a solicitor in respect of all business regulated by cl. 2 (c) of the General Order of 1882 as amended by any subsequent General Order may at the option of the solicitor be by a gross sum in lieu of by detailed charges : Provided that within six months after delivery of a charge made under this Order whether it has been paid or not the client may require that a detailed bill of charges shall be delivered and the solicitor shall thereupon comply with the requisition and any bill so delivered shall be subject to taxation as if the provisions of this Order with respect to the regulation of remuneration by gross sum had not been made.

This statement of charges seems to me to fall within the scope of that Order, provided that the only business included therein is business remuneration in respect of which is regulated by the Solicitors' Remuneration Act, General Order, 1882, cl. 2 (c). If the business is of that description, it appears to me that, on the face of the Order of 1934, the court would not make an order under the Solicitors Act, 1932, s. 64, unless the client had taken the steps open to him or her under the proviso to the Order. Therefore, the main question for me to consider is whether all the business to which this statement of charges relates is business regulated by cl. 2 (c) of the General Order of 1882. All non-contentious business is within cl. 2 (c) of the General Order unless it falls within some other provision of the General Order. The only provision in the General Order other than cl. 2 (c) which could possibly apply to this case is cl. 2 (a), which provides :

In respect of sales, purchases, and mortgages completed, the remuneration of the solicitor having the conduct of the business, whether for the vendor, purchaser, mortgagor, or mortgagee, is to be that prescribed in pt. I of sched. I to this Order, and to be subject to the regulations therein contained.

CORDERY ON SOLICITORS, 4th ed., p. 348, makes the following observation with regard to pt. I of sched. I to the General Order of 1882 :

The scale fees in sched. I do not apply : (a) To land situate out of the jurisdiction . . . (c) To property other than freehold, [copyhold,] or leasehold, but *qu.* as to the fees for negotiating sales, purchases and loans. The scale fee for negotiating a loan applies though the loan is not exclusively on real or leasehold property.

It is plain, therefore, that I must investigate sched. I further. Undoubtedly, a mortgage was completed in this case, but it has not been contended before me that the mortgage includes any freehold or leasehold land within the jurisdiction. I emphasise that because I think this was a Scottish trust. The only item in pt. I of sched. I which could apply to any of the business transacted by the respondent firm in this case is the item "Mortgagor's solicitor for negotiating loan." It is plain that there is no other scale charge which could possibly apply to any of the work done in this case.

I have to consider the decision of KEKEWICH, J., in *Re Furber* (1), because I am bound by that decision. In that case there was freehold or leasehold property within the jurisdiction and there were other scale charges which were applicable besides the scale charge for negotiating a loan. Accordingly, the judge began his judgment ([1898] 2 Ch. 538, at p. 542) :

The question raised on this summons is one of general importance to the profession. It is whether a solicitor can charge a scale fee for negotiating a loan though the loan is not to be advanced on a mortgage of freehold, copyhold or leasehold property exclusively.

That, if I may presume to say so, precisely stated the point raised by the facts of that case. The judge concluded his judgment (*ibid.* at p. 544) :

The result is that I must remit the matter to the taxing master with an intimation of my opinion that Mr. Furber is entitled to charge the scale fee for negotiating loan notwithstanding that there was no mortgage of freehold, copyhold, or leasehold property exclusively.

That again was a decision on the precise point raised in that case, and I have no doubt that, if any freehold or leasehold property within the jurisdiction had been subjected to the mortgage in question, this decision would have applied and would have bound me, but in that case, of course, other scale fee charges would have been applicable also. In reaching his conclusion the judge uses language which seems to me to go beyond the case which he had to decide and to apply where no freehold or leasehold property within the jurisdiction is subjected to the mortgage, and, indeed, to a case like the present where no

other scale fee of any kind is applicable to any of the business to which the statement of charges relates. He says (*ibid.*, at p. 543) :

My conclusion—and I am bound to say that but for the opinion of the taxing master I should have had very little hesitation about it—is that “negotiating loan” means “negotiating loan” of any kind provided the loan is on mortgage. It would not, for instance, include the case of a loan upon a promissory note, or money borrowed from bankers without any specific security. I think it is erroneous to suppose that because some property comprised in a mortgage is not of the particular kind to which title is deduced, or of which the title is investigated in the manner indicated in the schedule, therefore the scale fee for negotiating ought not to be charged.

In so far as that language extends, as I think it does extend, to a case in which no freehold or leasehold property within the jurisdiction is subjected to any mortgage and in which no other scale fee is applicable, while it is an observation to which I must apply great weight, it is not binding on me. I cannot bring myself to hold that the item “Mortgagor’s solicitor for negotiating loan,” is a scale charge which is applicable to business of the character indicated in the statement of charges which I have to consider in this case and to which no other scale charge is applicable.

If my conclusion is well founded that must be an end of the application, but if I am wrong in my conclusion on the construction of the General Order of 1882, the respondents could not rely on the statement of charges as a statement delivered pursuant to the Gross Sum Order of 1934 because it is impossible to say how much of the gross sum in the statement of charges is referable to the item for negotiating the loan to which a scale fee would be applicable. I should still have to consider whether, in the circumstances of this case, I ought to make an order under s. 64. I could not make an order under s. 66 without making an order under s. 64 because there would be, on the hypothesis which I am now considering, no bill within the meaning of s. 66. Accordingly, the question would be whether I ought to make an order under s. 64 to deliver a bill and an order under s. 66 for taxation of the bill so delivered. Counsel have conceded that I am neither guided nor constrained by any judicial decision in considering whether I ought to exercise my jurisdiction under s. 64 to make an order for delivery of a bill. The question whether or not the scale charge ought or ought not to have been made is, from a practical point of view, of small moment in the present case, though from a legal point of view it is, of course, most important. The applicant by implication admits that she realised both the amount which she had been charged and the work in respect of which that amount had been charged within a month of the date on which the bill was delivered and the charge paid by retainer, because she says she always intended to have the bill taxed. Realising all that, she not only refrained from raising even the slightest question about the statement of charges, but she continued to employ the respondent firm for several more years both in relation to old business and in relation to new business and expressed appreciation of their services in one direction or another on several occasions. Even when she notified the respondents that she was about to change her solicitors and when, therefore, she could have no possible ground for withholding from them the information that she had always intended to have the bill taxed, she does not make the slightest suggestion of any such intention, and it was not until 1946 that any such suggestion was made to the respondent firm. It is suggested she was in difficulty in communicating with the respondent firm. It is plain she was not. It is suggested that she was without assistance, but she had her husband with her in Switzerland. It seems to me that, in the circumstances which I have indicated even if I am wrong in my construction of the General Order of 1882, I ought not to exercise the jurisdiction which I should undoubtedly have in that event to order the defendants to deliver a bill of costs.

Application dismissed with costs.

Solicitors: *Ridsdale & Sons* (for the applicant); *Kenneth Brown, Baker, Baker* (for the respondents).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

R. E. PHILLIPS (INSPECTOR OF TAXES) *v.* BOURNE.

[KING'S BENCH DIVISION (Atkinson, J.), January 16, 17, 30, 1947.]

Income Tax—Assessment—Profit from trade—Cattle dealer—Lands insufficient for the keep of the cattle—"Cattle"—*Inclusion of pigs—Income Tax Act, 1918 (c. 40), sched. D, case III, r. 4.*

The taxpayer, a farmer, had 45 acres of land, of which 33 were pasture and 12 arable, the rent of the farm being £130 per annum. He kept pigs the number of which varied, but there were at times 60, and there was housing for 70. Only about 10 per cent. of their food was grown on the farm. The profits from this business amounted to more than £2,000.

HELD: the word "cattle" in the Income Tax Act, 1918, sched. D, case III, r. 4, included pigs, and, as the taxpayer's lands were insufficient for the keep of the pigs, so that the assessable value afforded no just estimate of the profits, he should be assessed on his profits under the rule.

[AS TO ASSESSMENT ON CATTLE DEALERS, see HALSBURY, Hailsham Edn., Vol. 17, p. 73, para. 146 and Supplements; and FOR CASES, see DIGEST, Supplement, Income Tax, Nos. 79e, 79f.]

AS TO "CATTLE," see HALSBURY, Hailsham Edn., Vol. 1, p. 569, para. 975; and FOR CASES, see those referred to herein; also WORDS AND PHRASES, Vol. 1, p. 402.]

Cases referred to:

- (1) *R. v. Paty* (1770), 2 Wm. Bl. 721; 2 East, P.C. 1074; 1 Leach, 72; 2 Digest 292, 626.
- (2) *R. v. Chapple* (1804), Russ. & Ry. 77; 2 Digest 293, 635.
- (3) *R. v. Whitney* (1824), 1 Mood. C.C. 3; 2 Digest 294, 643.
- (4) *Fletcher v. Sondes (Lord)* (1826), 3 Bing. 501; 1 Bl. N.S. 144; 42 Digest 672, 836.
- (5) *Wright v. Pearson* (1869), L.R. 4 Q.B. 582; 10 B. & S. 723; 38 L.J.Q.B. 312; 20 L.T. 849; 33 J.P. 534; 2 Digest 247, 307.
- (6) *Child (Childs) v. Hearn* (1874), L.R. 9 Ex. 176; 43 L.J.Ex. 100; 2 Digest 236, 231.

CASE STATED BY General Commissioners of Income Tax.

The Commissioners found that pigs were not "cattle" within the meaning of the Income Tax Act, 1918, sched. D, case III, r. 1, and, accordingly, that a farmer, who kept a large number of pigs as well as cows, was not liable to be assessed on his profits under that rule, although the assessed value of his land was no just estimate of his profits. The Crown appealed. The facts, as found in the Case Stated, appear in the judgment.

D. L. Jenkins, K.C., and *Reginald P. Hills* for the Crown.

L. C. Graham-Dixon for the taxpayer.

Cur. adv. vult.

Jan. 30. ATKINSON, J. This is an appeal by the revenue against a finding by the general commissioners that a farmer was not liable, on the facts of the case, to be assessed on his profits. I think the most convenient course would be to refer to the relevant sections first.

The Income Tax Act, 1918, sched. B, provides:

Tax under sched. B shall be charged in respect of the occupation of all lands, tenements, hereditaments and heritages in the United Kingdom, for every 20s. of the assessable value thereof estimated in accordance with the rules of this schedule.

The rule applicable to sched. D, case I, provides:

The tax shall extend to every trade carried on in the United Kingdom or elsewhere . . . and shall be computed on the full amount of the balance of the profits or gains . . .

The Finance Act, 1941, s. 10 (1), provides:

Subject, as respects farming and farm land, to the provisions of the next succeeding section, farming and market gardening shall be treated as trades for the purposes of income tax and accordingly (a) the profits or gains thereof shall be charged under case I of sched. D.

The exception is contained in s. 11 of the Act of 1941. I may say that the two years involved in this case are 1940-41 and 1941-42. Section 11 (1) provides:

If, for the year 1941-42 or any subsequent year of assessment, the total annual value of the farm and market garden land of an individual in the relevant period, together with so much of the annual value of the farm and market garden land of any partnership of which he is a member during that period as is proportionate to his share for that period in the partnership income, does not exceed £300 in all, so much of the last preceding section as requires the profits or gains of farming to be charged under sched. D

as the profits or gains of a trade shall not apply in relation to him for that year of assessment and he shall be assessed and charged to income tax . . .

under sched. B on the assessed value of his land. I come next to the rule which has to be interpreted in this case, namely, r. 4 of the Income Tax Act, 1918, sched. D, case III :

A If the commissioners find that lands which have been charged under sched. B on the assessable value, and which are occupied by a dealer in cattle or a dealer in or a seller of milk, are insufficient for the keep of the cattle brought on to the lands, so that the assessable value affords no just estimate of the profits, they may require a statement of the profits to be delivered, and charge such further sum thereon as, together with the charge under sched. B, will make up the full sum wherewith the dealer or seller ought to be charged in respect of the like amount of profits charged according to r. 2 of the rules applicable to this case.

B The scheme seems simple. A farmer *prima facie* is taxed on his profits, but, if he has only a small place, of which the annual value is £300 a year—this has since been reduced to £100 a year [by the Finance Act, 1942, s. 28 (1)]—his profits will not be inquired into, but he will be assessed merely on the annual value of his holding. That is fair enough if his profits are made from the occupation of the land, but, if he carries on a trade on the land and makes considerably more than the assessed value, one cannot talk of these profits as being made out of the occupation of the land any more than one could if one built a factory on the land and proceeded to make profits from the use of the factory. They are profits made on the land ; they are not profits made from the occupation of the land. Section 11 of the Act of 1941 is intended to provide for such a case. If you bring on more cattle than you can maintain and keep on the land and deal in cattle or milk so that you make far more profits than the assessable value, then you have to be taxed as if you were carrying on a trade. That is the scheme of this legislation.

D The question here is : What is the meaning of the word "cattle" ? The facts stated in the Case are these. The taxpayer, Mr. Bourne, had a farm at Eccleshall. The area was 45 acres of which 33 acres were pasture and the remaining 12 acres arable. The rent of the farm was £130 per annum, and he was assessed under sched. B for the two years under appeal on assessable values of £130 and £108 respectively. Then the Case states : "The taxpayer kept between 30 and 40 cows on the land and sold the milk to milk dealers." E In 1940 work was begun on an armament factory close to the farm and canteens were opened to supply meals to the factory, where a large number of people were employed. The taxpayer contracted to supply the canteens with milk and for a time he was allowed to take whatever swill he required free of charge. At a later date a charge was made for the swill. The taxpayer used this swill to fatten pigs which he bought at approximately 3 months old, kept F for 3 to 4 months, and then sold them for killing for bacon. At times he had up to 60 pigs, but the numbers varied from time to time. The Case finds that the pigs were fed in certain buildings, which I will describe later on, and approximately 90 per cent. of their feed was composed of swill which was obtained from the canteens and only 10 per cent. of their food was grown on the farm. The pigs were housed in this way. There were three existing G brick-built pig-styes holding 10 pigs each, four loose boxes holding 10, and one moveable wooden pig arch holding approximately 8 pigs, so that there was housing for 78 pigs. The profits of these activities amounted to more than £2,000 a year, so that the profits he made were out of all proportion to the assessment.

The main point is whether pigs are "cattle" within the meaning of sched. D, case III, r. 4. The commissioners found that they were not, and that the H land was sufficient to maintain the cattle he had got, *i.e.*, some cows, but there is a clear implication that, if the pigs were cattle, the land was not able to maintain them and that more animals had been brought on to the land than the land could maintain. They found, as they could not help so doing in those circumstances, that the assessable value was no just estimate of the profits.

The issue was thus reduced to the simple question : Are pigs "cattle" ? There are three ways in which counsel for the Crown approached this question. The first one I will call the "dictionary" way. It is perfectly clear that at one time the word "cattle" was a collective name for live stock—for live

animals held as property. THE NEW ENGLISH OXFORD DICTIONARY states :

The application of the term has varied greatly, according to circumstances of time and place, and has included camels, horses, asses, mules, oxen, cows, calves, sheep, lambs, goats, swine, etc. The tendency in recent times has been to restrict the term to the bovine genus, but the wider meaning is still found locally, and in many combinations . . . c. Now usually confined to, or understood of, bovine animals.

It is perfectly plain that at some time or other—the dictionary does not say how long ago—the word “cattle” would have included pigs and that it may do so to-day. One has to look at the surrounding circumstances to see in what sense it has been used. I forget the precise year in which the present translation of the Bible was made, but clearly at that time the term “cattle” was not restricted to bovine animals. One reads : “Adam gave names to all cattle.” Many quotations in THE NEW ENGLISH OXFORD DICTIONARY show that it was used in the widest sense. So that I start with this, that “cattle” may include pigs. I bear in mind the argument which was pressed on me that, in taxing matters, there is no room for intendment and that burdens have to be clearly and unambiguously imposed, but I am not infringing that rule when I say that it is quite clear that the word “cattle” may include pigs. There is this also to be said. This particular rule is a reproduction of the Income Tax Act, 1842, s. 100, sched. D, case III, r. 3, and it is in almost precisely the same language. That was a reproduction of a section which appeared in the Income Tax Act, 1806 [s. 112, sched. D, case III, r. 3.], 46 Geo. 3, c. 65. The point made is that, in interpreting a section which is a reproduction of a previous section, it is right to look at the meaning which the original section had. There is not the faintest doubt, I think, that in 1806 the word “cattle” would have been construed so as to include pigs. Even in 1842 (which is over 100 years ago) I think the same result would have followed. So much for the dictionary approach.

The next point is to consider what the rule is aiming at. I have touched on this already. If one is merely making profit from the occupation of land, say a small-holding, which is assessed at less than £300 (now £100) there is no inquiry into profits. That is all very well as long as the profits one is making arise from the occupation of the land, but, if the profits do not arise from the occupation of the land but from some industry or trade carried on on the land, a totally different position is created. The object of the rule clearly is to provide for a case where a number of animals are brought on the land which the land cannot possibly support, and dealing in them, or, if they are bovine animals, dealing in milk and making profits far in excess of the sum on which one is assessed. Let me take a simple example which I have seen for myself. In Canada, I went over a very big cattle farm with very big cattle houses. The cattle were kept in sheds and they were never let out, the reason being that there were so many bitter herbs in the grass in the district that the milk would be ruined. They were milked three times a day. On the fields some food was grown to help feed the animals, but in the main they obtained the food from outside, the amount grown on the ground being quite small. It would be absurd to say that the profits there were made from “the occupation of land.” They were not. They were made from carrying on an industry on the land, which is a totally different thing. So here. It is a typical example of what the section is designed to prevent. Here is a man who has quite a small farm and he brings some 50 pigs on to it. I think the Case refers to the fact that they were at times allowed to root about the fields, but they were not getting their food in that way—90 per cent. of their food came from outside. They were in pig-styes, loose boxes and the like. It is perfectly plain that the profits made out of this trade in pigs did not arise from the occupation of land. They arose from a business carried on on the land, a trade carried on on the land, which is quite a different thing. So it is clear that this trade in pigs was the very thing which the rule was designed to prevent. Therefore, even if the matter stopped there, I think one would be bound to say that pigs were cattle within the meaning of the rule.

The third line of argument of counsel for the Crown was to call my attention to a number of cases in which the expression “cattle” had been interpreted. The first in order of date was in 1770, *R. v. Paty* (1). In that case, it was necessary to interpret what was known as the Black Act (9 Geo. I, c. 22) :

If any person or persons shall unlawfully and maliciously kill, maim, or wound any cattle . . .

certain results were to follow. The question in *R. v. Paty* (1) was whether a mare was cattle. BLACKBURN, J., had the point submitted to all the judges, and unanimously they held that the word "cattle" included a mare. In other words, they rejected the narrow interpretation of the word which suggested that it merely referred to cows and animals of the bovine class. The next case was in 1804, *R. v. Sarah Chapple* (2), where a woman was prosecuted under the same Act for killing three pigs. Again, the question was submitted to all the judges, except two. All agreed that pigs were "cattle" within the meaning of that Act. The next case was in 1824, *R. v. Whitney* (3), where, in a case under the same Act, two asses were held to be cattle. Eleven judges were called together to determine the point. In other words, on three occasions, the narrow meaning of the word "cattle" was rejected. The next case was in 1826, *Fletcher v. Lord Sondes* (4). It was a complicated case, and the facts do not matter for this purpose, but there is a passage which shows what the meaning of the word "cattle" was supposed to be then. BEST, C.J., said (3 Bing. 501, at pp. 580, 581):

The statute of Elizabeth is a penal law. The rule to which I allude requires that all penal laws should be construed strictly, that no case should be holden to be reached by them but such as are within both the spirit and letter of such laws. If these rules are violated, the fate of accused persons is decided by the arbitrary discretion of judges, and not by the express authority of the laws. If general words follow an enumeration of particular cases, such general words are by another rule of construction holden to apply only to cases of the same kind as those which are expressly mentioned. By 14 George II, c. 1, persons who should steal sheep or any other cattle were deprived of the benefit of clergy. The stealing of any cattle, whether commonable or not commonable, seems to be embraced by these general words, any other cattle; but by 15 George II, c. 34, the legislature declared that it was doubtful to what sorts of cattle the former Act extended besides sheep, and enacted and declared that the Act was meant to extend to any bull, cow, ox, steer, bullock, heifer, calf and lamb, as well as sheep, and to no other cattle whatsoever. Until the legislature distinctly specified what cattle were meant to be included, the judges felt that they could not apply the statute to any other cattle but sheep. The legislature by the last Act says it was not to be extended to horses, pigs, or goats, although all these are cattle.

That passage was cited to me as showing the view that was held at that time as to the meaning of the word "cattle"—in other words, that the term "cattle" was not restricted to bovine animals. The next case cited was *Wright v. Pearson* (5), decided in 1869, where the question was the meaning of the word "cattle" in the Dogs Act, 1865, which gave a right of damages against the owners of dogs for injuries done to cattle or sheep. It was held that the word "cattle" included horses and mares. In 1874 in *Child v. Hearn* (6), the Railways Clauses Consolidation Act, 1845, s. 68, imposing an obligation to fence against the straying of cattle, fell to be construed. In that case, pigs had strayed on the land and damage had been caused, and it was held that the expression "cattle" did include pigs.

Thus, I have had a number of cases cited to me in which the word "cattle" had to be construed, and in every one of them the narrow meaning was rejected and the wider meaning was adopted. I agree that they were all decisions on a particular Act, but they do establish that, in interpreting the word "cattle" in an Act, one has to look at what is the evil aimed at—what it is that the section wishes to deal with. If one finds that the word "cattle" must have been used in the wider sense, one must give effect to it. The conclusion to which I have come is that the word "cattle" in this section does include pigs, that the lands were insufficient to maintain these pigs, that the decision of the commissioners was wrong, and that the appeal must be allowed with costs. The Case must go back to the commissioners to arrive at the true assessment of profits.

Appeal allowed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Ellis & Fairbairn* (for the taxpayer).

[Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.]

PEARCE v. DOULTON (INSPECTOR OF TAXES)

[KING'S BENCH DIVISION (Atkinson, J.), January 20, 1947.]

Income Tax—Schedule A—Deductions—Depreciation of value of lease—Premiums on insurance policy to produce sum equivalent to purchase price—Income Tax Act, 1918 (c. 40), sched. A, No. I (1); No. V, r. 8 (1).

In 1932 the appellant bought a lease, expiring in 1958, of 12 houses for £900. The ground rent was £20 and the rent received for each house £16 a year. The appellant was assessed to income tax under the Income Tax Act, 1918, sched. A, No. I, in the sum of £144—*viz.*, 12 times the annual value of each house, £16, less £48 for repairs :—

HELD : no allowance could be made in respect of the ultimate loss of the purchase price on the expiration of the lease nor in respect of the annual premiums which would be payable on an insurance policy to produce that amount at the expiration of the period of the lease, the latter not being a maintenance expense within sched. A, No. V. r. 8 (1).

[AS TO THE INCOME TAX ACT, 1918, SCHED. A, No. I, and No. V, r. 8 (1), see HALSBURY'S STATUTES, Vol. 9, pp. 533, 542.]

Case referred to :

(1) *Inland Revenue Commrs. v. Fergus* (1926), 10 Tax Cas. 665.

CASE STATED by General Commissioners of Income Tax.

At a meeting of the commissioners at Woolwich on Mar. 5, 1946, the taxpayer appealed against assessments to income tax for the year ending Apr. 5, 1946, in the net sum of £144 under sched. A to the Income Tax Act, 1918. The commissioners confirmed the assessment, and the taxpayer appealed. The facts appear in the judgment.

The taxpayer appeared in person.

Reginald P. Hills for the Crown.

ATKINSON, J. : On July 23, 1932, the taxpayer purchased a lease of 12 houses, and paid a sum of £900 for it. The ground rent under the lease was £20. The rent that he collects on the houses amounts to £16 a year for each house. No one disputes that that is a fair rental, or that that sum fairly represents the annual value of the house. The taxpayer was assessed under sched. A on that basis, the gross assessment being 12 times £16, or £192. The statutory allowance of £48 for repairs was allowed, and that left a sum of £144 in respect of which the taxpayer paid tax.

That assessment was made under sched. A, No. I, which provides :

In the case of all lands, tenements, hereditaments or heritages capable of actual occupation, of whatever nature, and for whatever purpose occupied or enjoyed . . . the annual value shall be understood to be :—(1) the amount of the rent by the year at which they are let, if they are let at a rackrent and the amount of that rent has been fixed by agreement commencing within the period of seven years preceding the fifth day of April next before the time of making the assessment.

The annual value is, therefore, fixed under the rules in a particular way. In this case it has been arrived at in that way, and really that is an end of the case, but the taxpayer says : "That is not treating me fairly, because I have paid £900 for this lease and at the end of the lease, which expires in 1958, I shall have lost my £900 capital. This way of taxing me makes no allowance for my loss of that sum." He contends that that £900 ought to be spread out over the number of years of the lease and a deduction made accordingly, or that he ought to be allowed the annual premium he would have to pay for a policy of insurance producing £900 at the end of the period. That is a very attractive argument, but, as a matter of law, it is untenable. The assessment is to be made in accordance with the rules.

This point has been dealt with in *Inland Revenue Commissioners v. Fergus* (1). There a lease had been purchased and a lump sum paid, and a claim was made that there ought to be a deduction in respect of that sum. ROWLATT, J., said (10 Tax Cas. 665, at p. 672) :

When you consider the nature of income tax, it is to charge income tax upon an income-producing property or an annual-value-producing property when you have got it, although of course you have had to pay to get it first.

That is this case put in a nutshell. Therefore, I am bound to disallow that claim.

The claim in respect of the premiums really arises under sched. A, No. V, r. 8 (1):

If the owner of any land or houses to which this rule applies shows that the cost to him of maintenance, repairs, insurance, and management, according to the average of the preceding five years, has exceeded, in the case of land, one-eighth part of the annual value of the land as adopted under this schedule, and, in the case of houses, [one-sixth part of that value], he shall be entitled in addition to any reduction of the assessment for the purposes of collection, on making a claim for the purpose, to repayment of the amount of the tax on the excess.

In my judgment, the cost of the premiums in question is not an expense he could bring into account under r. 8 (1), because the insurance referred to in the rule is insurance of the premises, the expense of insuring the continued existence of the premises against loss by fire or in other ways. The words "cost to him of maintenance, repairs, insurance, and management" all have relation to the maintenance of the property in question. It is clear that, because a man who owns a wasting asset may choose wisely to take out an insurance to replace the capital, he cannot claim that the premium he has paid in respect of such a policy be treated as a maintenance expense. So, on both the points raised the taxpayer fails, and the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitor: *Solicitor of Inland Revenue* (for the Crown).

[Reported by W. J. ALDERMAN, Esq., *Barrister-at-Law.*]

EDWARDS v. MINISTER OF PENSIONS

[KING'S BENCH DIVISION (Denning, J.), January 23, 1947.]

Royal Forces—Pension—Attributability—Compelling presumption—Medical examination and attestation before outbreak of war—No further examination when embodied for war service—Royal Warrant Concerning Retired Pay, Pensions, etc., 1943, art. 4 (3).

The benefit of art. 4 (3) of the Royal Warrant Concerning Retired Pay, Pensions, etc., 1943, applies to members of the territorial and of the regular forces who were medically examined before the outbreak of war, as well as to those who were examined when they joined the forces after the outbreak of war.

On attestation, on Apr. 4, 1939, the appellant was medically examined and found fit for general service. He was embodied on Sept. 2, 1939, but there was no further medical examination or medical report. He was discharged in 1945 on account of epilepsy:—

HELD: the disease was not noted in a medical report made on the commencement of the appellant's service, and, therefore, there was a compelling presumption in his favour.

Brown and others v. Minister of Pensions (1) not followed.

[EDITORIAL NOTE.] The conflict between the High Court and the Court of Session which is revealed by this case is unfortunate because, by s. 6 (2) of the Pensions Appeal Tribunals Act, 1943, the decision of the judge nominated by the Lord Chancellor to hear appeals on points of law is final and conclusive. In the Scottish cases referred to by DENNING, J., the Court of Session were hearing sixteen appeals and the LORD JUSTICE-CLERK (COOPER), giving the opinion of the court, said that each case depended on its own facts and then observed that there were certain general matters which were common to a number of the cases which could be conveniently discussed at the outset. He then asked the question: Does art. 4 (3) of the Royal Warrant apply where a person in respect of whom a claim is made was not examined at the commencement of his war service? Having given the definition of "war service" in art. 1 (21), of the Warrant—"service . . . during the whole or any part of the period beginning on Sept. 3, 1939"—he said that art. 4 (3) applied primarily to those men and women affected by the National Service Acts who began their service after Sept. 3, 1939, and were medically examined at the commencement of their war service. The implication was that, if the medical authorities made an examination and failed at that examination to detect or note a disease in a recruit, it should be presumed that the disease was not then present and a special onus was applied in favour of such a claimant, requiring

the Minister to establish that the disease which subsequently appeared was not attributable or aggravated by war service. If, however, the claimant, either because he was already a serving soldier or for some other reason, was not medically examined on the commencement of his "war service" as defined, there was no room for the application of this special onus or for the added emphasis which it applied to the general onus prescribed by art. 4 (2). In such cases art. 4 (3) did not apply and the case was ruled by art. 4 (2). The court pointed out that in many cases it made little practical difference, because, at least by the time the case reached an appellate tribunal, the issue was usually so narrowed down that the onus prescribed by art. 4 (2) was sufficient to make it possible for the average applicant to dispense with the added emphasis on that onus prescribed by art. 4 (3). It is interesting to note that DENNING, J., decided the point now raised in the same way in *Jewitt v. Minister of Pensions*, [1946] 2 All E.R. 545, on which occasion his attention was not drawn to the cases in the Court of Sessions.

FOR THE PENSIONS APPEAL TRIBUNALS ACT, 1943, see HALSBURY'S STATUTES, Vol. 36, p. 480.]

Case referred to :

(1) *Brown and Others v. Minister of Pensions*, 1946 S.C. 471.

APPEAL against a decision of a pensions appeal tribunal that there was no compelling presumption in favour of the appellant who had been medically examined on attestation but not on embodiment for war service. The facts appear in the judgment of DENNING, J.

G. H. Crispin for the appellant.

Stephen Chapman for the respondent.

DENNING, J. : In this case the appellant was medically examined on Apr. 4, 1939, with a view to service, was found fit for general service, and was attested. He was embodied on Sept. 2, 1939, but there was no further medical examination or medical report. He went into the army, served in France, and was evacuated from Dunkirk, where he was in the water and subjected to bombing. On June 21, 1944, after the Normandy landings, he went to France again. He developed epilepsy in 1945 and was discharged on that account. He now claims a pension.

The first question that arises is whether there is any compelling presumption in his favour. The chairman of the tribunal, following, no doubt, observations by the Court of Session in *Brown and others v. Minister of Pensions* (1946 S.C. 471, at pp. 473, 474), said that there was no compelling presumption. The Court of Session there held that the compelling presumption under art. 4 (3) is not applicable where there has been no medical examination at the commencement of war service. Although the course which the chairman took is perfectly understandable, in my judgment, that approach is not correct, especially when the man was examined, as he was in this case, before war service commenced in Sept., 1939. It seems to me that it would be a very strange result to hold that because he was not examined on or after Sept., 1939, he is thereby deprived of the benefit of the compelling presumption. There were many members of the Territorial Army or the regular forces and others who enlisted before Sept. 3, 1939, and were not medically examined again after it, and it would be strange if all these men were deprived of the benefit of the compelling presumption. Article 4 (3) says :

Where an injury or disease which has led to a member's discharge or death during war service was not noted in a medical report made on that member on the commencement of his war service, a certificate under para. (1) of this article shall be given unless the evidence shows that the conditions set out in that paragraph are not fulfilled.

It seems to me that if the services accept a man for war service without a medical report, either because he has been previously examined or for some other reason, he still has the benefit of art. 4 (3). If there was no medical report on the commencement of his war service, there was nothing noted in a medical report, and in those circumstances I should have thought the disease was not noted in a medical report made on the commencement of his war service. In this case the disease was not noted in the medical report on Apr. 4, 1939, which was the effective medical report. The man was found fit for general service and that should suffice. Reluctant as I am that there should be any difference between this court and the Court of Session on a point, I feel bound to say that, in my judgment, the benefit of art. 4 (3) applies to members of the

Territorial Army and of the regular forces who were examined before Sept., 1939, as well as to those men who were examined after Sept. 3, 1939, when they went into the army. Indeed, the Minister of Pensions has not contended before me for the contrary view.

As for the rest of the case, the facts are that the appellant had three epileptic attacks since January, 1945. They all occurred while he was asleep and after he had travelled long journeys. The Medical Services Division made a report saying, as has been proved before in these cases, that epilepsy often develops inside the individual. It is a constitutional nervous disease. It is only if there is some severe stress in service that there may be any aggravation of it. They reported that these long journeys were of no material importance as such exercise is not looked on as constituting the degree of physical stress or shock necessary to aggravate the malady. The effect of that evidence was entirely for the tribunal. When the appellant was before the tribunal, he gave further detailed descriptions of the experiences to which he was subjected. Again, that was a matter for the tribunal to consider in relation to the medical evidence. They were entitled to deal with the case on the appellant's statement coupled with the opinion of the Medical Services Division as explained by the medical member then and there. If they had approached the case in the right way, therefore, there would have been no reason for interfering with their decision. But the correct approach is important and may be vital. As the chairman seems, according to the note, to have said that this was a case where there was no compelling presumption, and as, in my judgment, there was a compelling presumption, the proper course is to remit the matter to the tribunal so that they can approach it in the light of what I have said.

Case remitted.

Solicitors: *Culross & Trelawny* (for the appellant); *Treasury Solicitor* (for the respondent).

[*Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.*]

PRYOR, B. I. v. PRYOR, E. S.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), February 7, 1947.]

Infants and Children—Custody—Divorce proceedings—Death of parent obtaining order for custody—Application by third party for custody—Supreme Court of Judicature (Consolidation) Act, 1925, (c. 49), s. 193 (1).

On the death of the parent to whom custody of the children of a marriage has been granted after a decree of divorce the court has jurisdiction, under s. 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, to entertain an application by a third party for the custody of the children.

Davis v. Davis (1) *no longer law.*

[AS TO APPLICATIONS BY THIRD PARTIES FOR CUSTODY OF CHILDREN, see HALSBURY, Hailsham Edn., Vol. 10, p. 756, para. 1194; and FOR CASES, see 27 DIGEST, p. 534, Nos. 5786 and 5788.]

Case referred to:

(1) *Davis v. Davis* (1889), 14 P.D. 162; 58 L.J.P. 88; 27 Digest 534, 5788.

APPLICATION by the parents of a deceased petitioner (the wife), to whom a decree of divorce and custody of her children had been granted, for leave to intervene in her suit and ask for the custody of the children. The facts appear in the judgment (which was delivered in open court).

L. V. Ardagh for the parents of the deceased wife.

The husband was not represented.

WILLMER, J. : In this case application is made by the parents of a deceased petitioner (a) for leave to intervene in the suit, notwithstanding the death of the petitioner, for the purpose of asking for the custody of the children of the marriage between the petitioner and the respondent, (b) for an order for such custody, and (c) for certain other relief which does not raise any question of general interest and which will be dealt with by the order of the court. I have

adjourned the summons into court for judgment because so much of the application as is concerned with leave to intervene in the suit raises a question under the Supreme Court of Judicature (Consolidation) Act, 1925, which does not appear to have arisen previously for determination by the court.

The petition, which was by the wife, was filed on Sept. 18, 1944, and was for dissolution on the ground of desertion for a period of at least three years immediately prior thereto. The suit was undefended, and on Oct. 18, 1945, a decree *nisi* was pronounced, which was made absolute on Apr. 30, 1946. On the pronouncing of the decree *nisi* a further order was made that the two children of the marriage should remain in the custody of the petitioner until further order. On Aug. 12, 1946, the petitioner died, leaving a will which made no testamentary disposition with regard to the guardianship of the two children of the marriage. Since the death of the petitioner the children have resided with and have been cared for by, the parents of the petitioner, the present applicants. I have before me an affidavit sworn by the father of the petitioner, which satisfies me that the children are well cared for and are happy in their present surroundings; that the respondent, since his desertion of the petitioner some seven years ago, has been virtually a stranger to them; and that he is not now in a position to undertake the custody of the children or provide them with a suitable home. The respondent has, in fact, given his consent in writing to an order in the terms now prayed, and it seems obviously desirable in the best interests of the children that an order should be made committing them to the custody of the present applicants, the result of which will be no more than to give legal effect to the existing arrangement.

The question has been raised, however, whether I have power to make such an order in the present proceedings. My attention has been directed to a statement in *RAYDEN*, 4th ed., c. XII, p. 454, s. 70, where it is said:

Such an application [*i.e.*, to intervene on a question of custody] cannot be made by a third party after the death of a petitioner judicially separated from her spouse.

It may be said that *a fortiori* it cannot be made in a case where the marriage of the deceased petitioner has been dissolved. The authority cited for the statement in the text is *Davis v. Davis* (1). A similar statement, and a reference to the same case, is made in *LATEY*, 13th ed., p. 236, note (g). In that case *BUTT, J.*, refused to accede to an application by the mother of a deceased petitioner in circumstances precisely similar to those of the present case. The application in *Davis v. Davis* (1), however, was made under s. 4 of the Matrimonial Causes Act, 1859, now repealed and replaced by s. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, and it is instructive to compare the wording of the repealed section with that of the section now in force. Section 4 of the Act of 1859 provided:

The court, after a final decree of judicial separation, nullity of marriage, or dissolution of marriage, may . . . make, from time to time, all such orders and provision with respect to the custody . . . of the children the marriage of whose parents was the subject of the decree . . . as might have been made by such final decree or by interim orders in case the proceedings for obtaining such decree were still pending; . . .

BUTT, J., held in *Davis v. Davis* (1) that this section referred only to an application to be made by one of the parents, and did not contemplate an application being made by a stranger. The words of s. 193 (1) of the Act of 1925 are significantly different:

In any proceedings for divorce or nullity of marriage or judicial separation, the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children, the marriage of whose parents is the subject of the proceedings . . .

It will be seen that the words of s. 4 of the 1859 Act limiting the power of the court to such orders "as might have been made" by final decree or by interim orders in the proceedings have not been reproduced in the present section. On the contrary, the court is given power, at any time, to "make such provision as appears just." I see nothing in the present section to prevent me from doing that which, under the old section, *BUTT, J.*, held that he had no power to do, subject to my being satisfied, as I am, that the application by the parents of the petitioner is just, that is, in the best interests of the children. In my judgment, the decision in *Davis v. Davis* (1), being founded on

the wording of the repealed section of the Act of 1859, is no longer authoritative, and the statements in the textbooks, to which I have drawn attention, are erroneous having regard to the wide powers now conferred by s. 193 (1) of the Act of 1925. For these reasons I accede to the present application. The applicants will have leave to intervene in the suit, and on their application I grant them the custody of the two children of the deceased petitioner.

Leave to intervene and custody given.

A Solicitors: *Moodie, Randall, Carr & Brown* (for the parents).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

LLOYD v. LLOYD AND HILL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.), January 15, 1947.]

B *Divorce—Condonation—Revival of condoned offence—Effect on liability of co-respondent.*

Revival of condoned adultery operates against both respondent and co-respondent. Where, therefore, a husband petitioned for a divorce on the ground of his wife's adultery with the co-respondent, which had been condoned, but had been revived by her subsequent desertion, the petitioner was, therefore, entitled to ask for an order against the co-respondent for costs and damages.

C [AS TO REVIVAL OF CONDONED ADULTERY, see HALSBURY, Hailsham Edn., Vol. 10, p. 680, para. 1006; and FOR CASES, see DIGEST, Vol. 27, pp. 345, 346, Nos. 3266-3276.]

Cases referred to:

D (1) *Bernstein v. Bernstein*, [1893] P. 292; 69 L.T. 513; *sub nom. Bernstein v. Bernstein, Turner and Sampson*, 63 L.J.P. 3; 27 Digest 341, 3213.

(2) *Beard v. Beard*, [1945] 2 All E.R. 306; [1946] P. 8; 114 L.J.P. 33; 174 L.T. 65; Digest Supp.

(3) *Norris v. Norris, Lawson and Mason* (1861), 4 Sw. & Tr. 237; 30 L.J.P.M. & A. 111; 27 Digest 346, 3270.

E PETITION by a husband for divorce on the ground of the wife's adultery which had been condoned but had been revived by the wife's subsequent desertion and renewed adultery with the co-respondent. The report is confined to the question of the liability for costs and damages of the co-respondent in these circumstances.

Graham R. Swanwick for the husband.

The wife did not appear.

F *Karminski, K.C.*, and *F. T. Alpe* for the co-respondent.

HODSON, J.: This is a petition for divorce presented by the husband against his wife on the ground of her adultery with the co-respondent, against the latter of whom damages are claimed. The adultery alleged in the petition was condoned, but there was revival as against the wife of that condoned adultery by reason of her subsequent desertion and adultery with the co-respondent.

G It has been argued that, even if the adultery of the wife was revived against her by her subsequent desertion, it could not be revived against the co-respondent apart from her later adultery with him. It seems to be an odd proposition that, because the co-respondent has nothing to do with the condonation or the revival, he should get the benefit of the condonation and not lose that benefit when the wife forfeits it by her own conduct in reviving the adultery. The position, as counsel for the husband put it, is simply this. I have to consider on the case as a whole whether condonation exists as a bar. If there has been revival, it does not exist as a bar, and that is good for the co-respondent as well as good for the wife. I think there is no authority to the contrary. Language has been used in many cases, and, in particular, by the Court of Appeal in *Bernstein v. Bernstein* (1), inveighing against the proposition that when an act of adultery has been condoned, it can afterwards be brought up and relied on, but that language, certainly in *Bernstein v. Bernstein* (1) (see *per* LINDLEY, L.J. ([1893] P. 292, at p. 318), was not directed to the question of revival, and when the courts have had to consider the question of revival they

have always held that the revival of condoned adultery as a result of a subsequent matrimonial offence is part of the law of England (*Beard v. Beard* (2)). No question of revival arose in *Bernstein v. Bernstein* (1), and, to my mind, nothing in that case is of any assistance here except a reference to an earlier case, *Norris v. Norris*, *Lawson and Mason* (3). The actual wording of the judgment of the Judge Ordinary in that case does assist the argument of the co-respondent in this case, but the Judge Ordinary was only exercising his discretion on a question of costs where there were two co-respondents, the adultery of one having been condoned and the petitioner being unable to prove his case against the second. In the exercise of his discretion the Judge Ordinary refused to condemn the first co-respondent in costs where the adultery had been condoned, and he used language which went further than any that he need have used in saying (4 Sw. & Tr. 237): "I cannot condemn Lawson in costs." If he had considered the doctrine of revival, which he obviously did not consider, he might not have used the word "cannot." It is a very short report, and all that the judge said after that was: "The petitioner, by condoning his wife's adultery with Lawson, has waived all right to any proceedings against him in this court." Again, if he had been considering the doctrine of revival he would not have said that. It is plain from that passage and from the judgment in the case of *Bernstein v. Bernstein* (1) to which I have made reference, that the question of revival was not being considered at all.

I see no reason to doubt that, in any event, if the condonation goes, it goes for all purposes, and I am certain that it is not open to a co-respondent to say: "Because the wife has been forgiven, you can never bring up the past against me although you may bring it up against her." Therefore, I find that the husband is entitled to his decree, to ask for an order for costs against the co-respondent and to an order for damages.

Decree nisi with costs against the co-respondent and an order for £200 damages.

Solicitors: *Taylor, Jelf & Co.* (for the husband); *W. R. Perkins* (for the co-respondent).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

FRASER v. FRASER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), January 24, 1947.]

Divorce—Maintenance—Secured maintenance—Liberty to apply as to nature of security—Variation of order—Power of court—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190 (1)—Administration of Justice (Miscellaneous Provisions) Act, 1938 (c. 63), s. 14.

On an application for maintenance subsequent to decree absolute the registrar made an order for payment by the husband of certain sums for the maintenance of the wife and the child of the marriage, and further ordered the husband to secure to the wife for her life *dum sola* the annual sum of £50 upon the balance of his capital then remaining in England, with liberty to apply as to the nature of the security. The husband held an appointment in Turkey and was a beneficiary to the extent of £3,650 in the estates, administered in Scotland, of his parents, of which sum £2,000 had been paid. It transpired that the husband was not in possession of any capital in England, practically the whole of the £2,000 having been expended, and the balance being in the hands of lawyers in Scotland. On a further summons, taken out under the liberty to apply in the registrar's order, the registrar made an order that the security to be provided by the husband for the annual sum of £50 should comprise the property devised by his parents then being administered by the lawyers in Scotland:—

HELD: even if it were proper to reserve liberty to apply in an order of this character (which was doubted), that provision must be read subject to the provisions of the order as a whole, and, in particular, subject to the provision that the order for payment was to be secured on the balance of the husband's capital then remaining in England, and it could not empower the registrar to make an order securing payment on capital out of England, as to do so would amount to a variation of the original order, which was outside the power of the court.

[**EDITORIAL NOTE.** This case reveals an unfortunate position, and possibly, a *casus omisus* in the relevant legislation, doubtless due to the unsatisfactory way in which this branch of our law has developed. It is important to note that the judge suggests a remedy which may be effective in at least some cases, namely, a variation of the unsecured payments.]

AS TO ORDERS SECURING MAINTENANCE, see HALSBURY, Hailsham Edn., Vol. 10, p. 789, para. 1251; and FOR CASES, see DIGEST, Vol. 27, pp. 508-510, Nos. 5467-5475.]

A Cases referred to:

- (1) *Blyth v. Blyth*, [1942] 2 All E.R. 469; [1943] P. 15; 112 L.J.P. 4; 167 L.T. 411; Digest Supp.
- (2) *Shearn v. Shearn*, [1931] P. 1; 100 L.J.P. 41; 143 L.T. 772; Digest Supp.

APPEAL by the husband from an order of a registrar varying a previous order for secured maintenance. The facts appear in the judgment.

B *S. Seuffert* for the husband.
Frank Whitworth for the wife.

WILLMER, J.: This is an appeal by the respondent husband against an order made by the registrar varying a previous order made by him for maintenance in so far as the same related to an annual sum ordered to be secured for the wife by the husband. The ground of the appeal is that the registrar had no power to vary his own previous order with regard to secured maintenance.

C In view of the importance of the point and the authorities to which I was referred I have thought it right to take time to consider my decision and to pronounce my judgment in open court.

The history of the matter can be shortly stated. The petition was based on adultery. The husband did not defend the proceedings, and on Sept. 3, 1945, a decree *nisi* was pronounced by PILCHER, J. The decree was made absolute on March 11, 1946, and on the following day the wife filed notice of application for maintenance. The registrar, by an order dated July 4, 1946, ordered the husband to pay to the wife for her own maintenance £150 per annum less tax and a further sum of £52 per annum for the maintenance and education of the child of the marriage, and he further ordered the husband to secure to the wife for her life *dum sola* the annual sum of £50 less tax on the balance of the husband's capital now remaining in England. The order

E further gave liberty to apply as to the nature of the security. The wife did not appeal against this order, but the husband did. His appeal was dismissed by BYRNE, J., and a further appeal to the Court of Appeal was dismissed on Nov. 20, 1946.

The husband is a chartered accountant and holds an appointment in Turkey, in respect of which he is in receipt of a salary and a cost-of-living bonus. He is also a beneficiary under the wills of his parents, lately deceased, and the amount of his interest under the two wills is estimated at £3,650. The estates of the husband's parents are being administered by a firm of writers to the signet in Edinburgh. It appears that up to date the husband has received some £2,000 odd of the total due to him, and there remains due something in excess of £1,600. I was informed that the reason for the wording of the registrar's order, that the annual sum of £50 should be secured on the balance of the husband's capital now remaining in England, was to make it clear that any assets which the husband might have in Turkey were to be excluded, since it was not thought desirable to tie up any assets in Turkey so as to impair the ability of the husband to earn his living in Turkey.

After the dismissal of the husband's appeal to the Court of Appeal it appeared that he was not in possession of any capital in England. Apparently, the £2,000 received by him under his parents' wills had already been totally, or practically, expended, and the balance of £1,600 was (and is still, so far as I am aware) in the hands of the lawyers in Scotland. In these circumstances the original order of the registrar, in so far as it ordered the annual sum of £50 to be secured on the balance of the husband's capital now remaining in England was of no value to the wife. A further summons was, therefore, issued by the wife, under the liberty to apply in the previous order, asking that the security to be provided by the husband for the annual sum of £50 should comprise the stocks, shares, monies and securities, the land and house, furniture and other effects, or the proceeds thereof when realised, and any other property

devised or sequestered to the husband by his late father and mother and now being administered by the lawyers in Edinburgh. The registrar made an order in the terms prayed, and it is from this order that the present appeal is brought.

It should be said at once that the husband's behaviour throughout appears to be completely without merits. With the salary which he earns from his appointment in Turkey and the amounts received, or to be received, under the wills of his late parents, it is obvious that he is in a financial position to provide reasonable maintenance for the wife. Quite apart from the fact that it was his misconduct which broke up the marriage, he appears to have done his best to evade his responsibilities to his wife and the child of the marriage. It is only necessary to mention the abortive appeals from the original maintenance order and the manner in which the monies already received under the wills of his parents appear to have been recklessly squandered. One cannot but sympathise with the wife in the difficult position in which she has been placed. The decision of this appeal, however, does not depend on the merits of the parties or on sympathy with the wife in her difficulties, but on whether the registrar had power, as a matter of law, to make the order now complained of.

The original order of the registrar, in so far as it provided for secured maintenance, was made in pursuance of the powers conferred by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (1). The provisions for variation of orders for alimony, maintenance and periodical payments are now consolidated in the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 14. Under this section the court has power to discharge or vary such orders, to suspend the provisions thereof, or to revive the operation of any provisions so suspended, but this section is silent as to any power to vary an order for secured maintenance made in pursuance of s. 190 (1) of the Act of 1925. There is not, and so far as I know there never has been, any statutory power to vary or discharge an order for secured maintenance. This is made abundantly clear by the decision of the Court of Appeal in *Blyth v. Blyth* (1) in which case the court refused to rescind an order for secured maintenance, notwithstanding the fact that both parties desired its rescission. That, of course, was a case in which a deed had already been executed in pursuance of the order, and it may be said that the present case is different because as yet no deed has been executed, but it is clear that the decision of the Court of Appeal did not depend on the fact that a deed had been executed. On the contrary, the judgment of GODDARD, L.J., makes it quite clear that it is not only the order, but the order under which the deed was executed, that the court has no power to rescind.

The rule that the court cannot rescind or vary an order for secured maintenance is not really challenged by the wife. It is argued that what the registrar has done in this case does not amount to a variation of his previous order, but that, having reserved liberty to apply as to the nature of the security in his original order, he was free, on the subsequent summons, to make a further order specifying what securities should be comprised within the order. I regret that I am unable to agree. Having regard to what was said by HILL, J., in *Shearn v. Shearn* (2), I doubt very much whether in an order of this character it was proper to reserve liberty to apply at all. This point was not before the Court of Appeal, because it was not necessary for their decision on the hearing of the previous appeal by the husband. Nor is it necessary for me to decide it now, for, even if it was proper to reserve liberty to apply, that provision must be read subject to the provisions of the order as a whole, and, in particular, subject to the provision that the order for payment was to be secured on the balance of the husband's capital now remaining in England. How could the liberty to apply empower the registrar to make an order securing payment on capital not in England, which is what he has, in fact, done? To do so amounts, in my judgment, to a variation of the original order, which is outside the power of the court. It appears to me that what was said by HILL, J., in *Shearn v. Shearn* (2) is very much in point, and I think it is valuable to quote a short passage from his judgment. He says ([1931] P. 1, at p. 4) :

But the court has no power to modify an order to secure, nor has it power in modifying an order to pay to turn it into an order to secure. The two orders are essentially different. The order under s. 190, (1) is not an order to make periodical payments and secure the payments; it is an order to secure and nothing else. Under it the only obligation of the husband is to provide the security; having done that, he is

under no further liability. He enters into no covenant to pay and never becomes a debtor in respect of the payments. The wife has the benefit of the security and must look to it alone; if it ceases to yield the expected income she cannot call upon the husband to make good the deficiency.

Applying that to the present case, the only obligation of the husband under the original order to secure was to provide the security specified—i.e., his capital now remaining in England. Having done that he is under no further liability. Equally he is under no further liability if there is no capital now remaining in England. He cannot now be forced to provide other or different security, that is, capital not at the time of the order in England.

For these reasons, although I sympathise with the wife in the difficulties in which she finds herself, I cannot do other than allow the present appeal. It appears to me that the wife's remedy, if the maintenance provided under the original order falls short of what is just, lies in a different direction. As has been previously pointed out, the court always has power in a proper case to vary an order for unsecured maintenance. It may be that where, as here, the provision for secured maintenance fails, a strong case could be made out for variation of the unsecured monthly or weekly payments.

Appeal allowed.

Solicitors: *Crawley & De Reya* (for the husband); *Russell & Arnholz* (for the wife).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

BAXTER v. BAXTER

[COURT OF APPEAL (Lord Greene, M.R., Asquith, L.J., and Vaisey, J.), January 4, February 17, 1947.]

Divorce—Nullity—Wilful refusal to consummate marriage—Wife insisting on use of contraceptives by husband—Acquiescence by husband—Matrimonial Causes Act, 1937 (c. 57), s. 7 (1) (a).

A petitioner who only succeeds in proving a refusal in which he has acquiesced does not establish that non-consummation of the marriage is due to the wilful refusal of the respondent within the meaning of the Matrimonial Causes Act, 1937, s. 7 (1) (a).

Therefore, where, to obtain sexual gratification, a husband had for 10 years acquiesced, though reluctantly, in the condition, imposed by the wife, that he should use a contraceptive sheath:

HELD: the husband was not entitled to a decree of nullity.

[FOR THE MATRIMONIAL CAUSES ACT, 1937, s. 7 (1) (a), see HALSBURY'S STATUTES, Vol. 30, p. 339.]

Case referred to:

(1) *Cowen v. Cowen*, [1945] 2 All E.R. 197; [1946] P. 36; 114 L.J.P. 57; 173 L.T. 176; Digest Supp.

APPEAL by the husband from a decision of HODSON, J., dated June 5, 1946, refusing a decree of nullity on the ground that the husband had not sufficiently proved that the non-consummation of the marriage was due to the wilful refusal of the wife. The facts appear in the judgment of the court.

S. Lincoln for the husband.

S. E. Karminski, K.C., and *Colin Duncan* for the King's Proctor.

Cur. adv. vult.

Feb. 17. LORD GREENE, M.R., read the following judgment of the court. By his petition, dated Nov. 16, 1945, the husband sought a decree of nullity of marriage on the ground that his marriage had never been consummated owing to the wilful refusal of his wife to consummate the marriage. This is a new ground for a decree of nullity introduced for the first time by the Matrimonial Causes Act, 1937, s. 7 (1) (a). The case was undefended. HODSON, J., held that the husband had not sufficiently proved the contents of his petition and dismissed it. As the appeal appeared to us to be likely to raise questions of some general importance in the decision of which we would not have the benefit of argument on behalf of the wife, we thought it right to ask for the assistance of the King's Proctor. Counsel, accordingly, appeared for the King's Proctor

and placed before us a full argument in support of the decision of HODSON, J.

The parties were married on Jan. 10, 1934, and they lived together until 1944 when the husband left the wife. It was the husband's case that throughout the whole of this period, from the very beginning of the married life, the wife wilfully refused to consummate the marriage in that she would never allow him to have intercourse with her unless he took the precaution of using a contraceptive sheath. This attitude was, according to his evidence, due to the wife's firm refusal to have a child, an attitude in which she was encouraged by her parents. The evidence of the husband as to this attitude of the wife and her parents was supported by that of his brother-in-law. HODSON, J., found or assumed that the husband was to be believed when he said that he had never had intercourse with his wife save when he was wearing a contraceptive sheath. On this basis we are, in my opinion, constrained to say that the marriage has never been consummated. The authority for this is the recent case in this court of *Cowen v. Cowen* (1) where it was held that intercourse of this character does not effect a consummation of the marriage. This authority is, of course, binding on us, but the section requires proof that the non-consummation of the marriage was due to the wilful refusal of the respondent which is, we think, not the same thing as saying that the respondent wilfully refused to consummate the marriage.

On this branch of the case HODSON, J., held that the husband failed. He had not the advantage which we have had of hearing a full argument in opposition to the husband's case. His judgment was a very short one and we do not think it right to examine his phraseology too minutely. In substance he found that the husband had not proved that this non-consummation was due to the wilful refusal of the wife and that it was due rather to the husband's own action in acceding to his wife's "request" without even making an attempt to consummate the marriage without a contraceptive. Counsel for the husband not unnaturally criticised the use of the word "request," which, he said, did not adequately describe what was the foundation of his case, namely, the firm refusal of the wife to allow intercourse unless the husband wore a contraceptive sheath. We do not, however, think that the sense of the judgment would really be affected if the word "demand" or the word "insistence" were to be substituted for the word "request."

The husband's case is a remarkable one since, to succeed, it requires a finding that for a period of 10 years, during which intercourse regularly took place, the husband was regularly and continuously being prevented from effecting a normal consummation of the marriage by his wife's regular and continuous refusal to allow him to do so. Counsel for the husband agreed that, if the husband had acquiesced in the wife's requirements, he would not be entitled to relief. This appears to us to be plainly right since in that case the non-consummation would be due, not to a refusal by the wife, but to a course of conduct acquiesced in by the husband. Counsel, however, contended that on the evidence acquiescence could not be attributed to the husband since it was due, not to his free will that he used the contraceptive, but to the fact that he could not have intercourse in any other way. He said that the husband pleaded with the wife for many years.

The answer to the question: What will amount to "wilful refusal"? must, in our opinion, depend on the facts of the case. A wife, through coyness, frigidity or nervousness, may well refuse to allow intercourse for a considerable period after the marriage. It is not to be thought that in such cases the husband would be entitled to say that she had been guilty of wilful refusal within the meaning of the sub-section until at least he had unsuccessfully brought to bear such tact, persuasion and encouragement as an ordinary husband would use in the circumstances. It is, in our opinion, insufficient for a husband to say: "My wife refused to let me do what I asked." He must show that he himself has acted as a reasonable man would have acted with a view to overcoming his wife's reluctance before he can successfully assert wilful refusal by her. In the present case the evidence fails to satisfy us, as it failed to satisfy HODSON, J., that the husband took all reasonable steps to effect the consummation that he desired. We do not place among such reasonable steps the use of force or a trick, but we do not know the circumstances in which the wife's refusal was made save that it was not in response to any attempt to have normal intercourse.

A refusal in cold blood in a discussion over the dinner table is one thing. A refusal in other and more intimate circumstances when the passions of a normal woman might be expected to be active might well be more difficult to persist in, particularly for a period of ten years. Moreover, it is clear from the evidence that the wife was not averse to sexual intercourse, and it is proper to infer, in the absence of evidence to the contrary, that she found it as attractive as a normal woman might be expected to do. Her only stipulation was that, in enjoying this advantage, she should be protected against the risk of becoming pregnant. There is nothing to suggest that she was prepared to deprive herself altogether. The husband indulged her desires in the sense that he was willing to give her the gratification which her instincts demanded. If he was sincere in his aversion to the use of a contraceptive, one would have thought that a refusal of the type of intercourse which the wife found both attractive and safe might well have brought her to a different frame of mind. But he did not refuse. On the contrary, leaving aside any question of gratifying the passions of his wife, he continued to have intercourse with a sheath in order to gratify his own, because, as he said in answer to a question by HODSON, J., had he not used a sheath he would not have been able to cohabit with her. In other words, he was not prepared to deprive himself of sexual intercourse. He could not get it in the way that he wished, and he, accordingly, took it in the only way that he thought was available to him.

The true conclusion from all the facts, in our opinion, is that suggested by ASQUITH, L.J.—that, to obtain the desired gratification, he acquiesced, though, no doubt, reluctantly, in the conditions imposed by his wife and did so for 10 years. A reluctant acquiescence is, nevertheless, an acquiescence, and, in our opinion, HODSON, J. was right in his decision. A petitioner who only succeeds in proving a refusal in which he has acquiesced does not, in our opinion, establish that non-consummation is due to a wilful refusal by the respondent within the meaning of the statute. The appeal must be dismissed.

Appeal dismissed.

Solicitors : *William P. Webb* (for the husband) ; *Treasury Solicitor* (for the King's Proctor).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

CAKEBREAD v. HOPPING BROS. (WHETSTONE) LTD.

[COURT OF APPEAL (Lord Oaksey, Tucker and Cohen, L.JJ.), February 6, 1947.]

Factories and Shops—Dangerous machinery—Woodworking machinery—Circular saw—Employers' duty to maintain guard in position—Delegation to workman—Negligence of workman—Woodworking Machinery Regulations, 1922 (S.R. & O., 1922, No. 1196), reg. 21—Law Reform (Contributory Negligence) Act, 1945 (c. 28), s. 1 (1).

The plaintiff workman, a woodworker of experience and skill, while operating a circular saw belonging to his employers, the defendant company, suffered injury, part of one of his fingers being cut off. Regulation 21 of the Woodworking Machinery Regulations, 1922 (S.R. & O., 1922 No. 1196) provides : "The guards and other appliances required by these regulations shall be maintained in an efficient state and shall be constantly kept in position while the machinery is in motion, except when, owing to the nature of the work being done, the use of the guards or appliances is rendered impracticable. The guards shall be so adjusted as to enable the work to be carried on without unnecessary risk." There was a guard on the saw in question, but, with regard to maintaining it in position, there was an arrangement between the workman and his foreman by which the workman was permitted to adjust the guard and keep it some 3½ inches high, a height which was a breach of reg. 10 (c).

HELD : (i) the employers were in breach of their statutory duty to maintain the guard in an efficient state and in position and also in breach of their duty adequately to supervise the work in the factory, and these breaches contributed to the accident.

(ii) the workman was under a duty at common law to observe for his own

safety the care which a prudent man would have observed and his failure to exercise this care contributed towards the accident, and, therefore, the damages must be apportioned under the Law Reform (Contributory Negligence) Act, 1945.

(iii) it could not be said that the workman had aided and abetted the employers in the breach of their duty under reg. 21 and that, therefore, he was prevented from recovering by the maxim *ex turpi causa non oritur actio*.

[AS TO THE DUTY TO FENCE DANGEROUS MACHINERY, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594-595, paras. 1130 and 1131; and FOR CASES, see Digest, Vol. 24, pp. 908-911, Nos. 62-81.]

Cases referred to :

- (1) *Gordon v. Metropolitan Police Chief Commissioner*, [1910] 2 K.B. 1080; 79 L.J.K.B. 957; 103 L.T. 338; 74 J.P. 437; 12 Digest 280, 2297.
- (2) *Holman v. Johnson* (1775), 1 Cowp. 341; 12 Digest 279, 2288.
- (3) *Vincent v. Southern Railway Co.*, [1927] A.C. 430; 96 L.J.K.B. 597; 136 L.T. 513; Digest Supp.
- (4) *Butterfield v. Forrester* (1809), 11 East 60; 1 Man. & G. 571 n; 36 Digest 112, 745.
- (5) *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722; [1940] A.C. 152; 108 L.J.K.B. 779; 161 L.T. 374; Digest Supp.
- (6) *Lewis v. Denye*, [1940] 3 All E.R. 299; [1940] A.C. 921; 109 L.J.K.B. 817; 163 L.T. 249; Digest Supp.
- (7) *Smith v. Baveystock & Co., Ltd.*, [1945] 1 All E.R. 531; Digest Supp.
- (8) *Vyner v. Waldenberg Bros., Ltd.*, [1945] 2 All E.R. 547; [1946] 1 K.B. 50; 173 L.T. 330; Digest Supp.

APPEAL from HILBERY, J. The facts appear in the judgment of LORD OAKSEY, L.J.

Edgedale for the workman.

Beney, K.C., and *H. C. Leon* for the employers.

LORD OAKSEY, L.J.: This is an appeal from a decision of HILBERY, J., in an action brought by a workman under the Factories Act, 1937, and the Woodworking Machinery Regulations, 1922, (S.R. & O., 1922, No. 1196). HILBERY, J. decided the case in favour of the defendants, the employers, on the general ground that the accident had been caused entirely by the workman's own negligence, but, in case another court should take a different view, he assessed the damages at £600.

The workman, who was a man of great experience and skill in woodworking, was working on a circular saw. This saw was provided by the defendants with a guard, but it is common ground that the guard was not in accordance with the Woodworking Machinery Regulations, 1922, because it did not extend from the top of the riving knife to a point as low as practicable at the cutting edge of the saw within the meaning of reg. 10 (c). The workman, according to his own evidence, did not like using a guard which was placed low down. He said that he was unable to see the wood he was cutting if the guard was put down as low as it was able to go. Therefore, instead of putting it down as low as possible, he kept it some 3½ inches up. On the day in question the wood chattered for some reason, his hand was thrown upwards and forwards and struck against the circular saw, and part of one of his fingers was cut off.

The workman's case is based on reg. 21 and 23 of the Woodworking Machinery Regulations, 1922. Regulation 21 provides :

The guards and other appliances required by these regulations shall be maintained in an efficient state and shall be constantly kept in position while the machinery is in motion, except when, owing to the nature of the work being done, the use of the guards or appliances is rendered impracticable. The guards shall be so adjusted as to enable the work to be carried on without unnecessary risk.

In the first place, the workman contends that reg. 21 imposes an absolute duty on the employer, in addition to the absolute duty imposed by reg. 10 (c), to keep the guard, which must extend in the way that I have explained under reg. 10 (c), so adjusted that the work can be carried on without unnecessary risk. He argues that, if a guard is of an improper form of construction, it is impossible for the employer to fulfil his obligation under reg. 21. Regulation 23 is headed "Duties of persons employed" and says :

Every person employed on a woodworking machine shall (i) use and maintain in

proper adjustment the guards provided in accordance with these regulations . . . except when owing to the nature of the work being done, the use of the guards or appliances is rendered impracticable.

The workman contends that that obligation never came into existence, because there was no guard provided in accordance with the regulations. There is no doubt that the duty to adjust this guard had been entrusted to the workman. He was a man of experience, and, with working woodworking machinery, it is almost essential that the men working the machine should adjust it themselves.

A The workman maintains that there was no duty imposed on him by the regulations to do the adjusting and that the duty which rested on the employers could not be fulfilled because the guard was an improper guard. The workman also argues that, apart from the regulations, there being this breach of statutory duty on the part of the employers, he is freed from any duty at common law to take the care which an ordinary and reasonable man would take, and that, therefore, B however negligent he may be, he would not have been disentitled before the Law Reform (Contributory Negligence) Act, 1945, from bringing an action. He goes so far as to say that, since the Act of 1945, his negligence would not come into operation under that Act at all.

There are other facts in the case which are, in my opinion, of crucial importance, because, apart from the employer's breach of statutory duty in not supplying a proper guard, there was evidence which clearly establishes that the employers C had not carried out their duties of adjustment and of supervision under reg. 21.

The employers contended, first, that, if this guard had been adjusted as low as it would go, there would have been no accident. There was evidence to that effect; that was the view which the judge took; and counsel for the employers said that that showed the workman was alone to blame. He further argued that, in any event, the workman cannot take advantage of his own wrong, and he D cited a number of cases in support of that proposition, one of which was *Gordon v. Chief Commissioner of Metropolitan Police* (1) and *Holman v. Johnson* (2) (see 1 Cowp. 341, at p. 343). He also referred to *Vincent v. Southern Ry. Co.* (3). Next, he relied on the maxim *ex turpi causa non oritur actio*, and said that it was clear that the workman had aided and abetted the employers in their breach of statutory duty under reg. 21 in failing to adjust the machine, and that, therefore, the statute being in the nature of a criminal statute, that aiding and E abetting in the commission of a crime made the case one from which no action could properly arise. He said further that the workman had not discharged the onus of proving that the cause of the accident was the employers' failure to perform their statutory duty, and that, in any event, applying the rule laid down by the statute of 1945, the damages ought to be apportioned as 99 per cent. to the fault of the workman and as 1 per cent. to the fault of the employers.

F The Law Reform (Contributory Negligence) Act, 1945, s. 1 (1), lays down a new rule in these words:

Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility G for the damage.

The principal difficulty in this case seems to me to be that here, the fault of the employers in not supplying a proper guard having been found by the judge to have had nothing to do with the accident, the other allegation of breach of duty against the employers is that they did not adjust the guard, but entrusted the adjustment to the workman himself. It does not seem to me a question which it is necessary for me to decide whether the workman, having undertaken H the duty of adjusting the guard himself, could assert that he had not adjusted it and had gone on knowingly with it improperly adjusted, but was entitled to set up a breach of statutory duty against the employers, because the evidence clearly establishes that the employers' foreman was negligent in that he knew that the guard was not being adjusted as well as it could be adjusted and yet he left the adjustment to the workman. That was a continuing breach of the statutory duty imposed by reg. 21 on the employers. Therefore, that is a breach of duty which the workman can assert. It being impossible to prove exactly how an accident with a circular saw happens, it would not be right to rely

on the suggestion that there is no affirmative evidence sufficient to discharge the onus that the foreman's negligence substantially contributed to the accident, and, therefore, I think that the Act of 1945 does come into operation, and that the workman was guilty of fault within the meaning of that Act, not necessarily a fault under reg. 23, but a fault in failing to observe the care which a prudent person would have taken for his own safety. There is nothing in the Factories Acts or in the Woodworking Machinery Regulations, 1922, which, in my view, exempts him from responsibility from a lack of due care on his own part. Therefore, I think these damages of £600 ought to be apportioned between the employers and the workman and, in my view, they should be borne equally by each of the two parties. For these reasons I think that the appeal should be allowed.

TUCKER, L.J. : This accident happened on July 5, 1945. If it had happened three weeks earlier I should have agreed in the result with the judgment of HILBERY, J., because at that time contributory negligence on the part of the workman or negligence on his part causing the accident would have put him out of court, but the accident happened after the Law Reform (Contributory Negligence) Act, 1945, had come into force, and, therefore, it now becomes necessary to consider the effect of that Act on these claims, which are brought under the Woodworking Machinery Regulations, 1922.

I propose, first, to state the conclusions that I have arrived at and then to examine some of the authorities and see whether those conclusions are inconsistent with any authority binding on this court. I need not repeat the facts save to mention that it is conceded that the guard on this machine was at all times in breach of reg. 21 of the Woodworking Machinery Regulations, 1922, and that it was not possible to adjust the guard so as to enable the work to be carried on without unnecessary risk. Whenever this machine was being used by the workman or by anybody else, the employers were continuously and at all times in breach of their duty to maintain that machine in proper adjustment. That leaves for further consideration whether or not the workman was guilty of any breach of statutory duty or of negligence. Regulation 23 does not come into the picture because it lays down that every person employed on a wood-working machine shall use and maintain in proper adjustment the guards provided in accordance with the regulations. If a person employed on wood-working machinery has not been provided with a machine with guards in accordance with these regulations, he cannot use and maintain them in proper adjustment. That still leaves open the question whether or not the workman was absolved from the common law duty of using ordinary reasonable care for his own safety.

In my opinion, therefore, the employers were in breach of their statutory duty and that breach contributed to the accident which resulted. Furthermore, I agree with what has been said by LORD OAKSEY, L.J., that in any event the employers were negligent and in breach of their duty to provide adequate supervision over the work carried on in the factory, and that was a contributory cause to the accident which happened. The next matter for consideration is whether the workman is precluded from recovering anything by reason of the Law Reform (Contributory Negligence) Act, 1945. If this accident had happened before June 15, 1945, [when the Act came into force] he would have failed because he was clearly guilty of contributory negligence. He was an experienced man who knew the regulations, he was the properly appointed person to work this machine, and he owed a duty at common law to take reasonable care. To hold otherwise would be to produce very remarkable results and would be contrary to what was said by LORD ELLENBOROUGH in *Butterfield v. Forrester* (4) (11 East. 60, at p. 61) (which was recently referred to by LORD ATKIN in *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722, at p. 730) :

A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding on what is considered to be the wrong side of the road, that would not authorise another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.

I can see no reason why those observations should not apply in cases which arise under the Factories Act, 1937.

I think that view is supported by the fact that this question has in recent years been more than once before the House of Lords, who have decided that contributory negligence is open to the employers by way of defence in cases of this kind. I would refer to a passage in the speech of LORD SIMON in *Lewis v. Denye* (6), dealing with these regulations ([1940] A.C. 921, at p. 929) :

A I am not satisfied that a breach of regulations for dangerous trades imposing duties on the workman in all cases automatically furnishes a defence to the employer whom he sues for damages for breach of statutory duties imposed on the employer. The workman's breach may, however, be such as to provide evidence of his negligence. And here, apart altogether from reg. 23, negligence of the appellant which caused the accident was in my opinion made out.

I think that that applies in the present case.

B I would emphasise that this is not a case where the only breach on the part of the employers is one committed by the workman himself. There may be cases where a proper machine is provided, as in *Smith v. A. Baveystock & Co. Ltd.* (7), and is originally adjusted properly and there is delegation under reg. 23 to a properly instructed and skilful man, who fails to adjust the machine. Different considerations may then arise. There the sole statutory breach is due to the act of the man himself. Here, in my view, apart altogether from the act of the workman, there was a continuous breach on the part of the employers by reason of the fact that they supplied a machine which could not be properly adjusted and which was, therefore, at all times out of adjustment and in breach of reg. 21.

I must refer to one or two cases which have been cited to see whether the decision at which I have arrived is contrary to them. The first of them is *Smith v. A. Baveystock & Co., Ltd.* (7). That action was brought under these regulations and the headnote accurately states ([1945] 1 All E.R. 531) :

D The appellant, an experienced circular saw operator, was employed by the respondent company to operate a circular saw in its factory. The guard of the saw complied with the Woodworking Machinery Regulations, 1922, and it was part of the appellant's duties to adjust the guard to his requirements. At the material time the appellant was cutting planks which varied in thickness and he had so adjusted the guard as to allow the thickest part of the plank free passage. Whilst sawing the wood the appellant's finger passed under the guard and was injured on the saw. The appellant brought an action against the respondent company alleging breach of the Woodworking Machinery Regulations, 1922, reg. 21 and/or breach of common law duty.

E LORD GODDARD, in giving his judgment, after explaining that the company could only carry out their obligations under these regulations by delegating their duties to somebody, said ([1945] 1 All E.R. 531, at p. 534) :

F The plaintiff adjusted the guard at what he considered was a suitable height to enable him to cut through this plank which was of varying or irregular thickness without stopping the machine. For myself I should have thought, provided, of course, that he had not left a wholly unnecessary gap, that he would put an adjustment on the guard which, in the circumstances, was practicable. But in any case it seems to me that the delegated duty had been put on him to adjust this guard and if he did not adjust the guard in such a way as was safe, it seems to be pretty clear—and that was the foundation of the decision in *Vincent v. Southern Railway Co.* (3)—that he cannot complain of it. He cannot take advantage of his own wrong and say to his employer : "Although you left me to adjust it and I did not adjust it, therefore I am going to claim damages against you." For myself I should say that there was no negligence in anybody in this case nor any breach of statutory duty. The employer had provided a perfectly proper machine and a perfectly proper guard. He had delegated the duty of seeing that the guard was properly adjusted to a perfectly competent person. He used the guard because the use of the guard was practicable and he adjusted it to such an extent that he considered it practicable for the work which he had to do. It does seem to me that if you are cutting one of these boards, which was to some extent of irregular thickness, that the guard was not unduly high. It was adjusted as far as practicable for the thickest part of the wood to pass through. Under those circumstances it seems to me there is no breach of statutory duty on the part of the employer. If it could be said there was, then the plaintiff, who was the person who had the duty of adjusting this guard, cannot be heard to say that he was not negligent or in breach of his statutory duty in doing what he did. I think, therefore, on the whole that this judgment was perfectly right and the appeal fails and must be dismissed.

I would emphasise, first, that LORD GODDARD was finding there had been no breach of statutory duty by anybody, which differentiates the case at once, and, secondly, that when he is saying that in any event "he did not adjust the guard in such a way as was safe, it seems to be pretty clear . . . that he cannot complain of it" and refers to *Vincent v. Southern Ry. Co.* (3), it was not necessary for him to consider whether or not under the Act of 1945 there might have been negligence or breach of statutory duty which would necessitate an apportionment. I think the language used by DU PARCQ, L.J., shows that that is the position. Speaking of the defendants he said ([1945] 1 All E.R. 531, at p. 535):

I think they are entitled to say "The fault is really yours and not ours. We were quite entitled to rely on you. True, if somebody else had been injured by any failure on your part to fulfil your obligation we should have had to pay the penalty, we should have been responsible to him. We cannot rid ourselves of our obligation. But it is quite absurd to think that if you, who are really the person to blame because you were reasonably and properly entrusted by us with this duty, failed to carry it out, therefore, we have got to pay damages to you."

That, again, leaves entirely at issue what the position would have been under the Act of 1945 in the case to which LORD GODDARD referred, *Vincent v. Southern Ry. Co.* (3). There the House of Lords held that there was an absolute duty on the railway company to provide a look-out man and to see that he was instructed to act. It was a case where the Prevention of Accidents Rules, 1902, provided (see S.R. & O., 1902, No. 616, r. 9):

. . . the railway companies shall . . . in all cases where any danger is likely to arise, provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train or engine approaching such men so working . . .

The House held that that was an absolute obligation on the part of the company and that they did not fulfil it merely by making the necessary regulations. In holding that in those circumstances the widow of the injured man, whose duty it was to provide one of his gang to act as a look-out man, could not succeed, language was used which has been relied on in this case for the proposition that in such circumstances the workman would not be able to recover even after the Act of 1945. VISCOUNT CAVE, L.C., in making the leading speech in that case, with which LORD ATKINSON and LORD SHAW agreed, said ([1927] A.C. 430, at p. 437):

The duty of a company in any case of danger is an absolute duty to provide a look-out man and to see that he is instructed to act; and if in any case it were proved that the foreman to whom, under the company's regulations, this duty was entrusted had failed in his duty and had not appointed a look-out man, the company might well be held liable for injury happening to any member of the gang other than the foreman himself. This does not mean that, in my opinion, the company in charging the foreman or ganger with the duty of deciding whether danger exists and of appointing a member of his gang to act as a look-out is taking an unreasonable course. Being a corporation, they must necessarily entrust that duty to some agent, and I see no sufficient reason why the foreman or ganger (who will be on the spot) should not be selected for that duty; but nevertheless if he should fail in that duty, the company may be liable for the consequences of the default to any person not concerned in it.

That is relied on by counsel for the employers. LORD SUMNER, after saying that he agreed with the view of the Court of Appeal that the plaintiff was in a dilemma, said ([1927] A.C. 430, at p. 441):

If Vincent failed to post a look-out or, being the look-out himself, failed to be duly vigilant, he contributed to his own death.

In that case it was not necessary for the House of Lords, any more than it was necessary for LORD GODDARD in *Smith v. A. Baveystock & Co., Ltd.*, to express a view of what the position would have been under the Act of 1945, and I do not read any of the observations of their Lordships as compelling me to hold that the workman in the present case is entirely out of court by reason of his negligence. I think he was negligent and that that negligence contributed to the accident, as did the breach of statutory duty and common law negligence on the part of the employers. I, therefore, think that this is a case under the new Act for apportioning the damages. I agree with the figure proposed by my Lord and I will only say that I can quite conceive in a *Smith v. A. Baveystock & Co., Ltd.* (7) type of case where a competent skilled man is left in charge

of a properly constructed machine and there is proper delegation to him under reg. 23 and adequate supervision in the factory, if he is injured, I can imagine that some courts might take the view that somewhere in the neighbourhood of 90 per cent. might possibly fall on the workman. This case on its facts is to be distinguished altogether from a case of that kind. For these reasons I agree that the appeal should be allowed.

A COHEN, L.J. : It seems to me beyond dispute that the employers committed a breach of the statutory duty imposed on them by r. 21 of the Woodworking Machinery Regulations, 1922. It is also clear that if the duty had been fulfilled the accident could not have happened. In those circumstances, it seems to me that the position defined by SCOTT, L.J., in giving the decision of this court in *Vyner v. Waldenberg Bros., Ltd.* (8) applies ([1945] 2 All E.R. 547, at p. 549) :

B If there is a definite breach of a safety provision imposed on the occupier of a factory, and a workman is injured in a way which could result from the breach, the onus of proof shifts on to the employer to show that the breach was not the cause.

How do the employers seek to discharge that onus ? First, they rely on the maxim *ex turpi causa non oritur actio*. It is not necessary for the workman to allege or prove any of the facts which are alleged to form the *turpis causa*, but it did transpire in the course of his evidence that he was responsible for the position in which the guard was found. Counsel for the employers argued

C that the workman was aiding and abetting the employers in the neglect of their duty under reg. 21 and that, accordingly, the words of LORD MANSFIELD were applicable (see *Holman v. Johnson*, 1 Cowper, 341, at p. 343) :

If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted.

D I feel some doubt whether the workman could be said to be aiding and abetting the employers' breach of duty, but, even assuming in favour of the employers that they established the requisite facts, I still think this argument is ill-founded. The maxim *ex turpi causa* is based on public policy, and it seems to me plain that on the facts of this case public policy, far from requiring that this action shall be dismissed, requires that it shall be entertained and decided on its merits.

E The policy of the Act of 1945 makes it plain that such a defence as was put forward by counsel for the employers in this case would be inconsistent with the intention of Parliament when it passed the Act. Alternatively, counsel for the employers says that the workman was the sole cause of the accident, and he relies on the cases which have been dealt with by TUCKER, L.J.—*Smith v. A. Baveystock & Co., Ltd.* (7), and *Vincent v. Southern Ry. Co.* (3). *Smith v. A. Baveystock & Co., Ltd.* (7) is distinguishable because there was in that case no breach of statutory duty. That seems to me a most material distinction. As

F I see the facts of this case, the workman is not seeking in any sense to take advantage of his own wrong. He is taking advantage of the independent continuing breach by the employers of their statutory duty under reg. 21, a breach of duty coincident with his own negligence, assuming that to be established, but continuing up to the very moment of the accident. Even if I were wrong on this point I should be still of opinion, on the evidence, that it was impossible to say that the workman was solely responsible for this accident.

G The last point raised by counsel for the employers related only to the question of contributory negligence. He said the workman owed a duty of care towards the employers. I agree so entirely with the reasons given by my brethren for holding the workman guilty of contributory negligence that I need not add anything on that point. The workman, therefore, being guilty of contributory negligence, I agree with my brethren that, for the reasons they have given, the damages should be apportioned fifty-fifty in accordance with the provisions of the Law Reform (Contributory Negligence) Act, 1945.

H Solicitors : *Shaen, Roscoe & Co.* (for the workman) ; *Goldingham, Wellington & Co.* (for the employers).

Appeal allowed.

[Reported by R. L. ZIAR, ESQ., Barrister-at-Law.]

FRANKLIN AND OTHERS *v.* MINISTER OF TOWN AND COUNTRY PLANNING

[KING'S BENCH DIVISION (Henn Collins, J.) February 10, 11, 20, 1947.]

Town and Country Planning—New town—Duty of Minister—Quasi-judicial capacity—Need to support proposed Order by evidence at public enquiry—New Towns Act, 1946 (c. 68), s. 1 (1); sched. I (3)

Pursuant to the New Towns Act, 1946, sched. I, para. 3, the Minister of Town and Country Planning held a public local inquiry into objections to a proposed Order under s. 1 (1) of that Act, called the Stevenage New Town Designation Order, 1946, by which Stevenage was designated as a "new town" within the Act. Before the New Towns Act became law, the Minister had stated that Stevenage was to be the first of the "new towns." At the inquiry, no evidence in support of the Order was adduced, and the objections then made were subsequently considered and rejected by the Minister. He dealt in writing with the substance of all objections except that directed to the difficulties of water supply and sewage disposal, with regard to which he said he was taking advice. Although there was no indication how the outstanding objection was to be dealt with, the Minister confirmed the Order.

Sched. I, para. 3 of the Act provides: "If any objection is duly made to the proposed Order and it is not withdrawn, the Minister shall, before making the Order, cause a public local inquiry to be held with respect thereto, and shall consider the report of the person by whom the inquiry is held." By s. 1 (1): "If the Minister is satisfied . . . that it is expedient . . . he may make an Order designating [an] area as the site of the proposed new town."

HELD: (i) the fact that the Minister did not support his proposed Order by evidence at the inquiry did not make it *ultra vires*, as the word "thereto" in sched. I, para. 3, qualifies the word "objection" and not the word "Order."

(ii) the wording of s. 1 (1) should not be interpreted as bestowing arbitrary power depending solely on the Minister's state of mind.

(iii) in considering the objections at the public inquiry the Minister was bound to bring an open mind to bear on the controversy and to act in a quasi-judicial and not merely an administrative capacity, and, as it appeared from the Minister's words and conduct that he had not had an open mind, the Order involved a denial of natural justice and must be quashed.

[AS TO QUASI-JUDICIAL POWERS, see HALSBURY, Hailsham Edn., Vol. 26, pp. 284—288, paras. 604—606; and FOR CASES, see DIGEST, Vol. 38, pp. 94—98, Nos. 697—711.]

Cases referred to:

- (1) *Jackson v. Barry Railway Co.*, [1893] 1 Ch. 238; 68 L.T. 472; 2 Digest 379, 424.
- (2) *Liversidge v. Anderson*, [1942] 3 All E.R. 338; [1942] A.C. 206; 110 L.J.K.B. 724; 116 L.T. 1; Digest Supp.
- (3) *Local Government Board v. Arlidge*, [1915] A.C. 120; 84 L.J.K.B. 72; 111 L.T. 905; 79 J.P. 97; 38 Digest 97, 708.

Appeal under the New Towns Act, 1946.

On Nov. 11, 1946, the respondent, the Minister of Town and Country Planning, after having held a public local inquiry, made the Stevenage New Town Designation Order, 1946. The appellants, William Vernon Franklin, George Leonard Hearn and Michael Robert Tetley, residents of Stevenage, objected to the proposed Order, and their grounds of appeal against it now were (a) that the Minister had not acted within his powers in making the Order; and (b) that, in considering the objections to the proposed Order and deciding on them, the Minister was exercising a quasi-judicial function, and that he failed to carry out his duty to give the objections fair and proper consideration. The facts appear in the judgment.

Capewell, K.C., and *Squibb* for the appellants.

The Attorney-General (Sir Hartley Shawcross, K.C.) and *H. L. Parker* for the Minister.

Cur adv. vult.

Feb. 20. HENN COLLINS, J., read a judgment in which he stated the grounds of appeal, and continued: The first of the objections—that the Minister

acted *ultra vires*—depends on the proper construction of para. 3 of sched. I to the New Towns Act, 1946. The words are these: “If any objection is duly made to the proposed Order, and it is not withdrawn, the Minister shall, before making the Order, cause a public local inquiry to be held with respect thereto and shall consider the report of the person by whom the inquiry is held.” The contention of the appellants is that the word “thereto” qualifies both the objection and the proposed Order, from which they say it would follow that the proposed Order, being a subject of the inquiry, must be supported by evidence at the hearing, and no such evidence was adduced. I do not think it necessary for me to decide whether that consequence would follow if the proposed Order were made the subject of inquiry, because I do not think, on the true construction of the paragraph, that the word “thereto” refers to the “proposed Order” in the phrase “objection to the proposed Order.” I regard the words “to the proposed Order,” as being merely a definition of the objection with which the paragraph is concerned. Read like this, the paragraph is not ambiguous. Once the objection is identified, the words, “to the proposed Order,” can be omitted, and the paragraph would then read thus: “If any objection is duly made and is not withdrawn, the Minister shall, before making the Order, cause a public inquiry to be held with respect thereto . . .” That, in my judgment, is the meaning of the paragraph.

The second objection is more formidable. It raises, first, the question whether the Minister, acting under the New Towns Act, 1946, has, in relation to a public inquiry for which sched. I to that Act provides, merely ministerial acts to perform, or whether his duties are at any stage judicial, or what has been termed, in relation to somewhat similar legislation, “quasi-judicial.” If the true view is that his function is not only administrative but also judicial, the question arises whether he acted in his adjudication, to quote the words of BOWEN, L.J., from *Jackson v. Barry Railway Co.* (1), “as an honest judge of this very special and exceptional kind.”

It is a commonplace feature of this class of case that a Minister should exercise both ministerial and quasi-judicial functions, and it is often difficult to draw a line between the two. Here, if I accepted the argument of the Attorney-General, no such difficulty arises, for he contends that at no stage is the Minister put in a quasi-judicial position, but that he acts throughout administratively, not only in making the original Order and in having a public inquiry at which all concerned may state and elaborate their objections, but also in considering the report of the officer who holds the inquiry and in deciding whether or not to confirm his original Order.

If that is the true view of this legislation, the result, put it how you will, is that an objector, who may have everything at stake, has legislative permission to fulminate, but can do no more. However real his grievance, it can be forced on him without any consideration of the merits of his case. Although invited to state his case in public, he cannot secure that what he says will be weighed and considered on its merits, or, indeed, at all. This is, at any rate, a sturdy contention, particularly in view of the line which the courts have consistently taken in respect of the rights of objectors under earlier legislation providing for public inquiries. One of the functions of the court is to stand between the executive and the members of the public so far as the common law requires and legislation permits, and, if it sees that being done which is contrary to natural justice, then, within those limits, it will intervene. It is not, and should not be astute to find in legislation reason or occasion for curtailing the jurisdiction, nor should it assume that legislation involves anything which is contrary to natural justice. Natural justice—a sense of fairness—may be impossible to define, but it is none the less real, and is deeply embedded in the common law, and it would take, in my view, explicit words in a statute, or irresistible inference from the words used, to abrogate the rights which flow from the common law conception of natural justice. The words relied on as giving the Minister an arbitrary power, that is to say, a power tempered only by public opinion so far as it can make itself effectively heard, are to be found in s. 1 (1) of the Act. Omitting what is immaterial for this purpose, the words are: “If the Minister is satisfied . . . that it is expedient . . . he may make an Order designating an area as the site of the proposed new town.” As was pointed out in *Liversidge v. Anderson* (2), words of that kind may

either mean that the Minister is to be satisfied on reasonable grounds, in which case his powers are not arbitrary in the sense which I have indicated, because they rest on something other than the state of his own mind, namely, the existence apart from his opinion of a state of things, or they may mean that the state of his mind—his “satisfaction”—is the sole basis of his power.

The answer to the question in which of these two senses such words are to be read requires a conspectus of the legislation in which they occur. In this Act I find substantially the same provisions made for the making and hearing of objections to the action of the Minister as have appeared in a number of statutes in which there is no colour for suggesting that the powers of the Minister are arbitrary. Under such provisions it has been held time and again that the functions of the Minister concerned are quasi-judicial and not arbitrary. The two conceptions are incompatible and I have no doubt that the words which I have quoted from the section are not intended to, and do not, mean that the Minister's power depends solely and absolutely on his state of mind. To take any other view would reduce the provisions for objections, the holding of a local public inquiry, the report of the officer who holds it, and the consideration of that report by the Minister to an absurdity, because, when all has been said and done, the Minister could disregard the whole proceedings and do just as he pleased. The Attorney-General argued that that was, indeed, the position, and that the sole use of the liberty to make objections was that the objectors (I am quoting his words) might “blow off steam” and so rally public opinion to which alone the Minister might bow.

The Attorney-General enforced his argument on the words of s. 1, and sought to discount the considerations to which the provisions as to objections give rise, by contending that to saddle the Minister with any functions which are not administrative but are quasi-judicial is to make him a judge in his own cause, and that that is so impossible a position that it is an irresistible inference that his functions are only administrative. He must have formed a view before he makes his original order. That is required of him by s. 1 of the Act. It is the correctness of that view which the appellants challenge. The Minister's view, the Attorney-General contends, is a matter of policy—the decision of the government, and, I suppose he would add, as such, immutable at the instance of objectors. I myself prefer the view that all matters of policy are embodied in the Act, and that its application to a particular place is not a matter of policy, but, be that as it may, the fact remains that, if there is a public inquiry, the Minister is bound to consider the report of it made by the officer who presides at the inquiry. But to what end if his first view of the matter is immutable? Why should Parliament have required the Minister, in a part of the Act which deals with the rights of objectors, to consider the report unless it be, to some extent at any rate, if not wholly, for the protection of the objector?

No doubt, the Minister is put in a difficult position. To act fairly in a matter about which one has, before hearing and considering all the evidence and arguments, formed and expressed a view, requires a firm mind and enough moral courage to say one was mistaken. But are those qualities out of reach of a Minister of the Crown? I should be loth to think so, or to suppose that those who passed the New Towns Act did not have that faith in the Minister. I see nothing in this statute which drives me to conclude that the Minister in giving his decision after a public inquiry, is acting only in an administrative capacity. He was bound, in my judgment, to bring to bear on the controversy between himself, as Minister, and the objectors, as the complainants of his administration, a mind open to conviction.

The next question is, did the Minister do so? If I am to judge by what he said at the public meeting which was held very shortly before the Bill, then published, became an Act of Parliament, I could have no doubt but that any issue raised by objectors was forejudged. The Minister's language leaves no doubt about that. He was not saying that there must be and shall be satellite towns, but he was saying that Stevenage was to be the first of them. But when he made that speech, and gave his answers to questions which were asked, he had no administrative functions in relation to the Act in question, for the Act had not then been passed. Though that was his attitude two days before the Bill received its second reading, it is on the objectors to prove that the Minister was in a like mind, or, at least, had not an open mind, from and after,

at latest, the inception of the public inquiry, which was held in Oct., 1946.

I was invited to say that, even if the Minister was ever required to act judicially, it was enough if he fairly considered the objections, and that at that point his judicial capacity ceased so that he could then properly allow the administrator, at the critical moment of decision, to get the upper hand. I think that on further consideration the Attorney-General receded from that contention, but, whether he did or did not, I cannot accept it. It is idle to say that a judge has functioned properly if all that he has done is to see that the case is conducted in seeming fairness (without, for example, hearing one party behind the back of the other and so on), and even to apply his mind to the evidence, unless he has also brought an open mind to the decision. Any other view would reduce the necessity for fairness, or the appearance of it, to a farce.

This is to say not that, in making his decision, he must exclude from his consideration any of the material which was in his mind before the objections were made, but that he must weigh all fairly together. If objections have been raised which, in his honest opinion, are met by other information, albeit extrajudicial, he may simply overrule the objections and the objectors cannot complain. If he says nothing, but simply confirms the Order, this court might have little, if any, ground for saying that he had not acted fairly in the light of all his information. In other words, the objectors, as appellants in this court, might fail to discharge the burden of proof. It would, however, be lamentable, as the Attorney-General was quick to acknowledge, if a Minister of the Crown were to take refuge, as it were, in silence, for nothing could be better calculated to create the impression among the public that the inquiry was a mere sham and that all the trouble and expense of the objectors had been foredoomed to futility. As I have no reason to anticipate any such conduct on the part of a responsible Minister, I content myself with saying that this court might share the public impression.

In this case, however, as was only to be expected of him, the Minister has dealt, in writing, with the substance of the objections—with one exception, namely, that directed to the difficulties of water supply and sewage disposal. It is obvious that those difficulties must be met before the scheme can go through. The Minister acknowledges that they have not been met, and that he is taking advice as to how it can be done. *Non constat* that any way will be found, and yet with that fundamental problem still outstanding, the Minister confirms his Order. How can it be said that he weighed the objection with an open mind when he acknowledges that he did not, and does not, know the force of it? When, therefore, I ask myself whether the objectors have satisfied me that, from and after the inception of the inquiry up to and including the moment at which the Minister decided to confirm his Order, he had not an open mind, my answer is that they have. I am convinced that he did not consider the question: "Aye or No should the Order be confirmed?" with an open mind, but that he meant to confirm it whatever the force of the objections might be, trusting that some solution would be found. This, in my judgment, involves a denial of natural justice, and I, accordingly, quash the order, with costs.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.* (for appellants); *Treasury Solicitor* (for the Minister).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

Re NORMAN, ANDREW *v.* VINE

[CHANCERY DIVISION (Vaisey, J.), February 19, 1947.]

Charities—Charitable purpose—Gift to editors of missionary magazine—"For such objects as they may think fit"—Trustees of charity.

The testatrix for over 50 years had been engaged in missionary work in China in association with a religious body known as the Brethren and being in some measure under the direction of the editors of a periodical entitled *Echoes of Service* and financially supported by and through them. The evidence showed that the editors were in reality trustees and treasurers of the churches of the Brethren as regarded their missionary activities. "*Echoes of Service*" was not only the title of a periodical, but had for many years been the accepted designation of a charity for (*inter alia*) distributing through the editors of the periodical gifts sent to them for the charitable objects of the Brethren. By her will, dated Sept. 23, 1931, the testatrix who died on Feb. 11, 1945, bequeathed "the residue of her moneys to the editors of the missionary periodical called *Echoes of Service* to be applied by them or him (*sic.*) for such objects as they may think fit."

HELD: the bequest was a valid gift to the editors for the use and benefit of the charity or charitable organisation known as "*Echoes of Service*."

Re Garrard ([1907] 1 Ch. 382) applied.

[AS TO GIFTS FOR RELIGIOUS PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 118-122, paras. 155-160; and FOR CASES, see DIGEST, Vol. 8, pp. 248-254, Nos. 74-160.]

Cases referred to:

- (1) *Dunne v. Byrne*, [1912] A.C. 407; 81 L.J.P.C. 202; 106 L.T. 394; 28 T.L.R. 257; 56 Sol. Jo. 324 P.C.; 8 Digest, 294, 718.
- (2) *Westminster Bank, Ltd. v. Farley*, [1939] A.C. 430; [1939] 3 All E.R. 491; 108 L.J. Ch. 307; 161 L.T. 103; 55 T.L.R. 943 H.L.; Digest Supp.
- (3) *Re Delany, Conoley v. Quick*, [1902] 2 Ch. 642; 71 L.J. Ch. 811; 87 L.T. 46; 51 W.R. 27; 18 T.L.R. 741; 8 Digest 245, 50.
- (4) *Re Garrard, Gordon v. Craigie*, [1907] 1 Ch. 382; 72 L.J. Ch. 240; 96 L.T. 357; 23 T.L.R. 256; 51 Sol. Jo. 209; 8 Digest 294, 716.

ADJOURNED SUMMONS to determine whether upon the true construction of the will of the testatrix a bequest "to the editors of the missionary periodical called *Echoes of Service* to be applied by them or him (*sic.*) for such objects as they may think fit" (a) was a valid gift to the editors beneficially, or (b) was a gift to them for the charitable purposes of *Echoes of Service*, or (c) that it failed for uncertainty. The facts are set out in the judgment.

Bower Alcock for the plaintiff (the executrix under the will).

J. Neville Gray, K.C., and *W. G. H. Cook* for the editors of *Echoes of Service*.

A. L. Ungood-Thomas for next-of-kin.

H. O. Danckwerts for the Attorney-General.

VAISEY, J.: By her will, dated Sept. 23, 1931, the testatrix, Ruth Norman, describing herself as a missionary in China, appointed her niece, the plaintiff, her executrix. After some legacies, including one of £50 to Henrietta Dunphy whom she calls her "dear fellow-worker in China," she in effect bequeathed what she designates as "the residue of her moneys to the editors of the missionary periodical called *Echoes of Service* to be applied by them or him (*sic.*) for such objects as they may think fit." It is these words which I have to construe.

The testatrix died at the Shanghai General Hospital on Feb. 11, 1945, and her will was proved by the plaintiff on Jan. 28, 1946. Her estate consisted of certain investments and moneys, and the summons raises the question whether they are all of them "moneys" within the meaning of the will. With that question I can deal at once by saying that they are, regard being had to the use of the word "money" in a later part of the will. The first three defendants are the present editors of the periodical called *Echoes of Service*. The other defendants are the testatrix's statutory next of kin and the Attorney-General.

It appears that the testatrix had for many years been a devoted member of the religious body of evangelical christians known as the Brethren, and for over 50 years she had been engaged in missionary work in China. Missionaries,

such as the testatrix, belonging to or associated with the Brethren, appear to be in some measure under the direction of the editors of *Echoes of Service* and to be financially supported by and through them. Indeed, the evidence shows that the editors are in reality trustees and treasurers of the churches of the Brethren, so far as regards their missionary activities. It is they who receive and dispense contributions for the missions of the Brethren, these amounting in 1945 to upwards of £74,000. It further appears that *Echoes of Service* is not only the title of a periodical, but that for many years it has been also the accepted designation of a charity for (*inter alia*) distributing through the editors (usually at their discretion, sometimes for a specified purpose) gifts sent to them for the charitable objects of the Brethren. Such gifts are sent and legacies are bequeathed to them not for their personal benefit, nor even to carry on the publication of the periodical, but in furtherance of the missionary work represented by it. I am told that "Echoes of Service" (in this wide sense) is recognised by the revenue authorities as a charity. It is in evidence that during her 50 years (and more) of service the testatrix was in constant correspondence with the editors and their predecessors in office, and was supported as a missionary by gifts sent to them (among others) on behalf of the churches of the Brethren, and, though she had at the time of her death retired from active service, she was still maintained by funds at the editors' disposal.

I have to consider the meaning and effect of this will, and to decide between three possible results:—(1) that the bequest is a valid gift to the editors beneficially; or (2) that it is a gift to them for the charitable purposes of (putting it shortly) "Echoes of Service"; or (3) that it fails for uncertainty. No case for any general charitable intention can be made out. In two respects the case may be regarded as unusual. In the first place, the legatees, although called the "editors" of a periodical, are, in fact, the trustees, treasurers and managers of a charity. Secondly, the case is not one in which a charity has been supported by a testatrix in her lifetime, but one in which she herself has been supported by the charity.

As regards the first point, if the bequest had been, not to the editors of the periodical, but to the trustees, treasurers and managers of the charity going by the name of the periodical, I think the case would have been clearly distinguishable from such cases as *Dunne v. Byrne* (1) and *Farley v. Westminster Bank* (2) where the character or quality of the legatee has been held not to import a charitable intention into the terms of a gift. I think I am justified in the circumstances of the present case in reading the bequest here as made to the trustees, treasurers and managers of the charity and the reference to "objects" as merely indicating that the legacy was to be applied generally to the purposes of that charity and not (for example) exclusively to missionary activities in China: see and compare *Re Delany* (3). The standard form of bequest which has for some years been recommended by the editors to benevolent testators (see the exhibited *Echoes of Service* for June, 1946) names the editors as the appropriate legatees exactly as though they were trustees, treasurers or managers of the charity, as, in fact, I conceive that they are.

On the second point, I cannot doubt that the position and powers of the editors were well known to the testatrix, from whom communications were from time to time inserted in the periodical, and I am disposed to think that she may have regarded herself and her fellow-workers as "objects" within the meaning of that word as used in her will. The audited account for 1945, printed in the exhibit I have mentioned, shows that substantially the whole of the funds collected were expended on missionaries and missionary efforts in various parts of the world. In my judgment, the case falls within the principle of *Re Garrard* (4) where JOYCE, J., held that a bequest to a vicar and churchwardens of a named parish to be applied by them in such manner as they should in their sole discretion think fit was a good charitable gift for ecclesiastical purposes in the parish, and I see no reason why in this case I should draw a distinction between two expressions so similar as "for such objects" and "in such manner." If I am wrong, it may be that the reference to objects, etc., is merely an indication of absolute ownership, with the result that the defendant editors take beneficially, and, were I so to hold, it would make no practical difference, since they offer to undertake to apply the funds for the purposes of their trust. In my view, however, that is not what the testatrix meant nor what she has said.

For the reasons which I have indicated, I do not accept the contention of the next of kin that this is a gift to the editors as individuals on an undefined non-charitable trust resulting in an intestacy. I will declare, first, that the bequest is a valid gift to the defendant editors for the use and benefit of the charity or charitable organisation known and designated as "Echoes of Service," and, secondly, that the moneys of which the residue is so bequeathed include all the items of property mentioned in the originating summons, and I order the costs of all parties to be taxed as between solicitor and client and raised and retained or paid out of the estate of the testatrix in due course of administration.

Declaration accordingly.

Solicitors: *Doyle, Devonshire & Co.* (for the executrix and next of kin); *Stunt & Son* (for the editors of *Echoes of Service*); *Treasury Solicitor* (for the Attorney-General).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

Re JAMES, LLOYD'S BANK, LTD., AND OTHERS v. ATKINS AND ANOTHER

[CHANCERY DIVISION (Roxburgh, J.), February 12, 1947.]

Executors—Order of application of assets—Variation of statutory order—"Property specifically appropriated for payment of debts"—Property specifically given "after payment of debts"—Exoneration of residue—Administration of Estates Act, 1925 (c. 23), s. 34 (3), sched. I, pt. II.

By his will the testator gave certain property to his trustee on trust to sell and, after payment of his debts and funeral and testamentary expenses, to invest. He then directed that the income was to be paid to his wife during her lifetime, and after her death the capital was to be held on trust for a class of nephews and nieces. The testator gave his residuary estate to his wife absolutely. The question was whether the specific gift or the residuary estate was the primary fund for payment of the debts and funeral and testamentary expenses:—

HELD: on the true construction of the will, the testator had specifically appropriated or devised or bequeathed property for the payment of debts, within the meaning of the Administration of Estates Act, 1925, sched. I, pt. II, para. 3, and the direction to pay debts out of a particular fund involved an intention to exonerate the residue of his estate. The debts and funeral and testamentary expenses were, accordingly, to be paid out of the property specifically given subject to their payment.

Re Kempthorne (1) and *Re Gordon* (7) distinguished.

Re Littlewood (5) applied.

[AS TO ORDER OF APPLICATION OF ASSETS, see HALSBURY, Hailsham Edn., Vol. 14, pp. 375—377, para. 704; and FOR CASES, see DIGEST, Supp.; Executors and Administrators, Nos. 5908a—5919a.]

Cases referred to:

- (1) *Re Kempthorne, Charles v. Kempthorne*, [1930] 1 Ch. 268; 99 L.J. Ch. 107; 142 L.T. 111; Digest Supp.
- (2) *Re Atkinson, Webster v. Walter*, [1930] 1 Ch. 47; 99 L.J. Ch. 35; 142 L.T. 129; Digest Supp.
- (3) *Re Lamb, Vipond v. Lamb*, [1929] 1 Ch. 722; 98 L.J. Ch. 305; 141 L.T. 60; Digest Supp.
- (4) *Re Petty, Holliday v. Petty*, [1929] 1 Ch. 726; 98 L.J. Ch. 207; 141 L.T. 31; Digest Supp.
- (5) *Re Littlewood, Clark v. Littlewood*, [1931] 1 Ch. 443; 100 L.J. Ch. 243; 144 L.T. 718; Digest Supp.
- (6) *Re Smith, Smith v. Smith*, [1913] 2 Ch. 216; 83 L.J. Ch. 13; 108 L.T. 952; 23 Digest, 497, 5640.
- (7) *Re Gordon, Watts v. Rationalist Press Association, Ltd., and Kemp*, [1940] Ch. 769; [1940] 3 All E.R. 205; 109 L.J. Ch. 289; 163 L.T. 308.

ADJOURNED SUMMONS to determine whether the testator's funeral, testamentary and administration expenses, debts and liabilities were payable, primarily, out of property specifically devised and bequeathed subject to

their payment, or out of the residuary estate which was bequeathed to his widow absolutely. The facts and the relevant provisions of the will appear in the judgment.

A. H. Droop for the executors.

R. Gwyn Rees for a nephew.

J. H. Boraston for the widow.

A ROXBURGH, J.: By his will, dated Feb. 28, 1933, Walter James, who died on Dec. 22, 1943, gave, devised and bequeathed unto his executor and trustee, Lloyds Bank, Ltd., his house No. 12, St. Thomas Square, Monmouth, and a parcel of land near Redbrook, together with any money standing to his credit at the bank:

B . . . upon trust as and when the bank shall think fit to sell call in and convert into money the same or such part as shall not consist of money and after payment of my just debts funeral and testamentary expenses to invest the proceeds in trustee securities . . .

The testator then directed the bank to stand possessed of the net rents, profits and income which should from time to time accrue from the said property and certain other property upon trust to pay the same to his wife, Emily James, during her life and after her death upon trust to pay the same in equal shares to, or for the benefit of, a large class of nephews and nieces. After making other dispositions, not material to be stated, the testator gave and bequeathed all the residue of his estate, including his furniture and household and personal effects, to his wife absolutely. The question which I have to determine is whether, on the true construction of the will, No. 12, St. Thomas Square, and the land at Redbrook and the moneys to the credit of the testator at the bank, or the testator's residuary estate, is the primary fund for the payment of the testator's funeral and testamentary expenses, including estate duty on his personal estate, and debts and administration expenses. Either fund is sufficient to bear the whole of the burden of the payments in question.

D Counsel for one member of that class of nephews and nieces has argued that the burden of these payments should fall primarily on residue. I have not felt it necessary to trouble counsel for the widow, but that does not mean that the case is not one of some complication and difficulty. The oft-cited s. 34 (3) of the Administration of Estates Act, 1925, is the foundation of the question which I have to decide. That sub-section provides:

E Where the estate of a deceased person is solvent his real and personal estate shall, subject to rules of court and the provisions hereinafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in sched. I, pt. II, to this Act.

F Schedule I, pt. II, to the Act is as follows:

Order of application of assets where the estate is solvent. 1. Property of the deceased undisposed of by will, subject to the retention thereof of a fund sufficient to meet any pecuniary legacies. 2. Property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid. 3. Property of the deceased specifically appropriated or devised or bequeathed (either by a specific or general description) for the payment of debts. 4. Property of the deceased charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for the payment of debts . . . 8. The following provisions shall also apply (a) The order of application may be varied by the will of the deceased; (b) This part of this schedule does not affect the liability of land to answer the death duty imposed thereon in exoneration of other assets.

H Before I turn to the authorities, I will express my view on the construction of this will. As I have indicated, the testator gave and devised and bequeathed particular property upon trust to sell and, after payment of debts and funeral and testamentary expenses, to invest the proceeds and stand possessed of the income upon trust for his widow for life and after her death to hold the capital upon trust for the benefit of a class of nephews and nieces. In my opinion, the testator, when he directed the bank to sell and after payment of just debts to

invest, was directing the bank to pay the debts. They could not carry out his direction to invest after payment without paying them. Therefore, I should hold that the testator had specifically appropriated or devised or bequeathed property for the payment of debts, within the meaning of the Administration of Estates Act, 1925, sched. I, pt. II, para. 3. Secondly, I should hold that the direction to pay debts out of a particular fund necessarily involved an intention to exonerate some other fund which the testator disposed of in some other part of his will—in other words, necessarily involved an intention to exonerate the residue of his estate which he devised and bequeathed to his wife absolutely. A

Am I right in reaching those conclusions? This depends on a difficult line of authorities. In *Re Kempthorne* (1), MAUGHAM, J., made these observations in reference to sched. I, pt. II, paras. 3 and 4 ([1930] 1 Ch. 268 at p. 278):

Now in both of those cases it is to be noticed that the legislature is assuming that the testator by his will has specifically appropriated in one case, or devised or bequeathed in the other, property for the payment of debts; or that he has charged with payment of debts specific property, or some property, under a general description, or devised or bequeathed property subject to a charge for payment of debts, and I cannot help concluding that those two paragraphs mean that the fact that the testator has done one of those things is not *per se* to constitute, to use the words of s. 34 (3), a provision in the will which operates to alter the order of application which is specified in part II of the schedule. B

Counsel for the nephew has referred to that paragraph, which, as I shall show in a moment, has since been applied in another case, and he has submitted that those words apply to the present case, but, in my judgment, they do not, because in that paragraph the words "*per se*" are of vital importance and in this case there is to be found, not only a devise or bequest of particular property for the payment of debts, but also an intention to exonerate another category of property disposed of by this will, namely, residue, and I think a review of subsequent cases will show that this ground of distinction is valid. C

In *Re Atkinson* (2) the testator bequeathed all his personal estate to his trustees upon trust for sale and conversion and upon trust that they should out of the moneys produced by such sale and conversion and of any ready money pay his funeral and testamentary expenses and debts and the legacies bequeathed by any codicil and should stand possessed of the residue of the moneys in trust as to one-third part thereof for one beneficiary, as to one other third part for another beneficiary, and as to the remaining one-third part for another beneficiary. The testator had also disposed of some real estate specifically and that disposition failed. The question was whether the primary fund was undisposed-of realty or the residue of personalty. CLAUSON, J., said ([1930] 1 Ch. 47, at pp. 50, 51): D

It has been contended on behalf of the residuary legatees that, by force of the new Act [*i.e.*, the Act of 1925], the debts were made primarily payable out of the undisposed-of real estate. On the other hand, it was contended on behalf of those who would take the undisposed-of property that, before the provisions of part II can be applied, regard must first be had to the provisions, if any, contained in the will. The question then is whether there is to be found in the will any provision which has the effect of altering the statutory order of application and putting some other assets of the deceased in front of the undisposed-of real estate. In *Re Lamb* (3) there was no such provision to be found in the will; and in *Re Petty* (4) a mixed fund was created for payment of debts, etc., and there was there no undisposed-of moiety of the balance of residue until the debts had been paid. Here the will contains a clear direction to the trustees to convert the personal estate and out of the moneys produced by such conversion to pay his funeral and testamentary expenses and debts: until that provision is worked out there is no necessity to have recourse to sched. I, pt. II, to the Act. E

In *Re Littlewood* (5) MAUGHAM, J., had to deal with a will in which Hannah Littlewood . . . gave and bequeathed "all my farm stock, implements and tenant right, but charged with the payment of all my just debts and funeral and testamentary expenses, and also with the payment thereof of the legacies mentioned in the will of my late husband William Littlewood, and an additional legacy of £50 which I bequeath to my stepdaughter Eleanor Booth, unto and equally between my stepson George Littlewood and my son Fred Littlewood" and the will contained also a gift of the testatrix's residuary estate to Frederick Littlewood absolutely. MAUGHAM, J., said ([1930] 1 Ch. 443, at pp. 445, 446): F

H

But if a testator chooses to charge debts by his will on certain specific items of personal estate, and then gives his residue to some person other than the legatee of the specific property, there can be no doubt, on the construction of his will, that he intends the specific property to be primarily applied in payment of the debts, to the exoneration of the person to whom the residue is given: *Re Smith* (6). Accordingly, in my view, the testatrix in this case intended to give to George Littlewood and Frederick Littlewood her farm stock, implements, and tenant right, after payment thereof of all just debts and funeral and testamentary expenses and the legacies therein mentioned and therein bequeathed: and to the residuary legatee Frederick Littlewood she intended to give the whole of the rest of the real estate, discharged from the payment of debts and legacies, provided that the specific gift of farm stock, implements, and tenant right was of sufficient value to discharge the liabilities.

It appears to me that the language there used by MAUGHAM, J., is extremely appropriate to the present case. It is interesting to note that he considered the words "after payment" as equivalent to a direction to pay. MAUGHAM, J., continued (*ibid.*, at p. 446):

I have now to consider the effect of the Administration of Estates Act, 1925, sched. I, pt. II, having regard to the authorities and also to the provisions of s. 34 (3) of the Act, and sched. I, pt. II, para. 8, which provides that "the order of application may be varied by the will of the deceased." In *Re Kempthorne* (1) I endeavoured to explain the difficulty which I felt in giving effect to some of the provisions of that part of that schedule . . .

I have no doubt that those words are a reference to the passage which I read earlier in my judgment. MAUGHAM, J., continued:

. . . and I understand that the Court of Appeal, who differed from me on one point in that case, also felt some difficulty in explaining the precise effect of those provisions. I think, however, that I am justified in taking the view that, *prima facie*, the paragraphs of the schedule are to have effect subject to the provisions of the will of the deceased, in cases where there is a reasonably clear indication of the intention of the deceased; and *a fortiori*, I think, is that the case where the will was executed before the coming into force of the Administration of Estates Act, 1925.

In my opinion, that passage shows two things. It shows that the proposition which MAUGHAM, J., is there enunciating is not limited to wills which were executed before the coming into force of the Administration of Estates Act, 1925. It also shows that the passage which I have read from a judgment of his own occasioned him no difficulty when he came to decide *Re Littlewood* (5) and I feel little doubt that that was because the words "*per se*" are emphatic. In *Re Littlewood* (5) the judge found (and, if I may say so, very naturally found) that there was not only a direction to pay debts out of the particular fund, but a clear intention to exonerate another fund which was disposed of by the testatrix.

This analysis of that passage, in my judgment, supplies the clue to *Re Gordon* (7), which is a decision of BENNETT, J. In that case ([1940] Ch. 769):

A testatrix by her will gave certain specific legacies and a legacy of £50 in trust thereof to pay debts, funeral and testamentary expenses, and to pay any balance remaining to a society. There was no residuary gift: *Held*, that there was an intestacy as to the residue and there being no direction in the will to vary the statutory order of application of assets, the debts, funeral and testamentary expenses of the testatrix were primarily payable out of property undisposed of. Ruling of MAUGHAM, J., in *Re Kempthorne* (1) applied.

In my judgment, the underlying ground of the decision in *Re Gordon* (7) was that there was no residuary gift. If a testator directs a particular fund to bear debts and makes no other disposition, it is, of course, impossible to hold that he intends to exonerate some other fund. That, I think, is why BENNETT, J., said at an early point in his judgment ([1940] Ch. 769, at pp. 772, 773):

It is said, and I think truly, that there has been no case which decides what the interpretation of the statutory provisions is, and what their effect is where a testator has made such a will as has to be considered in the present case.

The real distinction between *Re Littlewood* (5) (which was cited to the judge but was not referred to by him in his judgment) and *Re Gordon* (7) is that in *Re Littlewood* (5) there was a residuary gift and in *Re Gordon* (7) there was not. Moreover, at the end of his judgment BENNETT, J., said (*ibid.*, at pp. 775, 776):

In the present case it is clear that the testatrix has either bequeathed property

for the payment of her debts or has bequeathed property charged with the payment of her debts. She has made no other disposition of her property. The facts of the case plainly fall within the reasoning of MAUGHAM, J., with which, if I may respectfully say so, I entirely agree. Where a solvent testator has made by his will a disposition of property which falls either within para. 3 of the schedule or within para. 4, and has made no other disposition of his property and has not otherwise indicated his intentions, there seem to me to be no grounds for a conclusion that such a testator has intended to vary or interfere with or alter the order in which the statute has said that assets are to be applied for the payment of debts and funeral and testamentary expenses.

Of those three conditions precedent enumerated by the judge, only the first applies in the present case, and, accordingly, it is, in my judgment, clear that the decision in *Re Gordon* (7) is not applicable to the present case. On the contrary, *Re Littlewood* (5) is, in my judgment, directly applicable and would, I think, have compelled me to reach the conclusion which I should have wished to reach independently of all authorities.

Declaration that the testator's house, No. 12, St. Thomas Square, Monmouth, the land near Redbrook and the moneys standing to his credit at the bank was the primary fund for payment of the testator's funeral and testamentary expenses (including estate duty on his personal estate) and debts and administration expenses. Costs as between solicitor and client in due course of administration out of the estate.

Solicitors: *Vizard, Oldham, Crowder & Cash*, agents for *Vizard & Son*, Monmouth (for the executor and the widow); *Cunliffe & Airy* (for a nephew).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

FORSYTH v. FORSYTH.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Jones, J.), January 13, February 13, 1947.]

Husband and Wife—Maintenance—Jurisdiction—Husband ordinarily resident in Scotland—Wife residing in England at wish of husband—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 4.

At the time of the marriage in 1943 the husband was in the army and the wife went to live with her husband's family in Scotland, where she remained until Christmas, 1945, when trouble arose between the parties. The husband, who was on leave, told the wife that, owing to shortage of room in his parents' house, he had decided that she should return to London until he was demobilised and that he would follow her in a few days. In this belief the wife returned to her parents' home in London, but the husband did not follow and from that date she did not see him again nor did she receive any money from him. In July, 1946, the wife took out a summons before the justices in the petty sessional division in which she was resident, alleging that the husband had deserted her. The summons was directed to the husband at his address in Scotland and was served on him under the provisions of the Summary Jurisdiction (Process) Act, 1881. At the hearing the solicitor representing the husband objected to the jurisdiction on the ground that the husband was a domiciled Scotsman, but called no evidence in support of this submission, nor did the wife call any evidence that the husband was a domiciled Englishman. The justices overruled the objection to the jurisdiction, found that the complaint of desertion was proved and made an order for the wife's maintenance, but they did not make a separation order. For the purpose of the appeal it was deemed that the husband was shown to be ordinarily resident in Scotland and that the wife at the material time was, at the express wish of the husband, resident in England.

HELD: residence of the husband in England was not a condition precedent to the exercise by the justices of the petty sessional division in which the cause of complaint wholly or partly arose of their jurisdiction under the Summary Jurisdiction (Married Women) Acts; the combination of the Summary Jurisdiction (Process) Act, 1881, and the Summary Jurisdiction (Married Women) Acts, together provided that

the husband was brought by special statute or legislation within the jurisdiction; and, therefore, by virtue of s. 4 of the Summary Jurisdiction (Process) Act, 1881, the process, which, by s. 8 of that Act, includes the summons to answer the complaint of desertion, was properly issued and the justices had jurisdiction to try the case.

M'Queen v. M'Queen, ([1920] 2 Sc. L.T. 405) *not followed*.

[AS TO SUMMARY JURISDICTION OF JUSTICES IN MATRIMONIAL CAUSES, see A HALSBURY, Hailsham Edn., Vol. 10, pp. 834—848, paras. 1336—1354; and FOR CASES, see DIGEST, Vol. 27, pp. 554—568, Nos. 6081—6264.]

Cases referred to:

- (1) *M'Queen v. M'Queen*, [1920] 2 Sc. L.T. 405.
- (2) *Graham v. Graham*, [1923] P. 31; 92 L.J.P. 26; 128 L.T. 639; Digest Supp.
- (3) *Armytage v. Armytage*, [1898] P 178; 67 L.J.P. 90; 78 L.T. 689; 27 Digest 264, 2321.
- B (4) *Anghinelli v. Anghinelli*, [1918] P. 247; 87 L.J.P. 175; 119 L.T. 227; 27 Digest 553, 6078.
- (5) *Berkley v. Thompson* (1884), 10 App. Cas. 45; 54 L.J.M.C. 57; 52 L.T. 1; 49 J.P. 276; 3 Digest 393, 312.
- (6) *R. v. Humphrys, Ex. p. Ward*, [1914] 3 K.B. 1237; 84 L.J.K.B. 187; *sub. nom. R. v. Humphrys, Ex. p. Ward*, 111 L.T. 1110; 79 J.P. 67; 3 Digest 387, 258.
- C (7) *R. v. Lightfoot* (1856), 6 E. and B. 822; 25 L.J. (M.C.) 115; 27 L.T.O.S. 235; 20 J.P. 677; 3 Digest 393, 311.
- (8) *Trower & Sons, Ltd. v. Ripstein*, [1944] 2 All E.R. 274; [1944] A.C. 254; 113 L.J.P.C. 72; Digest Supp.
- (9) *Peagram v. Peagram*, [1926] 2 K.B. 165; 95 L.J.K.B. 819; 135 L.T. 48; 90 J.P. 136; Digest Supp.
- (10) *Price v. Price* (1927), 43 T.L.R. 609; Digest Supp.
- (11) *Chudley v. Chudley* (1893), 69 L.T. 617; 27 Digest 312, 2900.
- D (12) *Bell v. Bell*, [1941] S.C. (H.L.) 5; Digest Supp.
- (13) *Wilkinson v. Wilkinson*, [1943] S.C. (H.L.) 61; Digest Supp.

APPEAL by a husband against a maintenance order made on the ground of desertion by Edmonton (Middlesex) justices. The facts appear in the judgment of LORD MERRIMAN, P.

James MacMillan for the husband.

E *Bernard Lewis* for the wife.

Cur. adv. vult.

Feb. 13. LORD MERRIMAN, P., read the following judgment: This appeal by a husband against a maintenance order made on the ground of desertion by the justices of the petty sessional division of Edmonton, Middlesex, raises an important question of jurisdiction on which, so far as I am aware, there is no direct English authority.

F The facts are as follows. At the time of the marriage in 1943 the husband was serving in His Majesty's forces. The wife had also served in the A.T.S., but it would appear probable, though this is not definitely stated in her evidence, that she had been discharged on her marriage. She went to live with her husband's family in Scotland at 13, Torrie Road, Huntly. According to the wife's evidence, which is uncontradicted, they lived quite happily together until June, 1945, but on Christmas Eve, 1945, trouble arose in the household. G At that time the husband was on leave. He told his wife that there was no room in the house, one of his brothers having returned from India, and in these circumstances the husband had decided that it would be best if she returned to London until he was demobilised. He said that he would go there with her on the following Wednesday, but she saw nothing of him until one o'clock in the afternoon of that day, when he informed her that he did not intend to go to London until the Friday, as he was going to see his former employers about his job. However, he paid for her railway ticket and she departed, believing that he would be following on the Friday. The wife proved that she had not seen him since and that he had not sent her any money, though she had written to his address in Germany, from which I assume that he was serving in the British Army of the Rhine, to inform him that she had arrived safely at her mother's. Having heard nothing from him, the wife, on July 18, 1946, took out a summons before the justices at Edmonton, the petty sessional division in which she was resident, on the ground that her husband

had deserted her. At the hearing on Sept. 12 the husband was represented by a solicitor, who objected to the jurisdiction on the ground that the husband was a domiciled Scotsman, and relied on *M'Queen v. M'Queen* (1). He called no evidence in support of this submission. The husband's counsel admitted that, as things stand, the point can be put no higher than that the wife called no evidence to show that the husband was a domiciled Englishman. It must, I think, be taken for the purposes of the case that he is shown to be ordinarily resident in Scotland. Apart from the evidence to which I have already referred, the summons was directed to the husband at the address already mentioned, and, as is admitted, was served on him there under the provisions of the Summary Jurisdiction (Process) Act, 1881. The justices overruled the objection to the jurisdiction, and on the uncontradicted evidence of the wife found that the complaint of desertion was proved, and made an order for her maintenance of 20s. a week. They did not make a separation order. They gave as the reason for their decision that they were of opinion that the husband had deserted the wife, that he was in the army and had made no effort to trace her, and that he intended making London the matrimonial home. It was argued on behalf of the husband that the last finding with regard to the matrimonial home was erroneous if it was intended to imply that there was a settled intention on the husband's part to change his domicile, or, if that was not implied, it was irrelevant. I agree that, if the husband's domicile was Scottish, there was no sufficient evidence of a change of domicile. In my opinion, the true interpretation of this finding is that the case is one in which the wife, at the material time, was, with the full consent of the husband, and, indeed, at his express wish, resident in England, where he was to join her in due course. At any rate, that is my own conclusion from the wife's evidence, and I propose to consider the important question of the jurisdiction of the justices to hear this case on that finding of fact, which justifies a finding of desertion according to English law. A B C D

It is argued on behalf of the husband that the residence in this country, not of the wife alone, but of both spouses, is a condition precedent to the exercise by the justices of the petty sessional division in which the cause of complaint wholly or partially arose of their jurisdiction under the Summary Jurisdiction (Married Women) Acts. It is conceded, of course, that, apart from the provision in s. 2 of the Act of 1895 that the Act shall not apply to Scotland, no such condition is actually expressed in these Acts, but it is argued that, although the objection that the parties must be domiciled in this country cannot be supported, the condition that both must be resident in this country must be implied. This is said to follow by analogy with the limitation on the jurisdiction of the High Court to pronounce a decree of judicial separation laid down in *Graham v. Graham* (2), *Armytage v. Armytage* (3), and *Anghinelli v. Anghinelli* (4). Seeing that by s. 5 (a) of the Act of 1895 the justices' court has power to include in an order a provision that a wife be no longer bound to cohabit with her husband, and that such a provision, while in force, has the effect in all respects of a decree of judicial separation on the ground of cruelty, it is suggested that it is absurd to suppose that the legislature intended to give justices the power to make an order which, in effect, is a decree of judicial separation against a husband resident out of the jurisdiction when the High Court has no jurisdiction to do so. E F G

The decision in *Graham v. Graham* (2) may, at least, afford a reason for justices, in their discretion, declining to include a non-cohabitation clause in an order against a non-resident husband, and, as I have already said, no such order was made in this case, but, in my opinion, it would be unsafe to press this analogy. The two jurisdictions have entirely different origins. The jurisdiction of the High Court to pronounce a decree of judicial separation is founded on the principles on which the Ecclesiastical Court pronounced a decree of divorce *a mensa et thoro*. The jurisdiction of the justices is based on a series of statutes, the first of which now in force was passed in 1895. Nor is the jurisdiction by any means co-extensive with that of the High Court. In this country, no doubt, the cardinal offences of adultery, desertion and cruelty are identical in quality whichever court is dealing with them, but there are incidental differences. For example, with regard to all grounds of complaint, by virtue of s. 11 of the Summary Jurisdiction Act, 1848, the H

complaint must be made within six months from the time when the matter of complaint arose. As regards desertion, no period of duration is prescribed beyond such as may be inherent in the very finding of desertion. As regards cruelty, on the other hand, no act of cruelty, however savage, comes within the jurisdiction of the justices unless it has the element of persistence. From this it follows that justices may grant, though they are not obliged to do so, what is in effect a judicial separation for desertion lasting, say, one month, while they cannot grant it in respect of a single assault, however brutal, unless that has been the subject of certain specified proceedings to which I will later refer. Not less important is the fact that such an order may be made against a husband by justices for wilful neglect to provide reasonable maintenance, habitual drunkenness, or for cruelty to the children of the wife, or insisting on sexual intercourse while suffering from venereal disease, or compelling the wife to submit herself to prostitution, in respect of which matters, as such, the High Court has no jurisdiction to pronounce a decree of judicial separation, while conversely, justices have no jurisdiction in respect of insanity.

Manifestly, therefore, the consideration that judicial separation might be ordered by justices in circumstances in which it could not be decreed by the High Court is not decisive of the question at issue, but there is an even more important distinction between the two jurisdictions. While that of the High Court depends on the residence of both spouses within the jurisdiction, although not necessarily in the same place, but extends to matrimonial offences committed out of the jurisdiction (*Armstrong v. Armstrong* (3)), that of the justices is not general, but is strictly local. Moreover, if s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, is to be read subject to the implied proviso that both the spouses must be resident in this country, I can see no justification, nor was any suggested in the course of the argument, for reading the proviso into part of the section only. If it is to be implied at all, it must be implied, in my opinion, throughout the section. As will appear when I come to deal with the section in detail, it would be inappropriate to more than one of its provisions.

It will, however, be convenient, first of all, to consider the decision in *M'Queen v. M'Queen* (1). The argument based on this decision was less strenuously pressed, but, on reflection, I consider that it is the more formidable of the two. In that case the husband alleged that he was a domiciled Scotsman residing in Scotland until, on the outbreak of the war of 1914-1918, he joined His Majesty's forces, and the wife was an Englishwoman whom he married during the war. They never resumed cohabitation on his discharge from the army in January, 1920. There was a conflict about the reason for their living separately, and the wife, in June, 1920, made a complaint to the West Ham police court on the ground that the husband had deserted her, whereupon that court issued a summons to the husband to appear to answer the complaint. The summons was duly served in accordance with the Summary Jurisdiction (Process) Act, 1881. The magistrate made an order which, again, was duly served in accordance with that Act. Default having been made in making the payments awarded, the magistrate issued a warrant to apprehend the husband and bring him before the court. This in turn, after being endorsed by a justice of the peace in the county of Kinross, was executed and the husband was lodged in the police cells at Kinross, with a view to his being taken to England. The husband presented a note of suspension and liberation on the grounds that he had been wrongfully arrested and imprisoned, since, being a domiciled Scotsman, he could not be imprisoned in respect of a warrant from one of the inferior courts of England. The matter came before LORD ASHMORE in the Bill Court, who, applying the reasoning of the opinions delivered in the House of Lords in *Berkley v. Thompson* (5), held that the whole *substratum* of the jurisdiction exercised by the magistrates' court necessarily collapsed, and that, there being no initial jurisdiction over the complainer, the English court had no power to cite him to that court, and, on that assumption, the subsequent procedure, including both the granting of the order and the warrant to apprehend, was all inept. He, therefore, continued the order for interim liberation. It is stated in a note in 85 *Justice of the Peace* (Notes), p. 335, that this decision was upheld by the Court of Session, but I have been unable to find any report of this decision.

Manifestly this case is decisive in Scotland on the question whether an English maintenance order can be enforced in the manner there attempted against a husband domiciled and resident in Scotland. We, however, are concerned, not merely with a particular method of enforcement, but with the jurisdiction to make an order at all, and, in so far as the case decides that the English court has no jurisdiction over the husband and no power to cite him to the court, it does not bind us. Nevertheless, we should naturally regard the decision with deference and be guided by it unless we were convinced that it was wrong. Incidentally, I find it impossible to accept the view of the case expressed in LUSHINGTON'S SUMMARY JURISDICTION (MARRIED WOMEN) ACTS, a textbook which I always find very helpful on this subject. It is made to appear (3rd ed., p. 2) that the decision depended on the acceptance by the court of the husband's story that the wife had refused to come to Scotland to live with him there, and that, therefore, the desertion, if any, was on her part. There was, no doubt, a conflict of evidence, but, as appears from the summary already given, I do not read LORD ASHMORE'S decision, which appears to me to be founded as a matter of principle on *Berkley v. Thompson* (5), as turning only on a question of fact.

However that may be, it is clearly necessary for this court to consider the bearing of *Berkley v. Thompson* (5), on the present case. That was a case under the Bastardy Laws Amendment Act, 1872. The putative father was domiciled and ordinarily resident in Scotland and was there served with the summons. Incidentally, the point that the service was imperfect under the Summary Jurisdiction (Process) Act, 1881, was disregarded in order that the question of principle might be decided (10 App. Cas. 45, at p. 46). The question was whether jurisdiction to adjudicate in bastardy could be derived from ss. 4 and 6 of that Act, or whether it must not be founded on service within the jurisdiction by which, as LORD SELBORNE, L.C., explained (*ibid* at p. 48), was meant, not the jurisdiction of the particular justices, but the jurisdiction of the law of that country to which alone the Act of Parliament applied. At the beginning of his opinion, LORD SELBORNE, L.C., said (*ibid* at p. 47):

I will observe two things at the outset. First of all, though a summary jurisdiction under the Bastardy Acts is given to justices, yet the bastardy law is one thing and the Summary Jurisdiction Acts are another; and this being a case of bastardy we shall have to consider the bastardy law in the first place, and then, if necessary, the application to that law of the Summary Jurisdiction Acts afterwards. Now the bastardy laws beyond all question did not, before the year 1881, give to the justices any jurisdiction in a case of this kind where the person summoned was a Scotchman, domiciled, and not only ordinarily but actually resident, in Scotland. Those Bastardy Acts were English Acts, they did not extend to Scotland, and did not contain any provisions whatever contemplating their execution in Scotland; and until the Act of 1881 I have not heard from the learned counsel any reference to any one of the Summary Jurisdiction Acts which gave a jurisdiction in bastardy cases except to execute those bastardy laws which did not, as I have said, extend to Scotland.

Later, after reading s. 3 of the Bastardy Acts, 1872, he said (*ibid* at p. 49):

It is impossible to read that provision without seeing that this legislation proceeds upon the footing that the presence of the putative father in England is necessary for the jurisdiction to attach . . .

(See also *R. v. Humphrys* (6)). That being so their Lordships, affirming a Divisional Court of the Queen's Bench Division and the Court of Appeal, held that it was impossible to found jurisdiction otherwise non-existent on the provisions of ss. 4 and 6 of the Summary Jurisdiction (Process) Act, 1881, which regulate procedure in cases where jurisdiction exists. All their Lordships discussed the question as one of general principle. LORD SELBORNE, L.C., in particular, added immediately after the passage last quoted:

. . . and I must say, both with respect to the decision in *R. v. Lightfoot* (7) and with respect to that legislation, that they proceeded upon general principles; because the general principle of law is "*Actor sequitur forum rei*"; not only must there be a cause of action of which the tribunal can take cognizance, but there must be a defendant subject to the jurisdiction of that tribunal; and a person resident abroad, still more, ordinarily resident and domiciled abroad, and not brought by any special statute or legislation within the jurisdiction, is *prima facie* not subject to the process

of a foreign court—he must be found within the jurisdiction to be bound by it. However, one need not here rest upon general principles, because there is the decision, and there is the statute of 1872.

This passage was recently applied with approval by LORD WRIGHT delivering the judgment of the Privy Council in *Trower & Sons, Ltd. v. Ripstein* (8).

It is vital to consider what LORD SELBORNE, L.C. meant by the phrase (10 App. Cas. at p. 47):

A . . . yet the bastardy law is one thing and the Summary Jurisdiction Acts are another; and this being a case of bastardy we shall have to consider the bastardy law in the first place, and then, if necessary, the application to that law of the Summary Jurisdiction Acts afterwards.

It is important to observe what is meant by “the Summary Jurisdiction Acts.” In *Peagram v. Peagram*, AVORY, J. said ([1926] 2 K.B. 165, at p. 173):

B I have no doubt that the expression “the Summary Jurisdiction Acts” in that section [the Maintenance Orders (Facilities for Enforcement) Act, 1920, s. 7] means the Acts which form the code for regulating procedure of courts of summary jurisdiction, beginning with the Summary Jurisdiction Act, 1848, and including the Summary Jurisdiction Acts of 1879, 1884 and 1899; but in my opinion it does not include the Summary Jurisdiction (Married Women) Act, 1895, notwithstanding the title of that Act.

C There is a passage in the judgment of LORD HEWART, C.J. (*ibid* at p. 170) to the same effect. In other words, for the purposes of comparison in a case like the present, the Summary Jurisdiction (Married Women) Acts stand in the same relation to the Summary Jurisdiction Acts as did the Bastardy Act, 1872, dealt with in *Berkley v. Thompson* (5), *i.e.*, the Summary Jurisdiction (Married Women) Acts are the substantive legislation and the “Summary Jurisdiction Acts” proper merely regulate the procedure: see s. 8 of the Act

D of 1895. For the present purpose it is necessary to include in the Summary Jurisdiction Acts the Summary Jurisdiction (Process) Act, 1881, which, by s. 1, is deemed to be included in the expression “Summary Jurisdiction Acts” and “Summary Jurisdiction (English) Acts,” and, as the subject-matter suggests, it would, apart from the fact that Ireland only is expressly excluded, necessarily be taken to apply to Scotland, differing in this respect, from the general body of the summary jurisdiction code. The Act of 1881 in any

E circumstances to which it applies is, in effect, the connecting link between the summary jurisdiction procedure in England and Scotland respectively. So far as the extent of jurisdiction is concerned, the question is whether there is any distinction between the Summary Jurisdiction (Married Women) Acts and the Bastardy Act, 1872. Now, it is quite clear that in the passage already

F quoted from his opinion (10 App. Cas. at p. 49), LORD SELBORNE, L.C. regarded the wording of s. 3 of the Bastardy Act, in so far as it referred to the return to England of the man alleged to be the father after he had ceased to reside in England, as showing that the legislation proceeds on the footing that the presence of the putative father in England is necessary for the jurisdiction to attach. It is worth noticing, also, that, apart from this territorial limitation, the section also provides its own special limitation of time which differs from that

G provided over the whole range of summary procedure by s. 11 of the Summary Jurisdiction Act, 1848. Moreover, there is an even more important point, that s. 6 of the Summary Jurisdiction (Process) Act, 1881, deals specifically with the case of bastardy, and, so far from supporting the argument that one of the code of statutes regulating procedure gave jurisdiction to an English court though the putative father was to be found in Scotland, was held by LORD BLACKBURN (*ibid* at p. 57) to have precisely the opposite effect of making the bastardy summons triable in Scotland, notwithstanding the fact that, as

H in the case in question, the child was born and the mother ordinarily resident in England.

One must, however, also consider closely the passage immediately following in LORD SELBORNE’S opinion already quoted, and the further passage where he says with reference to s. 4 of the Act of 1881 (*ibid* at p. 50):

The learned counsel have contended that cases and persons which before were not within the jurisdiction of the English justices are brought within the jurisdiction of those justices by that section. To me it appears, quite clearly, that the section proceeds upon the assumption of jurisdiction under the Summary Jurisdiction Acts.

How can the process be issued under the Summary Jurisdiction Acts if the Summary Jurisdiction Acts give no power to issue such process? This point is not peculiar to bastardy cases; the argument goes to the extent, that any process whatever which a court of summary jurisdiction can be induced to issue, though in a case manifestly altogether beyond its jurisdiction, and as to which the Summary Jurisdiction Acts give it no jurisdiction, is nevertheless to be served and executed in the manner provided for in Scotland. To me the natural meaning of the words "process issued under the Summary Jurisdiction Acts" is process issued under the jurisdiction given by those Acts, and in the manner which those Acts authorise and require. It is begging the whole question to say that those Acts give jurisdiction to issue a summons in this case. On the contrary, all the enactments which have been referred to show that the justices have no such jurisdiction. That appears to me to go to the root of the whole argument.

This passage suggests that, apart altogether from the express terms of the Bastardy Act, LORD SELBORNE, L.C., might have been prepared to decide the case on the general principle that a person resident abroad, still more, ordinarily resident and domiciled abroad, and "not brought by any special statute or legislation within the jurisdiction" (p. 49) (I emphasise these words) is *prima facie* not subject to the process of a foreign court—he must be found within the jurisdiction to be bound by it. This involves a consideration of the relation between s. 4 of the Act of 1895 and s. 1 of the Summary Jurisdiction Act, 1848.

For a proper appreciation of the issues involved, it is essential to keep in mind the distinction referred to by LORD SELBORNE, L.C. at the end of the paragraph on p. 48 between the jurisdiction of the particular justices, which I will call the local jurisdiction, and the jurisdiction of the law of England to which the substantive Acts of Parliament, *i.e.*, the Summary Jurisdiction (Married Women) Acts, apply, which I will call the general jurisdiction. Manifestly, the decision in *Berkley v. Thompson* (5) precludes justices from assuming a jurisdiction over a person ordinarily resident abroad, which includes Scotland, and not found within the jurisdiction, merely by reason of the procedural provisions of the summary jurisdiction code, unless that jurisdiction is given by the substantive Act creating the subject-matter of the complaint, or as the case may be. Now, the material words of s. 1 of the Summary Jurisdiction Act, 1848, are:

... where an information shall be laid before ... justices of the peace for any county ... within England ... that any person has committed or is suspected to have committed any offence or act within the jurisdiction of such ... justices for which he is liable by law, upon a summary conviction for the same before ... justices of the peace, to be imprisoned or fined, or otherwise punished, and also in all cases where a complaint shall be made to any such ... justices upon which ... they have or shall have authority by law to make any order for the payment of money or otherwise, then ... it shall be lawful for such ... justices ... to issue ... their summons directed to such persons, stating shortly the matter of such information or complaint, and requiring him to appear at a certain time and place ... to answer to the said ... complaint ...

It is clear, so far as an information is concerned, that the local jurisdiction of any given justices is strictly limited by the commission, or suspicion of the commission, of an offence within their own jurisdiction. So far as a complaint is concerned, the local jurisdiction again is limited by their being the justices who have authority to make an order for the payment of money or otherwise. It is unquestionable that applications by a married woman for an order under the Summary Jurisdiction (Married Women) Acts are the proper subject of a complaint under s. 1 of the Summary Jurisdiction Act, 1848, and it is, therefore, necessary to examine s. 4 of the Act of 1895 to see how the local jurisdiction of the justices is limited in this respect. Section 4, as amended, reads as follows:

Any married woman whose husband shall have been convicted summarily of an aggravated assault upon her within the meaning of section forty-three of the Offences against the Person Act, 1861, or whose husband shall have been convicted upon indictment of an assault upon her, and sentenced to pay a fine of more than five pounds or to a term of imprisonment exceeding two months, or whose husband shall have deserted her, or whose husband shall have been guilty of persistent cruelty to her, or wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, may apply to any court of summary jurisdiction acting within the city, borough, petty sessional or other division or district,

in which any such conviction has taken place, or in which the cause of complaint shall have wholly or partially arisen, for an order or orders under this Act; Provided that where a married woman is entitled to apply for an order or orders under this section on the ground of the conviction of her husband upon indictment, she may apply to the court before whom her husband has been convicted, and that court shall, for the purposes of this section, become a court of summary jurisdiction, and shall have the power without a jury to hear an application, and make the order or orders applied for.

A Other causes of complaint have been added by later Acts, but the limits of jurisdiction remain unchanged.

Now, first of all, it is desirable to see how the matter stands as regards the husband's conviction on indictment of assault in respect of which he is sentenced to pay a fine of more than £5 or a term of imprisonment exceeding two months.

B In this case, at least, no question of the jurisdiction of any particular petty sessional division is necessarily involved at all, seeing that the application for an order may be made at the time of the conviction to the judge of assize or to quarter sessions, as the case may be, who, by reason of the proviso at the end of the section, becomes a court of summary jurisdiction and may make the order or orders applied for. To take a simple illustration, suppose that a domiciled Scotsman resident in Scotland comes to Cumberland, where he knows his wife is living, and assaults her there. He is arrested and tried at the Carlisle Assizes.

C What ground is there for importing into the section that before the judge of assize makes an order on the wife's application he must be satisfied that the husband, as well as the wife, is resident in some part of England? I see no reason to doubt that the judge, if he passes the prescribed sentence, has jurisdiction to make an order in favour of the wife. If so, why does not the same consideration apply to a wife's application to the justices of the petty sessional division in which the husband has been summarily convicted of an aggravated assault

D upon the wife, having regard, especially, to the provision in s. 8 of the Act of 1895 that her summons may be issued and made returnable immediately on such conviction. I can see no ground for holding that the words of the statute should not be given their plain and natural meaning. In my opinion, it would be wholly alien to the obvious intent of this part of the section to import the irrelevant proviso that the husband should be resident in this country.

E It remains to consider how the matter stands as regards the other grounds of complaint mentioned in s. 4, or added by later Acts. As to these, it is essential to establish that the cause of complaint shall have wholly or partially arisen in the local jurisdiction of the justices. Now, as regards adultery and persistent cruelty, it is obvious that one act of adultery, or one act, at least, in the course of conduct alleged to constitute persistent cruelty whether to the wife or to her children, must have occurred in the local jurisdiction of the justices' court. To

F neither offence is the residence of either spouse necessarily relevant. As in the case of the convictions already dealt with, it may be argued that, if the adulterous association or the persistence in the course of cruelty, as the case may be, enables the husband to be found within the jurisdiction and there served with a summons, the appropriate court may have jurisdiction although he is ordinarily resident out of the jurisdiction but not otherwise. The same applies

G *mutatis mutandis*, to insistence on sexual intercourse while suffering from venereal disease, or to compelling the wife to submit herself to prostitution if the intercourse has occurred or the husband has exercised the compulsion within the jurisdiction. As regards habitual drunkenness, although the Habitual Drunkards Act, 1879, does, the Licensing Act, 1902, which creates the cause of complaint, does not, apply to Scotland. This is a special case which may depend on where the conviction takes place, but, as it does not appear to throw any light on the question, I express no definite opinion on the point.

H So far, there may well be instances of all these grounds of complaint where the appropriate court can act solely because the husband is found within the general jurisdiction and is served there, but that is a different thing from saying, to quote LORD SELBORNE, L.C., again, that he is "brought by legislation within the jurisdiction." There remain the two kindred grounds of complaint of wilful neglect to provide reasonable maintenance and desertion. I describe these as kindred grounds because in either case the absence of the wife from the husband without just cause would defeat her application and because in both cases it is well settled in English law that the cause of complaint partially

arises where the wife, justifiably living apart from the husband, resides : *Price v. Price* (10) ; *Chudley v. Chudley* (11). We have not been informed what is the law in Scotland corresponding to that relating to wilful neglect to maintain in this country. Suffice it to repeat that the precise provisions of this Act do not apply to Scotland. As to desertion, we are on surer ground. It is established on the highest authority that desertion as a matrimonial offence does not mean the same thing in Scotland as it does in England, notwithstanding the express use of the same word in the Matrimonial Causes Act, 1937, and the Divorce (Scotland) Act, 1938, respectively : see *Bell v. Bell* (12), and *Wilkinson v. Wilkinson* (13). I do not ignore the possibility that complications might arise in any given case if a court of summary jurisdiction in England can make a valid separation order against a husband, even though he be domiciled in Scotland, on grounds which would be insufficient in Scotland. When the Act of 1895 was passed, and *a fortiori* when the earlier Married Women (Maintenance in Case of Desertion) Act, 1886, was passed, it would have been impossible to assert, whatever common characteristics there might be, that the law relating to desertion was exactly the same in Scotland as in England, but the same consideration applies to a decree of judicial separation, for example, on the ground of "constructive" desertion when the spouses are resident in England but domiciled in Scotland.

Nevertheless, from the wording of s. 4 of the Summary Jurisdiction Act, 1848, it would appear that, so far as an information is concerned, what the legislation contemplates is that an offence is created by law, and that the defendant, wherever he may be resident, has committed, or is suspected of having committed, that offence within the local jurisdiction of particular justices to enable them to deal with it. The residence of the offender may be where it is impossible to reach him, but, if it happens to be in Scotland, it seems to me to be reasonably plain that there is special legislation which brings him within the jurisdiction, and does so not merely when he can be found and arrested within the jurisdiction. Is there any reason why the same should not apply to a husband who has given rise to a cause of complaint which, in the words of s. 4 of the Act of 1895, wholly or partially arises within the local jurisdiction of the justices ? It would not be true to say that it is impossible to read this provision without seeing that this legislation proceeds upon the footing that the presence of the husband in England is necessary for the jurisdiction to attach. On the contrary, I must say that it seems to me that there is no warrant for regarding either the subject-matter of an information or the subject-matter of a complaint as being qualified by the condition that the person against whom the information is laid or the complaint made must be ordinarily resident within the general jurisdiction before he is amenable to the local jurisdiction of the justices. In my opinion, it is not the procedural Act alone, but the combination of that Act and the substantive Acts which together provide that the husband in this case is, in LORD SELBORNE'S words, "brought by special statute or legislation within the jurisdiction." Assuming this to be correct, the matter works out as follows : By virtue of s. 4 of the Act of 1881 the process, which by s. 8 includes the summons to answer the complaint of desertion, may be served in the manner admittedly followed in this case.

Moreover, it seems to be arguable that, so far from any subsequent process for enforcement being out of order, as was held in *M'Queen v. M'Queen* (1), it may be expressly covered by the following provisions, bearing in mind that the original order and any order for its enforcement are the subject of separate complaints and process thereon. By sub-s. (4) of s. 4 of the Act of 1881, the Act is not to apply to any process requiring the appearance of a person to answer a complaint for the recovery of a sum of money which is a "civil debt" within the meaning of the Summary Jurisdiction Act, 1879. By s. 6 of the Act of 1879 where a sum of money claimed to be due is recoverable on complaint to a court of summary jurisdiction and not on information, such sum shall be deemed to be a civil debt, and by s. 35 any sum declared by that Act or by any future Act to be a civil debt, which is recoverable summarily, or in respect of the recovery of which jurisdiction is given by such Act to a court of summary jurisdiction, shall be deemed to be a sum for payment of which a court of summary jurisdiction has authority by law to make an order on complaint in pursuance of the Summary Jurisdiction Acts. So far, this would appear to make

A the recovery of money payable under a maintenance order the subject of complaint as for a civil debt, but by s. 54 of the Act of 1879 the Act is to apply to the levying of sums adjudged to be paid by an order which is enforceable as an order of affiliation, and to the imprisonment of a defendant for non-payment of such sums, in like manner as if an order in any such matter or so enforceable were a conviction on information, and by s. 9 of the Act of 1895 the payment of any sum of money directed to be paid by any order under that Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation. However, it is unnecessary to express a final opinion on this point, for, as I have said before, we are not concerned with enforcement but with jurisdiction to hear and determine.

B For these reasons, although I confess that my views on this matter have fluctuated more than once, I have come to the conclusion that, on the question of the jurisdiction to issue and serve the summons, at any rate, *M'Queen v. M'Queen* (1) was wrongly decided, and that it is our duty to say so. In my opinion, the process in this case was properly issued and served and the justices had jurisdiction to try this case. The appeal, therefore, will be dismissed.

JONES, J.: I have had the advantage of reading the judgment which my Lord has just delivered. I concur with it, and I have nothing to add.

Appeal dismissed with costs.

C Solicitors: *H. H. Wells & Sons*, agents for *Andrew Duncan*, Huntley, Aberdeenshire (for the appellant): *Alfred Slater & Co.* (for the respondent).

[*Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.*]

ined. WESTMINSTER (DUKE) v.
TON. [1948] 1 All E.R. 248.

D EYRE AND ANOTHER v. REA

[KING'S BENCH DIVISION (Atkinson, J.), February 3, 4, 1947.]

Landlord and Tenant—Covenant—Breach—Damages—Measure—Landlord and Tenant Act, 1927 (c. 36), s. 18.

E The defendant, the assignee of a lease, granted sub-leases of parts of the premises to five sub-tenants who, by arrangement with him, converted the premises into five separate flats. The defendant thereby was guilty of breaches of covenants in the lease not to alter the internal planning of the premises, not to permit the premises to be used otherwise than as a private dwelling-house in one occupation, and not to underlet or part with the possession of any part of the premises. In an action by the landlord for forfeiture for breach of covenant the judge refused a claim by the defendant for relief against forfeiture under s. 146 (2) of the Law of Property Act, 1925, and granted a decree of forfeiture and an order for possession. On a claim by the landlord for damages for the breaches of covenant,

F HELD: the measure of damages prescribed in the Landlord and Tenant Act, 1927, s. 18, for breach of covenant to keep and put premises in repair should not be extended to a breach of this nature, and, notwithstanding the fact that the premises, as converted, were, from a financial point of view, more valuable, the plaintiffs were entitled to the cost of restoring them to the state of an unconverted single dwelling-house, plus the loss of rent during the period of conversion.

G [AS TO DAMAGES FOR BREACH OF COVENANT TO REPAIR, see HALSBURY, *Hailsham Edn.*, Vol. 20, pp. 219-222, paras. 239-242; and FOR CASES, see DIGEST, Vol. 31, pp. 337-342, Nos. 4808-4851.]

H Cases referred to:

- (1) *Hanson v. Newman*, [1934] Ch. 298; 103 L.J. Ch. 124; 150 L.T. 345; Digest Supp.
- (2) *Elliot v. Boynton*, [1924] 1 Ch. 236; 93 L.J. Ch. 122; 130 L.T. 497; 31 Digest 553, 7003.
- (3) *Batson v. London School Board* (1904), 69 J.P. 9; 31 Digest 490, 6376.
- (4) *Feilden v. Byrne*, [1926] Ch. 620; 95 L.J. Ch. 445; 135 L.T. 107; 31 Digest 174, 3067.
- (5) *Angell v. Burn* (1933), 77 Sol. Jo. 337; Digest Supp.
- (6) *Portman v. Latta* (1942), 86 Sol. Jo. 119; Digest Supp.

ACTION for forfeiture for breach of a covenant in a lease, for a declaration of title to possession, and for rent, mesne profits and damages. The facts appear in the headnote.

C. L. Henderson, K.C., and *B. L. A. O'Malley* for the plaintiffs.
H. Heathcote-Williams for the defendant.

ATKINSON, J., reviewed the evidence, held that he had no option but to decree a forfeiture, and that there was no ground on which he could give relief to the defendant, the main reason being that there was no case of which he knew where relief had been given except on the basis of the breach being at once rectified, and continued :—On the question of damages, we have had an interesting argument. The plaintiffs say : “The damages we are entitled to are what it will cost us to put the house back into the condition in which it was. This action is merely based on the conversion, and we are entitled to have the house given back to us in the state in which it was, that is, single occupation. We are entitled to the cost of the re-converting. Only in that way can justice be done to us. That was the house that we let, that was the house which the defendant assured us he was going to maintain in that condition, that was the house which the covenants provided we should get back at the end of the lease, and we are entitled to have that re-converted.” The plaintiffs also say : “Apart from what we want and what we are entitled to in that way, we are under a moral obligation to other owners of leases of houses in that road to perform the covenants which we have made them undertake. We may not be legally bound to, but we would regard it as a great breach of faith to tolerate one of these houses being maintained as a block of flats when we have made everybody else covenant that he will not do any such thing. That is what we say our right is.”

Counsel for the defendant for a time created a doubt in my mind, because he did not draw the distinction between the breach of a covenant of this kind and the breach of a covenant to keep and put premises in repair. He referred to s. 18 of the Landlord and Tenant Act, 1927, which provides as follows :

(1) Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid . . .

He says that the only measure of damages under that breach of covenant to repair is : What would have been the value of the premises if they had been delivered up in a proper state of repair, and what is the value of the premises in the state in which they have been delivered up ? There may be cases in which no one would dream of repairing, in which a house was almost certainly going to be pulled down at an early date, and in a case of that kind quite a small sum might be found to be due, or, at any rate, the cost of repairs would not be the measure of damages. That has been emphasised in *Hanson v. Newman* (1), but, again, that is a case dealing only with repairs. There a lessee objected to carrying out the covenants of the lease as to painting and repair. It was held that, in assessing damages under s. 18 of the Landlord and Tenant Act, 1927, the court had to ascertain the actual value of the property in its unrepaired state at the date of re-entry and the value which the property would then have had if there had been no breach of covenant, and the amount of damage sustained by the landlord is the difference between the two values.

On the strength of that, counsel argues that the plaintiffs have now got something which, from the financial point of view, is more valuable than the house would have been if it had been in single occupation. They can let it for a higher rent, he says, and, therefore, they have suffered no damage. I cannot assent to that argument. Section 18 is limited to damages for a breach of a covenant to repair. The cases cited to me also dealt merely with covenants to repair. It seems to me that I cannot extend that principle to a breach of a covenant of this sort and say to the plaintiffs : “Despite that covenant and although you let and are entitled to receive back an unconverted house, that is, a house suitable for single occupation, because you have got something which you may be able to let at a higher rent than the house which you are entitled to have back, you have suffered no damage.”

The plaintiffs have their rights, and I have to measure their rights so far as they are not modified by some provision in an Act of Parliament. I think that what they are entitled to is the cost of restoring this house to the condition in which they were entitled to have it returned to them, that is, an unconverted house. The cost of that is £896 12s. The evidence is that it will take two to two and a half months to do the work, during which no rent can be earned, and the damage for that will be another £50. Therefore, the order will be that there will be forfeiture of the lease, a declaration that the plaintiffs are entitled to possession, and judgment in their favour for £140 rent, the sum of £194 16s. for mesne profits, and for £946 12s. damages for breach of the covenants set out in the statement of claim, and costs.

Judgment accordingly with costs.

Solicitors: *Lee & Pembertons* (for the plaintiffs); *J. M. Isaacs & Co.* (for the defendant).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

Re A DEBTOR (No. 707 OF 1939). THE OFFICIAL RECEIVER AND TRUSTEE v. UNITED AUTO AND FINANCE CORPN., LTD. AND INLAND REVENUE COMMISSIONERS.

Re BAUGHAN. THE OFFICIAL RECEIVER (TRUSTEE) v. A. H. BENNETT AND WALLIS AND STEEVENS, LTD.

[CHANCERY DIVISION (Romer, J.), January 20, February 3, 1947.]

Bankruptcy—Surplus available for distribution—Application—Priority—Statutory interest on debts proved—Excess interest on moneylender's claims—Claim by trustee of bankrupt's marriage settlement—Bankruptcy Act, 1914 (c. 59), ss. 30 (3), 33 (7), (8), 42 (2)—Moneylenders Act, 1927 (c. 21), s. 9 (1).

A trustee in bankruptcy had a surplus remaining in his hands after paying a dividend of 20s. in the £ on all debts other than debts which were postponed under the Moneylenders Act, 1927, s. 9 (1), (*i.e.*, claims by moneylenders for interest in excess of 5 per cent. on the principal due to them). The question was whether this surplus should be first applied in payment of the postponed debts, or, under the Bankruptcy Act, 1914, s. 33 (8), in the payment of interest from the date of the receiving order to the creditors who had received 20s. in the £ on their proofs.

HELD: (i) the claim to excess interest was a debt proved in the bankruptcy within the Bankruptcy Act, 1914, s. 33 (7), while interest payable under s. 33 (8) was not such a debt, either within s. 33 (7) or for the purposes of the Moneylenders Act, 1927, s. 9 (1), and, therefore, the moneylenders' claim for postponed interest should be satisfied out of the surplus before the claims of creditors to statutory interest.

(ii) with regard to statutory interest, all debts were *pari passu*, and statutory interest would be payable in respect of all the claims, including those for excess interest.

During the lifetime of a bankrupt who had died without obtaining her discharge, her trustee in bankruptcy had paid a dividend of 20s. in the £ to all the creditors who had proved their debts. After the bankrupt's death, her trustee obtained a sum of money from the trustee of her marriage settlement on the ground that the covenant in the settlement to settle after-acquired property was void against him under the Bankruptcy Act, 1914, s. 42 (2). There was now a surplus available for distribution. The marriage settlement trustee having submitted a proof pursuant to s. 42 (2), the question was whether, as a postponed creditor, he was entitled to be paid a dividend out of this surplus before interest was paid on the claims of the other creditors under s. 33 (8) of the Act, or whether the statutory interest on the other claims should first be paid.

HELD: (i) the claim of the marriage settlement trustee against the bankrupt's estate was not a "debt" for the purpose of s. 33 (7) of the Act of 1914, and, accordingly, it was not one of "the foregoing debts" for the purpose of s. 33 (8), and was not entitled to be paid before the statutory interest on the other claims.

(ii) Section 42 (2) merely conferred the right to receive a dividend after all the claims of the creditors for valuable consideration had been satisfied, and these claims could not be regarded as "satisfied" until they had been paid in full with statutory interest.

[AS TO POSTPONED DEBTS, see HALSBURY, Hailsham Edn., Vol. 2, pp. 296-299, paras. 392, 393; and FOR CASES, see DIGEST, Vol. 4, pp. 481-485, Nos. 4335-4360.]

Cases referred to :

- (1) *Re Cumming & West, Ex. p. Neilson & Craig v. Trustee*, [1929] 1 Ch. 534; 141 L.T. 61; *sub nom. Re Cumming, Ex. p. Neilson & Craig v. Adamson (Trustee)*, 98 L.J. Ch. 83; [1929] B. & C.R. 4; Digest Supp. A
- (2) *Re Grason, Ex. p. Taylor* (1879), 12 Ch. D. 366; 41 L.T. 6; 4 Digest 484, 4357.
- (3) *Re Howes*, [1934] Ch. 49; 150 L.T. 95; [1933] B. & C.R. 133; *sub nom. Howes, Re Trustee v. Gill & Reigate, Ltd.*, 102 L.J. Ch. 346; Digest Supp.
- (4) *Ex. p. Reeve* (1804), 9 Ves. 588; 4 Digest 428, 3360.
- (5) *Re Genese, Ex. p. District Bank of London* (1885), 16 Q.B.D. 700; 55 L.J.Q.B. 118; 4 Digest 482, 4340. B
- (6) *Re Debtor (No. 231 of 1936), Debtor v. Petitioning Creditors & Official Receiver*, [1936] 3 All E.R. 641; 156 L.T. 9; *sub nom. Re Debtor (No. 231 of 1936)*, [1937] Ch. 181; 106 L.J. Ch. 189; [1936-7] B. & C.R. 113; Digest Supp. B

CASE I—MOTION by the trustee in bankruptcy asking for directions as to which classes of creditors had priority in the distribution of a surplus remaining after a dividend of 20s. in the £ had been paid on all debts except those postponed under the Moneylenders Act, 1927, s. 9 (1). The question was whether the claims of moneylenders to excess interest had priority over the claims of the other creditors to statutory interest under the Bankruptcy Act, 1914, s. 33 (8). The facts appear in the judgment. C

V. R. Aronson for the Official Receiver.

F. Ashe Lincoln for the moneylender creditors.

J. H. Stamp for the other creditors. D

CASE II—CASE STATED by the judge of the Oxford County Court sitting in bankruptcy. The trustee in bankruptcy had a surplus in hand after paying a dividend of 20s. in the £ on all proofs except a claim postponed under the Bankruptcy Act, 1914, s. 42 (2). The question was whether the postponed claim should be paid out of the surplus before statutory interest, under s. 33 (8) of the Act, was paid to the other creditors, or whether the statutory interest should be first paid. The facts appear in the judgment. E

V. R. Aronson for the Official Receiver.

A. G. de Montmorency for the trustee of the bankrupt's marriage settlement.

J. Harcourt Barrington for the other creditors. E

Cur. adv. vult.

Feb. 3. ROMER, J., read the following judgment. These two applications came before me on Jan. 20 last and, inasmuch as they both involved points of similarity, it was considered convenient that they should be heard and argued together, and this was, accordingly, done. The facts of the two cases, however, are not the same and will require separate and individual consideration. F

On the first application the Official Receiver, as trustee of the property of the debtor, seeks the directions of this court, pursuant to the Bankruptcy Act, 1914, s. 79 (3), in the circumstances set out in his report dated Aug. 28, 1946, and filed herein. This report of the Official Receiver is in the following terms: G

(1) The receiving order was made on Aug. 1, 1940, on a creditor's petition, and the order of adjudication was made on Aug. 5, 1940. The Official Receiver remained trustee of the estate. The debtor applied for his discharge on June 19, 1945, when it was granted subject to suspension for 2 months. (2) According to the statement of affairs the liabilities to rank for dividend were estimated at £2,769 8s. 8d. and the assets were estimated to produce £4,504. (3) At the date of the release of the Official Receiver as trustee, namely, on July 31, 1942, the only amount realised was £8 9s. 7d. which was absorbed in payment of fees and expenses. The debtor's estimate included £4,500 at which he valued his equity in a reversionary interest. Nothing was realised from this interest. (4) On Jan. 22, 1944, the debtor's mother died, leaving him her sole next of kin. His interest in the deceased's estate was claimed by the Official Receiver, and between Oct., 1944, and Jan., 1945, sums totalling £5,196 18s. were received on account of this interest. (5) Early in 1945, the Official Receiver caused notices to be given of his intention to pay a dividend. Twenty-four proofs were lodged for claims totalling £4,778 0s. 8d. Of this sum £202 3s. 7d. was admitted H

as payable preferentially and was paid. Twenty proofs of creditors other than moneylenders were admitted to rank for dividend at sums totalling £2,460 16s. 7d. Four proofs by moneylenders were admitted for sums totalling £2,014 18s. 11d. Of this sum the amount admitted to rank for dividend with the other creditors was £1,434 11s. 7d. Total £3,895 8s. 2d. The remainder, £580 7s. 4d. was postponed pursuant to the Moneylenders Act, 1927, s. 9 (1). (6) On Mar. 16, 1945, a first dividend of 15s. in the £ was paid on proofs for £3,895 8s. 2d. (7) Further sums were then received by the Official Receiver from the realisation of the deceased's estate and at present the balance standing to the credit of the estate is £1,692 11s. 11d. Of this sum about £1,000 will be required to pay the balance of 20s. in the £ on the proofs admitted for dividend. (8) It then falls to be considered how the balance of approximately £692 should be applied. The possible claimants to this fund are (a) the four moneylenders with their claims for postponed interest totalling £580 7s. 4d., and (b) the creditors who will have received 20s. in the £, with their claims to statutory interest at 4 per cent. on the amount of their debts from the date of the receiving order, under the Bankruptcy Act, 1914, s. 33 (8). (9) The Official Receiver seeks the directions of the court as to which of these two classes of creditors has priority in the distribution of the said sum of £692.

On Nov. 4, 1946, an order was made appointing the United Auto & Finance Corporation, Ltd., to represent the creditors who are moneylenders and who had submitted proofs in respect of money lent, and appointing the Inland Revenue to represent the creditors other than moneylenders. These two classes of creditors were each represented by counsel when the case came before me. The precise direction which the Official Receiver requires, and which was argued before me, is an order directing him to what person or persons he should pay the sum of £692 now in his possession, being the surplus remaining in his hands after payment of 20s. in the £ on all debts other than debts which are postponed by reason of the provisions of the Moneylenders Act, 1927, s. 9 (1). The second application comes before this court by way of Case Stated, pursuant to the Bankruptcy Act, 1914, s. 100 (3), by the judge of the Oxford County Court, sitting in bankruptcy. The Case Stated is as follows:

(1) This motion coming before me on Jan. 6, 1947, I was requested by all the parties to state the following Special Case for the opinion of the High Court pursuant to the Bankruptcy Act, 1914, s. 100 (3), and I consented to do so. (2) I find the following facts, as stated in the Official Receiver's report dated Dec. 9, 1946, to be proved: (a) A receiving order was made against the bankrupt on Oct. 4, 1927, and she was adjudged bankrupt on the same day. By an order dated Oct. 17, 1927, it was directed that her estate should be administered in a summary manner and the Official Receiver is the trustee of her property. The bankrupt died on Dec. 20, 1942, without having obtained her discharge. (b) On the occasion of her marriage to James Baughan, the bankrupt, then Marjorie Bennett, spinster, executed an antenuptial settlement dated Nov. 5, 1908, of all money or property to which she would become entitled on the death of her father, Alfred Bennett, and of all money or property which might thereafter be acquired by her. By the said settlement all such property was conveyed to trustees to hold on trust for the bankrupt until the said intended marriage and after the said marriage on trust for the persons named in the said settlement. By cl. 7 thereof the bankrupt covenanted to assign to the trustees all property not thereinbefore settled to which she might become entitled during coverture. The said intended marriage was duly solemnised on Nov. 6, 1908. (c) The bankrupt's father, the said Alfred Bennett, died on Jan. 7, 1918. By his will he bequeathed a legacy of £2,000 to his wife, Mrs. Georgina Bennett, for life with remainder in equal shares to his three children, of whom the bankrupt was one. (d) By an assignment dated June 8, 1929, the Official Receiver sold the bankrupt's life interest under the said settlement for the sum of £1,000, but the assignment did not include any assets other than those set out in the schedule thereto. With the said sum of £1,000 and with other available assets the Official Receiver paid a dividend of 20s. in the £ to all creditors who had at that time proved their debts. (e) On Apr. 14, 1935, the said Mrs. Georgina Bennett died and shortly afterwards the executors of the said Alfred Bennett transferred to the trustees of the settlement of Nov. 5, 1908, war stock of the value of £706 0s. 6d., being the bankrupt's share of the said settled legacy of £2,000. (f) Until May, 1940, the settlement trustees paid dividends on the £706 0s. 6d. war stock to the bankrupt. The Official Receiver then for the first time learned of the position and intervened, contending that the covenant to settle after-acquired property in the settlement of Nov. 5, 1908, was void against him by reason of the Bankruptcy Act, 1914, s. 42 (2). The respondent, Alfred Harvey Bennett, who is the surviving settlement trustee, admitted the Official Receiver's claim and on Dec. 10, 1946, transferred the said war stock to the Official Receiver. (3) The Official Receiver now proposes out of this sum to pay 20s. in the £ on any new proofs which

may be lodged and admitted and desires the directions of the court as to how he should dispose of the residue of the said sum. (4) On Dec. 9, 1946, the respondent, Alfred Harvey Bennett, submitted a proof pursuant to the Bankruptcy Act, 1914, s. 42 (2). (5) By an order made by this court on Dec. 11, 1946, it was ordered that the respondents, Wallis & Stevens, Ltd., be appointed to represent all the creditors other than the said Alfred Harvey Bennett on the trial of this motion.

Then certain copy documents, which I need not mention in detail, are attached to the Case. The concluding paragraph of the Case states :

The question for the opinion of the High Court is whether the Official Receiver should apply the surplus of the said war stock first in paying statutory interest on the claims of all the creditors, with the exception of the respondent, Alfred Harvey Bennett, pursuant to the Bankruptcy Act, 1914, s. 33 (8), and next in paying dividends to the said Alfred Harvey Bennett as a postponed creditor pursuant to s. 42 (2) of the said Act, or whether, on the other hand, he should first pay dividends to the said postponed creditor and apply any surplus, after payment of 20s. in the £ on his proof, in paying statutory interest to the creditors who have proved.

The respondent, Mr. A. H. Bennett, the surviving trustee of the debtor's marriage settlement, claims that the fund available should be applied towards satisfying his claim as such trustee in priority to paying statutory interest on the claims of all the creditors for valuable consideration.

The point of law in common between the two applications, as hereinbefore appears, is that in each case a conflict arises between postponed claims, on the one hand, and creditors claiming statutory interest, on the other. The statutory provisions postponing the claims in question, however, are not the same and it is the difference in the language in which those provisions are respectively couched that prevents each of the two cases from being necessarily governed by a determination of the other.

The claim by the moneylenders, on the first application, to interest in excess of 5 per cent. on the principal due to them is subjected to postponement by the Moneylenders Act, 1927, s. 9 (1), which is in the following terms :

Where a debt due to a moneylender in respect of a loan made by him after the commencement of this Act includes interest, that interest shall, for the purposes of the provisions of the Bankruptcy Act, 1914, relating to the presentation of a bankruptcy petition, voting at meetings, compositions and schemes of arrangement, and dividend, be calculated at a rate not exceeding 5 per cent. per annum, but nothing in the foregoing provision shall prejudice the right of the creditor to receive out of the estate, after all the debts proved in the estate have been paid in full, any higher rate of interest to which he may be entitled. The provisions of this sub-section shall, in relation to such a debt as aforesaid, have effect in substitution for the provisions of the Bankruptcy Act, 1914, s. 66 (1).

The analogous provisions of the Bankruptcy Act, 1914, s. 66 (1), are as follows :

Where a debt has been proved, and the debt includes interest, or any pecuniary consideration in lieu of interest, such interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding 5 per centum per annum, without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved in the estate have been paid in full.

It is, I think, clear that the amount due to a moneylender for interest which his debtor agreed to pay in excess of 5 per cent. per annum on the loan is within the definition of "debts provable in bankruptcy" which is contained in the Bankruptcy Act, 1914, s. 30 (3). It is not in respect of proof, but of the right to receive dividends, that the claim to such excess interest is subordinated to the claims of other creditors. It follows from this that a moneylender can include in the global sum for which he proves the amount of the excess interest due to him at the date of the receiving order, but he cannot get a dividend in respect of that amount until the debts which the other creditors have proved in the estate have been paid in full. The question then is whether the excess interest is subordinated further to the statutory interest which is payable on the debts of the other creditors proved in the estate. The provision for statutory interest is to be found in s. 33 of the Act of 1914. Sub-sections (1) to (4) of this section deal with preferential debts. Sub-section (5) enacts that s. 33 :

... shall apply, in the case of a deceased person who dies insolvent, as if he were a bankrupt, and as if the date of his death were substituted for the date of the receiving order.

Sub-section (6) deals with the position of the joint and several estates of partners. Sub-sections (7) and (8) are respectively in the following terms :

(7) Subject to the provisions of this Act, all debts proved in the bankruptcy shall be paid *pari passu*. (8) If there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date of the receiving order at the rate of £4 per cent. per annum on all debts proved in the bankruptcy.

Sub-section (9) is, for present purposes, immaterial.

A It was suggested in argument that "the foregoing debts" referred to in sub-s. (8) do not relate to the debts mentioned in sub-s. (7) (*viz.* "all debts proved in the bankruptcy"), but are referable to the preferential debts enumerated in sub-s. (1). I cannot accept this contention. Grammatically the words "foregoing debts" embrace all debts to which reference has been made in the earlier parts of the section and do not embrace some only to the exclusion of others. Moreover, the view contended for would lead to the curious result that B statutory interest would be payable in respect of the ordinary debts before anything was paid in reduction of the debts themselves. I, accordingly, read the words "the foregoing debts" as including both the preferential debts referred to in sub-s. (1) of s. 33 and also the universality of debts referred to in sub-s. (7). The result of this is that no creditor is entitled to statutory interest until all debts (preferential or ordinary) proved in the bankruptcy have been paid, and C that must mean paid in full. Inasmuch as a moneylender's claim to excess interest is a "debt" and is "provable," it would seem to follow that, if he in fact proves for it in the bankruptcy of his debtor, then the amount of such claim becomes a "debt proved in the bankruptcy" and must be paid before any surplus becomes available for the payment of statutory interest.

D Counsel, however, who argued the contrary view, said that the Bankruptcy Act, 1914, s. 33, and the Moneylenders Act, 1927, s. 9, do not stand alone and that there are other provisions of the bankruptcy legislation which also have to be considered on this question and that some guidance is also to be obtained from decided cases. These provisions and authorities conveniently lead to a consideration of the second application before me, to which they are mainly relevant. The postponement of the claim of Mr. A. H. Bennett, as trustee of Mrs. Baughan's marriage settlement, is due to the provisions of the Bankruptcy Act, 1914, s. 42 (2), which is as follows :

E Any covenant or contract made by any person (hereinafter called the settlor) in consideration of his or her marriage, either for the future payment of money for the benefit of the settlor's wife or husband, or children, or for the future settlement on or for the settlor's wife or husband or children, of property, wherein the settlor had not at the date of the marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property in right of the settlor's F wife or husband, shall, if the settlor is adjudged bankrupt and the covenant or contract has not been executed at the date of the commencement of his bankruptcy, be void against the trustee in the bankruptcy, except so far as it enables the persons entitled under the covenant or contract to claim for dividend in the settlor's bankruptcy under or in respect of the covenant or contract, but any such claim to dividend shall be postponed until all claims of the other creditors for valuable consideration in money or money's worth have been satisfied.

G For present purposes two points on this sub-section call for comment—(1), the position and rights of a claimant whose claim is expressly declared to be void against the trustee in bankruptcy, and (2), the postponement of a dividend until the claims therein mentioned of other creditors have been satisfied, in contrast to the postponement (already mentioned) of a dividend on excess interest until all the debts proved in the estate have been paid in full.

H The first of these points was considered by TOMLIN, J., in *Re Cumming and West* (1). TOMLIN, J., expressed himself as follows ([1929] 1 Ch. 534, at pp. 547, 548) :

It is to be remembered that s. 42 (2) is framed in a special way. It provides that the contract or covenant shall be void against the trustee in bankruptcy except so far as it enables the persons entitled under the covenant to claim for dividend in the settlor's bankruptcy under or in respect of the covenant. That is curious language. Presumably the curious or unusual framework of the clause is due to the desire of the legislature to produce a special result. The contract is void against the trustee, but there is reserved out of the voidness, a right on the part of the persons entitled under that contract to claim for dividend. It has been quite fairly and properly

admitted by Mr. Tindale Davis [for the settlement trustees] that, having regard to the decision in *Ex parte Taylor* (2), the trustee in bankruptcy is entitled, on a claim made within s. 42 (2), to reject the proof, leaving, of course, the claimant free, when all those creditors to whom he is postponed have been satisfied, to return to the charge, if he finds that the circumstances of the case are such that he can thereby obtain some advantage. The real explanation of these sections, and the explanation which seems to me to make them consistent throughout, is that "creditors" there means the persons entitled to prove; and that when there is a reference to "separate creditors," it means separate creditors, that is to say, persons whose claims are not made void by s. 42, but persons whose proofs the trustee is entitled to accept: and in the same way "joint creditors" means those creditors whose proofs the trustee is bound to accept; and that persons who claim under a contract made void against the trustee, are not creditors. They are persons having a special right—namely, a right to a claim for dividend in the settlor's bankruptcy, under or in respect of the contract, after all the claims of the other creditors for valuable consideration have been satisfied. If, as I think, that is the true meaning of these sections, the result is that the claimants in this case do not stand to-day as creditors; and their right to put in a proof, or their right to insist on the acceptance of that proof by the trustee, must depend upon all the creditors, that is to say, all the separate and joint creditors, whose proofs the trustee is bound to accept, having been first satisfied.

As I read that judgment, the position of a claimant such as Mr. Bennett in the present case is that he is not a creditor whose proof the trustee in bankruptcy is bound to accept, but he has the special right to which TOMLIN, J., referred, namely, the right to a dividend in the bankruptcy after all the claims of the creditors for value have been satisfied.

As to the provisions relating to payment of proved debts, on the one hand, and satisfaction of claims on the other, I was referred, in addition to the Bankruptcy Act, 1914, s. 66, and the Moneylenders Act, 1927, s. 9, to the terms of the Bankruptcy Act, 1914, ss. 36 and 63, and to the Partnership Act, 1890, s. 3. The Bankruptcy Act, 1914, ss. 36 and 63, are as follows:

36 (1) Where a married woman has been adjudged bankrupt, her husband shall not be entitled to claim any dividend as a creditor in respect of any money or other estate lent or entrusted by him to his wife for the purposes of her trade or business until all claims of the other creditors of his wife for valuable consideration in money or money's worth have been satisfied. (2) Where the husband of a married woman has been adjudged bankrupt, any money or other estate of such woman lent or entrusted by her to her husband for the purpose of any trade or business carried on by him or otherwise, shall be treated as assets of his estate, and the wife shall not be entitled to claim any dividend as a creditor in respect of any such money or other estate until all claims of the other creditors of her husband for valuable consideration in money or money's worth have been satisfied. 63 (1) Where one partner of a firm is adjudged bankrupt, a creditor to whom the bankrupt is indebted jointly with the other partners of the firm, or any of them, shall not receive any dividend out of the separate property of the bankrupt until all the separate creditors have received the full amount of their respective debts.

The Partnership Act, 1890, s. 3, says:

In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section, or of any buyer of a goodwill in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an arrangement to pay his creditors less than 20s. in the £, or dying in insolvent circumstances, the lender of the loan shall not be entitled to recover anything in respect of his loan, and the seller of the goodwill shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors of the borrower or buyer for valuable consideration in money or money's worth have been satisfied.

It will be observed that, whereas the claims referred to in the Moneylenders Act, 1927, s. 9, and in the Bankruptcy Act, 1914, ss. 63 and 66, are postponed until the other debts have been paid, those dealt with by the Bankruptcy Act, 1914, ss. 36 and 42, and by the Partnership Act, 1890, s. 3, are postponed until the claims of other creditors have been satisfied. This difference in phraseology may well be of some significance.

CLAUSON, J., expressed his views as to what amounts to the "satisfaction" of a proving creditor in *Re Howes* (3). He there held that, where the assets of a bankrupt are sufficient to satisfy in full the statutory interest on the amounts due to the separate and joint creditors respectively, but are not sufficient to pay, in addition thereto, the amount due to a partner of a debtor, the separate and

joint creditors are, on the proper construction of the Bankruptcy Act, 1914, s. 33 (8), entitled, in priority to the partner of the bankrupt, to be paid the statutory interest in full on their respective debts proved in the bankruptcy. In the course of his judgment CLAUSON, J., said ([1934] Ch. 49, at p. 52) :

If the claim of Sir Charles Cottier's executors [Sir Charles Cottier was the partner of the debtor] for principal is postponed to the claims of the separate and joint creditors for interest, there is enough to pay to both separate and joint creditors their interest at the statutory rate in full. The question is, are the separate and joint creditors entitled to say that the claim of the executors for principal is so postponed ? The executors contend that they are not so postponed and that they are entitled to be paid their principal before either the separate or joint creditors receive anything for interest. That, in my view, is a claim which the executors of Cottier are not entitled to make. If I were to allow that claim, I should be enabling Cottier's executors to procure for the benefit of his estate a diminution of the total amount which would otherwise be payable out of Howes' estate to creditors of Howes to whom Cottier is liable, and that seems to me to be contrary to the principles of bankruptcy. It is suggested that I can find something in the Bankruptcy Act, 1914, s. 33, which, in some way, would assist me in holding in favour of the claim of Cottier's executors. I cannot find it. The principle appears to be well established by the older cases, and the principle seems to be, that just as a debtor cannot compete with his own creditors, so a partner of a debtor cannot compete with any of the debtor's creditors, so long as there are any creditors of that debtor not fully satisfied to whom the claimant is under liability. Here there are joint creditors not fully satisfied, for they are not fully satisfied until they have had not only their 20s., but also the 4 per cent. Accordingly, in my view the right course is that the separate and joint creditors will receive their 4 per cent. in full, upon the amounts of their respective debts for the time being outstanding ; and what remains after that will be available to meet the claim of Sir Charles Cottier's executors.

It is clear that CLAUSON, J., was entertaining and expressing the view that the separate and joint creditors could not be regarded as "satisfied" in respect of their debts until they received statutory interest on the amounts admitted to proof as well as the amounts themselves. A similar view appears to have been taken and applied by LORD ELDON, L.C., in *Ex parte Reeve* (4) where it was held that under a joint commission of bankruptcy the right of the creditors to interest subsequent to the date of the commission, in the case of a surplus, should be preferred to a debt from the separate to the joint estate. LORD ELDON, L.C., after pointing out that the course in bankruptcy had been to stop the proof at the date of the commission inasmuch as the debt to be proved was the debt due before the commission, said (9 Ves. 588, at pp. 590, 591) :

It is true, now a great deal of debt accrued after the bankruptcy is paid under it ; for instance, all interest accrued, though after the date of the commission, if the state of the effects allows it, upon a sort of equitable principle, the interest being considered as a kind of adjunct or shadow of the principal debt, which was due before the bankruptcy . . . If the principle is, that neither the partnership nor the individual debtor shall claim in competition with the creditors, and if the creditors are entitled to any interest, the interest is as much a debt as the capital ; and that principle will prevent either the partnership or the individual debtor ranking with the other creditors, until all their demand is satisfied ; which includes both the principal and interest of their debts.

Although the last passage is somewhat ambiguous, it is reasonably plain, I think, that the interest to which LORD ELDON, L.C., was referring was the interest subsequent, and not previous, to the commission.

Re Howes (3) and *Ex parte Reeve* (4) are not, of course, precisely relevant to present purposes, for both cases involved, and were decided upon, the well established principle as to partners which is stated in the judgments, and that principle is not in issue in the present case. But I have the guidance both of LORD ELDON, L.C., and CLAUSON, J., that a creditor is not "satisfied" until he has been paid not only his debt but subsequent interest as well. It is, moreover, to be observed that the "satisfaction" envisaged by the Bankruptcy Act, 1914, s. 42 (2), is not of proved debts but of "claims" which *prima facie* should receive a somewhat wider interpretation than the word "debts" in a statute in which both expressions are used. Reference was made in argument to *Re Genese* (5) as supporting the proposition that a claimant in the position of the respondent, Bennett, should only be postponed to the extent necessary to pay creditors for value 20s. in the £ on their debts, and not further postponed to the

claims of such creditors for statutory interest. The point, however, was not dealt with by CAVE, J., who decided the case, and I cannot regard it as an authority in the sense contended for.

I have come, accordingly, to the following conclusions as to the position of Mr. Bennett as trustee of Mrs. Baughan's marriage settlement: (i) That his claim against the bankrupt's estate is not a "debt" for the purpose of s. 33 (7) of the Act of 1914; (ii) that, accordingly, it is not one of "the foregoing debts" for the purpose of s. 33 (8); (iii) that s. 42 (2) merely confers the right to receive a dividend after all the claims of the creditors for valuable consideration have been satisfied; and (iv) that such claims cannot be regarded as "satisfied" until they have been paid in full with statutory interest. In my judgment, accordingly, the question asked by the Special Case in the matter of Mrs. Baughan should be answered by stating that the Official Receiver should apply the surplus of the war stock therein mentioned, first, in paying statutory interest on the claims of all the creditors, with the exception of the respondent, Alfred Harvey Bennett, pursuant to the Bankruptcy Act, 1914, s. 33 (8), and, next, in paying dividends to the said Alfred Harvey Bennett as a postponed creditor pursuant to s. 42 (2) of the said Act.

The conclusions at which I have arrived on the second application do not, however, necessarily dispose of the first. As I have said earlier in this judgment, excess interest due on a moneylender's loan is a debt, and a provable debt. As was stated by GREENE, L.J., ([1936] 3 All E.R. 641, at p. 648) in *Re a Debtor* (6), the Moneylenders Act, 1927, s. 9 (1):

... does not destroy the excess interest for the purpose of the bankruptcy law; it leaves it as a real debt provable in bankruptcy and payable in bankruptcy, but, for certain limited and specific purposes, that debt is to be ignored or postponed.

A claim to excess interest, accordingly, differs substantially in quality from a claim which is postponed under the Bankruptcy Act, 1914, s. 42 (2). In my judgment, a claim to excess interest is a debt within s. 33 (7) of the Act and, accordingly, on the construction of this section, no surplus is available for the purposes of sub-s. (8) until this debt, together with the other debts, is paid in full. It is then said that, assuming this to be the effect of s. 33 if taken alone, nevertheless dividend is postponed by the Moneylenders Act, 1927, s. 9, until all the debts proved in the bankruptcy have been paid in full and such debts include statutory interest which, it is said, grows out of them. It is true that interest subsequent to the date of the receiving order is, in the words of LORD ELDON, L.C., in *Ex parte Reeve* (4) "a kind of adjunct or shadow of the principal debt," but the question is whether it is part of "the debts proved in the estate" for the purposes of s. 9. In my judgment, it is not. The phrase "debts proved in the estate" includes the total amounts for which creditors have successfully proved. I am unable to see why its ordinary signification should be varied so as to make it include also something for which a creditor has not proved, and for which he could not prove, namely, statutory interest on his debt. Had Parliament intended the dividend on excess interest to be postponed to statutory interest, it could either have said so in express terms or at least have assimilated it in treatment to such claims as those postponed by s. 42 (2) of the Act of 1914. As the legislature has done neither the one thing nor the other, I attribute to the phrase the same meaning as the words "debts proved in the bankruptcy" bear in the Bankruptcy Act, 1914, s. 33 (8), and in which statutory interest is plainly not included. Nor, I think, do the other provisions of the bankruptcy legislation to which I have referred lead to a contrary conclusion. In my judgment, accordingly, a debt in respect of excess interest takes precedence over statutory interest payable under the Bankruptcy Act, 1914, s. 33 (8), and the dividend payable on such debt is not postponed to payment of statutory interest by reason of the Moneylenders Act, 1927, s. 9 (1).

On the first application, therefore, I will direct the Official Receiver to apply the balance of £692, which is in question, first, in satisfying the claims of the four moneylenders for postponed interest, and, secondly, in or towards satisfying the claims of creditors to statutory interest under the Bankruptcy Act, 1914, s. 33 (8). It would appear that all debts are *pari passu* so far as statutory interest is concerned, and statutory interest will be payable in respect of all the claims including excess interest.

Orders accordingly. Costs of all parties in both applications to come out of the respective estates.

Solicitors: CASE I: *Tarry, Sherlock & King* (for the Official Receiver); *B. L. Harris & Co.* (for moneylender creditors); *Solicitor of Inland Revenue* (for the other creditors).

CASE II: *Tarry, Sherlock & King* (for the Official Receiver and the creditors other than the marriage settlement trustee); *Bird, Eldridge & Jones* (for the marriage settlement trustee).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

WEINGARTEN v. ENGEL

[KING'S BENCH DIVISION (Humphreys, J.), January 29, 30, 1947.]

Husband and Wife—Maintenance of wife—Necessaries—Desertion by husband—No money paid to wife for her support—Payments made by third party to provide necessaries—Recovery by third party from husband of sums advanced.

On some date before Apr., 1945, the defendant left his wife and went to live with another woman. From time to time he made his wife payments with which she supported herself and the children of the marriage, but from Aug. 12, 1945, until Feb., 1946, when the wife instituted divorce proceedings and was granted alimony *pendente lite*, he made her no payments. As a result, between Dec., 1945, and Feb., 1946, the plaintiff, who was the wife's brother, gave her £90 which was needed for her support and was used to provide the ordinary necessities of life for her and the children.

HELD: applying the equitable doctrine enunciated in *Deare v. Soutten* (1869) L.R. 9 Eq. 151; 34 J.P. 244, that the plaintiff was entitled to recover this £90 from the husband.

[FOR A HUSBAND'S LIABILITY FOR MONEY PROVIDED FOR THE MAINTENANCE OF HIS WIFE, see HALSBURY, Hailsham Edn., Vol. 16, p. 700; and FOR CASES, see DIGEST, Vol. 27, pp. 192, 205.]

Cases referred to:

- (1) *Deare v. Soutten* (1869), L.R. 9 Eq. 151; 21 L.T. 523; 34 J.P. 244; 18 W.R. 203; 27 Digest 205, 1773.
- (2) *Jenner v. Morris* (1861), 3 De G.F. & J. 45; 30 L.J. (Ch.) 361; 3 L.T. 871; 25 J.P. 419; 7 Jur. (N.S.) 375; 9 W.R. 391; 27 Digest 205, 1772.
- (3) *Harris v. Lee* (1718), 1 P. Wms. 482; *sub nom. Anon.*, 2 Eq. Cas. Abr. 135; 27 Digest 192, 1593.

ACTION tried by HUMPHREYS, J.

The plaintiff sought to recover from the defendant sums which he had paid to the defendant's wife to enable her to provide herself and her children with necessities after the defendant had left her and had ceased to support her. The facts appear in the headnote and the judgment.

J. Comyn for plaintiff.

J. Shaw for defendant.

HUMPHREYS, J.: The principle which must govern this case is to be found in *Deare v. Soutten* (1). The headnote of that case is as follows:

A person who has advanced money to a married woman deserted by her husband for the purpose of, and which has been actually applied towards, her support, is entitled in equity, though not at law, to recover such sums from the husband.

The judgment of LORD ROMILLY, M.R., is very short and is to this effect:

I am of opinion that this is a proper suit, and that the plaintiff is entitled to a decree. He refers to some cases and observes that an old case is overruled by *Jenner v. Morris* (2), a case to which I have been referred. I will not say he approved, because he was bound by it, but he certainly did not disapprove. Then he said:

The defendant is bound to repay what the plaintiff has advanced, but he is entitled to an inquiry as to the payments if he desires it, which would not be limited to the sums specified in the bill.

In that case no inquiry was asked for and the decree was drawn up for the payment of certain sums of money.

In this case the plaintiff alleges he comes within the terms of that equitable doctrine in these circumstances. The plaintiff is the brother of the defendant's wife. The defendant and the wife were married in 1928, and, they having lived together until the war, soon after the commencement of the war the wife was sent to the country with her three children, the children of the marriage. There she was kept by her husband. She was in different places and eventually arrived at and lived at Northampton. She left Northampton finally to come back to London where her husband had been living all the time, as far as I know. He certainly kept his house in London. She arrived back at a date which is given as about Apr. 30, 1945. She came to her husband's house and found it extremely uncomfortable. The husband did not live with her there; in fact, the husband had committed adultery and was at that time keeping and living with another woman. Whether technically in the language of the Divorce Court he had deserted her, I do not know and I do not mind, but he had for practical purposes deserted his wife, except that he was making her, and had made her up to that time, a perfectly reasonable allowance and he continued for a little time to make an allowance to her. It was not a regular weekly allowance, but sums were paid from time to time and, so far, she was not in want. She required nobody to help her to support herself because she was being supported, and so were the children, by her husband. A B C

The accounts produced in the case start on Apr. 30, 1945. That is quite an immaterial date because the brother is the person to be considered here and not the wife. She is not suing for anything. The brother says: "The moneys I advanced to the wife ought to be repaid to me by the husband." He did not advance any money in April. He only began to advance money in July, and that is the relevant period, from July, 1945, to February, 1946, when he ceased the advances, since the wife then obtained alimony *pendente lite*. In the period I have mentioned the plaintiff advanced £264 to the wife. D

The brother has, therefore, proved that he believed that the wife was in need of support for what the law calls necessities. That means reasonable support for herself and her three children which includes clothing, and so forth, as well as food. The cash which the husband supplied as from Apr. 30 to his wife totals £48 and that is all during the whole of that period from Apr., 1945, to Feb., 1946, that he supplied. E

But here we come upon a curious fact which neither party has really faced, and it is this. The husband, while his wife was living at Northampton, used to visit her and on one occasion he gave her a sum of £200. It was not part of her allowance, or anything of the sort. He gave her a sum of £200 to keep for him because, as he said, it was safer down in Northampton than it would be in London. Of course, everybody knows things were very unsafe in London and any house was likely, at any moment, to be destroyed by enemy action. It was a perfectly reasonable thing to do, and he trusted his wife. Most unfortunately, and very wrongly, because it was entirely without her husband's authority, she spent that money. Apparently she took the view which many women do take: "If my husband is now able to support some other woman as well as me, if he is living with another woman and committing adultery, I can live at a better rate than I should otherwise do"—in other words "I can make him pay for it." The brother, so far as the evidence goes, knew nothing of this £200. F G

From Aug. 12, to some date in Feb., 1946, the husband supplied not one penny towards his wife's keep. During that time she continued to live, and had to live, upon what her husband had given her, and I think it is a reasonable assumption to say—it is all one can do in a case of this sort, for figures are of very doubtful accuracy, as they are all estimates—that that £200 ought to have lasted her, and probably did last her, until nearly the end of the year. But when I come to the end of November, I think then, since for part of August, all September and all October the husband had not supplied a shilling, it is reasonable to say that her statement to her brother became true, that she had no money to support herself, and on Dec. 19 the brother gave her £30. He supplied another £40 in Jan., 1946, and a further £20 in Feb., 1946, making H

£90 altogether during that last period. At that time I think that the wife was justified in saying: "I ought to have an allowance to enable me to live decently and to clothe these three children." The defendant said: "I gave her first of all just what she asked for and then, when she went on asking, I made a calculation and I said to myself that if I let her have about £6 to £8 a week that would be reasonable, and so I went on giving her money when she asked for it rather on that basis."

A Now, on these various figures which have been given, the conclusion at which I have arrived is that the plaintiff has proved to my satisfaction that, as to the last three payments which were made by him to his sister, those not only were, as all the payments were, intended by him for her support, but they were, in fact, needed for her support since for several months the husband had paid not a shilling towards the maintenance of the wife and the children. He has, so far as it is possible to do it, satisfied me that those amounts must have been used for the ordinary necessities of life for her and the children, because they had no other means of support. He, therefore, has brought himself, so far as those three payments are concerned, within the equitable doctrine which I have referred to and which binds me.

I, therefore, give him judgment for £90 with costs.

Judgment for the plaintiff, with costs.

C Solicitors: J. Clifford Watts (for the plaintiff); Beachcroft & Co. (for the defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

HORDERN RICHMOND LTD. v. DUNCAN

[KING'S BENCH DIVISION (Cassels, J.), January 28, 29, 1947.]

E *Limitation of Action—Public authority—Joinder as third party—Limitation Act, 1939 (c. 39), s. 21—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 6 (1) (c).*

F Two lorries, one driven by the plaintiffs' servant and the other by the defendant, came into collision, as a result of which passengers in the defendant's lorry were injured. The defendant, who was driving an Army lorry at the time of the collision, as a servant of a public authority was entitled to protection under s. 21 of the Limitation Act, 1939, which provides that no action shall be brought against any person for any act done in execution of a public duty unless it is commenced before the expiration of one year from the date on which the cause of action accrued. The plaintiffs alleged that the accident was due wholly or in part to the defendant's negligence, and they sought a declaration that, in the event of the persons injured succeeding in an action for negligence against them, they would be entitled to claim an indemnity or contribution from the defendant as a third party, even though more than 12 months had then passed since the cause of action had accrued.

G **Held:** proceedings by a defendant against a third party were independent of and separate from the proceedings by the plaintiff against the defendant, and the Limitation Act, 1939, only started to run in favour of a third party when the defendant had been found to be liable to the plaintiff, and, therefore, the plaintiffs were entitled to the declaration.

I *Merlihan v. A. C. Pope, Ltd. and J. W. Hibbert (Pagnello Third Party) (1), discussed.*

[AS TO PROTECTION OF PUBLIC AUTHORITIES, see HALSBURY, Hailsham Edn., Vol. 26, pp. 288-304, paras. 607-630; and FOR CASES, see DIGEST, Vol. 38, pp. 119-130, Nos. 859-955.]

Case referred to:—

(1) *Merlihan v. A. C. Pope, Ltd., and J. W. Hibbert (Pagnello Third Party)*, [1945] 2 All E.R. 449; [1946] K.B. 166; 173 L.T. 257; 109 J.P. 231; Digest Supp.

Action tried by CASSELS, J.

The plaintiffs claimed a declaration that, in the event of any proceedings for damages being brought against them in respect of a certain accident, they would be entitled to claim indemnity or contribution against the defendant as a joint tortfeasor. The facts appear in the judgment.

Serjeant Sullivan, K.C., and *P. M. O'Connor* for the plaintiffs.
John G. Foster for the defendant.

CASSELS, J. : The questions which arise in this action are of deep concern for every litigant in an action for damages for negligence and all persons entitled to claim the protection of the Limitation Act, 1939.

On the evening of Nov. 2, 1944, the plaintiffs' lorry, driven by their servant, and an Army lorry, driven by the defendant and carrying soldiers, were going in opposite directions along a 25ft. road when they came into collision with each other with the result that four of the soldiers were injured. These proceedings are brought for a declaration that

... in the event of any proceedings for damages being instituted against these plaintiffs their servants or agents in respect of the accident mentioned in the pleadings in this action they shall be entitled to claim indemnity or contribution against the present defendant pursuant to the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, in respect of any damages or costs that may be awarded against them.

The date of the accident was Nov. 2, 1944. Today is Jan 29, 1947. Up till this moment not one of those four injured soldiers in the defendant's lorry has started proceedings against either the plaintiffs or the defendant. The plaintiffs say : "This accident occurred. We are ordinary citizens. The person whose negligence was, we say, either entirely or partly responsible for causing this accident is entitled to call himself a public authority, because he was engaged on public duty at the time and was a public servant, for he was serving in the Army. If an action is brought against us, we want to be in a position to bring in the defendant as a third-party, so that, in the event of our being found to be liable, we can claim under the Law Reform (Married Women and Tortfeasors) Act, 1935, indemnity or contribution in third-party proceedings. What we want is a declaration that we shall be entitled to maintain that claim notwithstanding the fact that the proposed third-party would be able to claim protection under the Limitation Act." That conjures up many interesting positions. It is said that there is a grave injustice on an ordinary citizen, possibly liable in damages for negligence to a plaintiff, if the circumstances show that there is another party who may also be liable in respect of the accident which gives rise to the action if that other party happens to be a public authority entitled to claim the protection of the Limitation Act, because, by delaying the institution of his proceedings for more than twelve months, the plaintiff may put it out of the power of the defendant to bring in the other party and render him liable to make contribution or pay an indemnity.

In *Merlihan v. A. C. Pope, Ltd., and J. W. Hibbert (Pagnello Third Party)* (1), decided by BIRKETT, J., a very similar set of circumstances seems to have arisen. The defendant in that case found himself unable to start third-party proceedings against the third-party within the twelve months, and the third-party pleaded the provisions of the Limitation Act, 1939, as he was entitled to, and his contention prevailed. BIRKETT, J., having in the course of that case found that the third-party equally with the defendant's driver was guilty of negligence contributing to the collision, went on to say ([1945] 2 All E.R., 449, at p. 450) :

The important matter which was relied on by counsel for the third-party is rather a difficult matter of procedure at law. In answer to the claim for contribution made by the defendants, the third-party said he was not liable by reason of s. 21 of the Limitation Act, 1939.

The judge then proceeded to show that the dates were all in favour of that contention. The Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1), to which reference had to be made in that case and to which I make reference now, provides :

Where damage is suffered by any person as a result of a tort (whether a crime or not) :
(a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage.

In giving his construction of that section of the Act, BIRKETT, J., said ([1946] K.B. 166, at p. 170) :

The point is a new one ; it has never been determined, and no real guidance on it exists. On behalf of the third-party it is contended that he is not liable to the plaintiff because of the Limitation Act, 1939, and, that in order to make the words in para. (c) of the Law Reform (Married Women and Tortfeasors) Act, 1935, applicable to this case, the words "who is, or if sued 'in time,' would have been liable" must be substituted. It is clear that Pagnello was not sued in time. His liability arises because of his negligence on Mar. 15, 1943. That was the date on which he became a tortfeasor, and, so far as the plaintiff is concerned, the cause of action, as is not disputed, arose on that date. It was argued for the defendants, several cases being cited which do not call for discussion, that so far as concerns them, as against the third-party, the date of the accident, Mar. 15, 1943, is irrelevant ; and that while that may be the date of the cause of action as between the plaintiff and the third-party, the date of the cause of action as between the defendants and the third-party must be taken to have been June 14, 1945, because that was the first date on which they became liable, by the finding of the court against them, for the damage suffered by the plaintiff. They say, therefore, that the Limitation Act, 1939, has no application. The conclusion to which I have come is that it is not competent for the defendants to claim contribution from the third-party. I so hold on the express ground that the third-party is protected by the Limitation Act, 1939, because the cause of action in fact accrued on Mar. 15, 1943. The Law Reform (Married Women and Tortfeasors) Act, 1935, certainly made a great change in the law and, apparently, this particular difficulty was not foreseen. In my opinion, it would not be a proper interpretation of s. 6, sub-s. 1 (c) to read it as if the material words were "who if sued *in time* would have been liable." There will be judgment for the third-party against the defendants with costs.

It is by reason of that decision by BIRKETT, J., that the plaintiffs in the present matter have sought a declaration that, as they have started these proceedings for a declaration within twelve months of the accident which may give rise to an action later on, they are entitled to say that their rights are still preserved, and that, if an action should be brought against the plaintiffs, they will be entitled to bring their third-party proceedings and to deprive the third-party of any protection which he might otherwise have had under the Limitation Act, 1939.

A plaintiff in a negligence case may bring an action against two defendants. If he does, each defendant is entitled to any defence which may be available. A plaintiff may obtain judgment against both defendants. He may obtain judgment against one defendant only, and the second defendant may obtain judgment against him for his costs. That is one set of proceedings. Another set of proceedings which may be available to a plaintiff who is claiming damages for negligence is an action brought by him against one defendant. That defendant is entitled, by what is known as third-party procedure, on leave being granted to him by the court, to bring in somebody else, not as a second defendant but as a third party, in order that, if he, the defendant, should be found to be liable to the plaintiff, he may pass on some of that liability to the third-party by claiming from the third-party an indemnity or contribution. That position is made possible by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 39 (2), which provides for the third-party procedure. Section 39 (2) provides :

(2) Every person served with any such notice as aforesaid [i.e., notice of being made a third-party] shall thenceforth be deemed a party to the cause or matter with the same rights in respect of his defence against the claim [i.e., the claim of the defendant against him as third-party] as if he had been duly sued in the ordinary way by the defendant.

The words "by the defendant" will be observed. Therefore, one has to bear in mind that third-party proceedings are in the nature of a separate action brought by a defendant against a third party, in which the cause of action is by no means necessarily the same as the cause of action which brings the plaintiff and the defendant before the court. The cause of action which brings a plaintiff and a defendant before the court in such a case as may arise out of this accident is negligence. The cause of action which entitles a defendant to bring a third party before the court is the liability of the third party to make contribution or to pay an indemnity. That cause of action has not arisen until the liability of the defendant has been ascertained.

By s. 39 of the Act of 1925 and the Orders and Rules of the Supreme Court notice of third-party proceedings is given to a third party before liability is established. If a plaintiff brings an action for damages against two defendants, he may get judgment against both, but, if a plaintiff brings an action against a defendant and the defendant brings in a third party, the plaintiff can never get a judgment against the third party. It is only the defendant who can get a judgment against the third party. Nor, in such proceedings, could the defendant succeed and yet leave the plaintiff with judgment against the third party. The proceedings by the defendant against the third party are independent of and separate from the proceedings by the plaintiff against the defendant, except that, when the defendant is made liable to the plaintiff, he then has his right open against the third party to establish if he can (and the onus may well be on him) that he possesses a right to indemnity and contribution from that third party.

My attention has been drawn to several cases in which declarations have been applied for and in some instances granted and in others refused, but I cannot help thinking that the granting of a declaration, which is part of the equity jurisdiction, is very much a matter for the discretion of the court in the circumstances of the case before it. I find it difficult to say that I should have arrived at the same conclusion as BIRKETT, J. arrived at on similar facts. I take the view that the Limitation Act only starts to run in favour of a third party when the defendant in the proceedings has been found to be liable for damages. Whether the judge who tries this case, if it ever should be brought to trial, will subscribe to the decision of BIRKETT, J., or will say that the point does not prevail in favour of the third party, I do not know, but it seems to me that, unless the legislature interferes, this position is bound to be faced in any case arising out of negligence where a plaintiff foregoes to sue one of the parties responsible for more than twelve months when the other party alleged to be responsible is entitled to the protection of the Limitation Act. That gives rise to such an injustice, to such an obstruction to justice being done, that, if this remedy which is sought by the plaintiffs here is calculated to meet the situation, it seems to me that that remedy ought to be granted.

Judgment for plaintiffs with costs.

Solicitors: *White & Co.* (for the plaintiffs); the *Treasury Solicitor* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

PART CARGO *ex* S.S. "SADO MARU"

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), November 26, 27, 28, December 6, 1946.]

Prize Law—Freight—Ship of neutral country carrying contraband—Seizure with hostile intention—Neutral country becoming belligerent enemy.

A ship owned by a Japanese company was despatched before the outbreak of the war between Great Britain and Germany in 1939 with a cargo for Hamburg and Rotterdam. After the outbreak of the war, the ship, while *en route*, was diverted and searched by the Royal Navy, and the cargo was seized in prize. The ship was not detained as she belonged to neutral owners and was innocent. In Dec., 1941, Japan became an enemy. On Nov. 19, 1942, the goods were condemned in prize except that part destined for Rotterdam. The proceeds of sale of the part not condemned were released, but a sum in respect of freight had been retained. On a claim by the Crown for the condemnation of the freight, it was conceded that no distinction need be drawn between the freight in respect of the cargo released and that in respect of the cargo condemned.

HELD: (i) the liability to condemnation did not depend on the original seizure having a hostile character in relation to the property concerned.

(ii) even if liability to condemnation on the subsequent outbreak of war did depend on the intention at the time of seizure, a seizure without hostile intention would be subject to the implied condition that the intention might become hostile if the owner became a belligerent enemy.

[AS TO COMPENSATION IN LIEU OF FREIGHT, see HALSBURY, Hailsham Ed., pp. 220, 221, para. 500; and FOR CASES see DIGEST, Vol. 37, pp. 658-664, Nos. 1165-1250.]

Cases referred to :

- (1) *The Fortuna* (1809), Edw., 56, 2 Eng. Pr. Cas. 17; 165 E.R. 1031; 37 Digest 660, 1196.
- (2) *The Prosper, The Holstein* (1809), Edw. 72; 2 Eng. Pr. Cas. 25; 165 E.R. 1037; 37 Digest 658, 1171.
- (3) *The Juno*, [1916] P. 169; 84 L.J.P. 154; 112 L.T. 471; 37 Digest 657, 1151.
- (4) *The Roumanian* (1914), 1 Br. & Col. Pr. Cas.
- (5) *The Fortuna* (1807), unreported.
- (6) *The Trende Sodskende* (Warrant No. 633), unreported.
- (7) *France Fenwick Tyne & Wear Co., Ltd. v. H. M. Procurator-General*, [1942] A.C. 667; [1942] 2 All E.R. 453; 58 T.L.R. 388; *sub. nom. The Prins Knud S.S., France Fenwick Tyne & Wear Co., Ltd. v. H.M. Procurator-General*, 111 L.J.P.C. 126; 167 L.T. 278; Digest Supp.
- (8) *The Twee Gebroeders* (1800), 3 Ch. Rob. 162; 165 E.R. 422; 37 Digest 594, 309.
- (9) *The Constancia Harlessen* (1810), Edw. 232; 165 E.R. 1093; 37 Digest 656, 1137.

CLAIM by the Crown for the condemnation in prize of the freight on certain consignments of cargo laden on board the Japanese ship, "Sado Maru." The case turns on the question whether, for goods or freight to be condemned in prize, it is necessary that they should have been seized with hostile intention. The facts appear in the judgment.

A. J. Hodgson for the claimant.
J. V. Nesbitt for H.M. Procurator-General.

Our adv. vult.

Dec. 6. LORD MERRIMAN, P. : In this case the Crown seeks condemnation of the freight on ten consignments laden on board the Japanese ship "Sado Maru," amounting to £2,267 3s. 10d. James Charteris Burleigh, the controller of the London branch of the Nippon Yusen Kabusiki Kaisya, the Japanese ship-owners, has entered a claim for this freight on the ground that it would have been recovered and received by the said branch after the goods had been carried to their destination. Strictly speaking, the claim is for compensation in lieu of the freight, which was payable in terms of the bills of lading on delivery at Hamburg or Rotterdam, as the case might be. The claim is based on the fact that this was an ordinary commercial shipment made before the outbreak of the recent war in Europe, and that, although that war had broken out when the ship herself was diverted and searched by the Royal Navy and the goods in question seized in prize, the ship herself was not detained, but was promptly released as belonging to neutral owners and being herself innocent.

The goods were condemned in prize on Nov. 19, 1942, as being contraband with an enemy destination, and therefore not protected by the Declaration of Paris, with the exception of a consignment of fatty acid which was the only parcel destined for Rotterdam and not Hamburg. The proceeds, for all these goods had in fact been sold and were represented in the hands of the marshal by the proceeds, had been released to the claimants who had satisfied the Procurator-General of their title, but the sum of £67 8s. 4d. in respect of the freight thereon was retained by the marshal for whom it might concern. Meanwhile, in Dec., 1941, Japan had become an enemy. It was expressly conceded on behalf of the claimant that no distinction need be drawn between the freight in respect of the cargo released and that in respect of the cargoes condemned. The first question, therefore, is whether the Crown is entitled to condemnation of so much of the proceeds of these goods in the hands of the marshal as represents freight. The second question is whether, in any event, the present claimant, representing the London branch of the Japanese company, has any claim to these monies. It has not been thought necessary to pursue the second question, which, if the Crown is entitled to a decree of condemnation, inevitably becomes academic.

The first question is of general importance. The claimant has made it clear that his only anxiety is to discharge his duty as the controller appointed by the Board of Trade under the Trading with the Enemy Act, 1939, and to assist the court in coming to a just decision, so that under s. 3A (3) (added to the Act by Defence Regulation, S.R. & O., 1940, No. 1289), he may eventually make a proper distribution of the assets of the London branch. The basis on which the Crown rests the claim for condemnation was stated by counsel as follows. He admitted that if Japan had remained neutral, compensation in lieu of freight

would have been payable in respect of these consignments, whether they were condemned or released, upon the principle recognized in the "*Fortuna*" (1), the "*Prosper*" (2), and the "*Juno*" (3), that, it being solely due to the incapacity of the cargo that the ship-owner was prevented from effecting an entire execution of the contract of carriage, while he had done his utmost to carry it to its consummation, it was inequitable that the incapacity of the cargo should operate to the disadvantage of the ship. But he submitted that because Japan subsequently became a belligerent, the freight, being still in this country in the hands of the marshal, thereupon became liable to condemnation as good and lawful prize, as would the ship herself have been if she had not in fact proceeded on her voyage before Japan became a belligerent.

Counsel for the claimants did not dispute that it is well settled prize law that in certain circumstances property in the hands of the marshal, including the right to receive freight or compensation in lieu thereof (which, to avoid circumlocution, I will hereafter refer to simply as freight), is liable to condemnation on the outbreak of hostilities if it belongs to an enemy subject. But he contended that this liability depends upon the original seizure having a hostile character in relation to the particular property. The simplest illustration of a hostile seizure was, he submitted, the prohibition by Order in Council during a period of embargo in anticipation of actual hostilities, such as occurred during the Napoleonic wars, of the restoration by the court to the owners, potentially belligerent, of ships or freight, or of the departure of the ships themselves. In the present case, so he contended, the seizure was directed against the cargo, and there was no hostile intention against the freight due to the admittedly innocent ship-owners, and it was a mere accident that the cargoes or their proceeds had not been condemned and the freight restored to the ship-owners thereout, before Japan became a belligerent. This contention makes it necessary to examine some of the authorities upon which counsel for the Crown relied. I have derived great advantage from a consideration of a treatise on prize droits in the form of "A REPORT TO THE TREASURY ON DROITS OF THE CROWN AND OF ADMIRALTY IN TIME OF WAR," presented to the Treasury during the Crimean War by Mr. H. C. Rothery, who was registrar of the High Court of Admiralty from 1853 to 1878, revised and annotated in 1915 by Mr. E. S. Roscoe, the Admiralty Registrar during the war of 1914-1918. The object of this treatise was to afford guidance to the Treasury in regard to the distribution of the proceeds of droits, but it sets out, incidentally, the grounds of condemnation out of which these droits arose, and this is its value for the present purpose, a value which is enhanced by the fact that it records the grants actually made to captors out of what would now be called the Prize Fund. Moreover, this treatise was referred to with marked approval by SIR SAMUEL EVANS in the "*Roumanian*" (4).

I propose to begin with two cases, the "*Prosper*" (2) and the "*Fortuna*" (5) referred to on p. 86 of Mr. Rothery's treatise. I should say in passing that the reference to the "*Fortuna*" in the foot-note is inaccurate. The report in Edwards (*supra*) obviously refers to a later voyage of this ship. To appreciate the full significance of these two cases for the present purpose, it is necessary to bear in mind the following dates collected from pp. 20 and 21 of the treatise and the report of the "*Prosper*" (2). Both vessels were Danish. Both were seized in 1807 on suspicion of carrying enemy property, and both were restored. The dates of seizure and release in the case of the "*Fortuna*" (5) were July 13 and 27 respectively. In the case of the "*Prosper*" (2) the dates do not appear. In each case, however, the question of the cargoes and freight had not been adjudicated at the time of the release of the ships. On Sept. 2, 1807, an Order in Council was made placing an embargo upon Danish property, and on Sept. 10, as appears from the "*Prosper*" (2), an Order in Council directed the payment of all freight due to Danish subjects into the Admiralty Court. On Nov. 4, war was declared with Denmark, and on Dec. 18 the cargo in the "*Fortuna*" (5) was condemned as lawful prize to the captors on payment of freight, but the freight which, as Mr. Rothery observes, "was in the cargo but which belonged to the Danish owner of the ship," was condemned to the Crown as Danish property captured before hostilities. In the case of the "*Prosper*" (2) the cargo turned out to be Portugese property and was ultimately restored as such. Nevertheless, it was restored subject to the payment of freight to the

Crown as succeeding to the rights of the enemy shippers and notwithstanding that the right to receive freight was a chose in action which the Danish ship-owner was not in a position to enforce. It will be seen, therefore, that in each of these cases, though the ship herself had been restored, in the case of the "*Fortuna*" (5) certainly before either the embargo or the outbreak of hostilities, the freight was treated as still being in the hands of the marshal by virtue of the cargo in each case being still under adjudication, and became vested in the Crown by reason of the outbreak of hostilities, although in one case the cargo was condemned and in the other it was restored.

Another case, the "*Trende Sodskende*" (6), illustrates the same point. In this case the vessel had been decreed to be restored. She had not left this country at the time of the embargo and was accordingly re-seized and ultimately condemned to the Crown as Danish property captured before hostilities. Meanwhile, the adjudication of the cargo had been in suspense, but it was subsequently condemned to the captors as enemy property, but the freight thereon was condemned to the Crown as Danish property captured before hostilities. The record of the grant made to the captors is extremely illuminating. They got nothing in respect of the ship, because she had been restored and afterwards re-seized to His Majesty's use, but "as the freight was not dependent on the ship, but was a thing reserved in judgment on the goods," ultimately condemned to the captors, the captors seemed to be entitled, so the King's Proctor reported, to a grant of one-fifth of the freight. It is only necessary to add that the "*Prosper*" (2) was referred to with approval in *Francis Fenwick, Tyne & Wear Co., Ltd. v. H. M. Procurator-General* (7) ([1942] A.C. 667, at p. 684). It is worthy of note in passing that the preface to 6 Christopher Robinson sets out a list of cases under appeal to the Privy Council where the vessels were condemned as enemy property on the breaking out of the Prussian hostilities. In one case at least, the "*Twee Gebroeders*" (8), the Crown was appealing against a decree of restoration. The "*Constantia Harlessen*" (9), like the "*Trende Sodskende*" (6), was a case in which the ship, before she was divested of her neutral character, had been captured and brought to Yarmouth, and freight was decreed to the Danish master by a Prize Court. But before the departure of the vessel the Danish hostilities broke out, and the ship was again seized and condemned to the Crown. Earlier in the voyage the cargo owners had advanced money on bottomry for certain necessary repairs to enable the voyage to proceed. In the circumstances this proved to be an advance against freight and not the subject of average. Accordingly, LORD STOWELL held that, although bottomry bonds, generally speaking, are disallowed as the subject of a claim in prize, nevertheless, the owners of the ship and cargo being entitled to set off against each other all deductions arising out of the immediate transaction, the Crown was obliged to accept the condemnation of the freight subject to the right of the cargo-owners to deduct the amount of the bottomry advances. In that case, although it is not expressly so stated, there appears to be no question of the cargo being liable to condemnation, seeing that the cargo owners were re-imbursed their advances, yet the Crown was entitled to condemnation of the freight subject to the re-imburement of advances, though the freight had originally been decreed to the Danish master while he was still a neutral.

The result, in my opinion, is that there is no foundation for imposing a condition that the original seizure of the freight itself, or of the goods in which the freight lies, must have been of a hostile character, but, even if liability to condemnation on the subsequent outbreak of hostilities did depend on the intention at the time of seizure, I should still be of opinion that the seizure, although devoid of hostile intention in the first instance towards the particular subject-matter as distinct from the rest of the property seized, would be subject to the implied condition that the intention might become hostile if the owner of the property became a belligerent enemy while the property itself remained in the custody of the Marshal. I hold that the sums in question are condemnable to the Crown as good and lawful prize.

Decree of condemnation.

Solicitors: *Simmons & Simmons* (for the claimant); the *Treasury Solicitor* (for H.M. Procurator-General).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

ROMAN v. ROMAN

[COURT OF APPEAL (Morton and Bucknill, L.J.J.), February 10, 27, 1947.]

Divorce—Costs—Security for wife's costs—Appeal by wife against decree nisi granted to husband.

A wife, who was appealing against a decree *nisi* of divorce granted to her husband, applied for security for the costs of her appeal. She was in receipt of a weekly sum of £14 4s. gross from her husband under an order of the court, and she also owned some jewellery,

HELD : there was no good reason for granting the application.

Per curiam : the question whether the Court of Appeal had jurisdiction to order a respondent husband to provide security for the costs of an appellant wife, and, if so, in what circumstances such jurisdiction should be exercised, was one of great importance, and, when it arose, it should, perhaps, be considered by a full court. If the jurisdiction existed, it should be exercised sparingly and not in a case where an appellant wife had sufficient estate of her own to pay her own costs.

[AS TO SECURITY FOR WIFE'S COSTS OF APPEAL, see HALSBURY, Hailsham Edn., Vol. 10, pp. 780, 781, para. 1234 ; and FOR CASES, see DIGEST, Vol. 27, pp. 206, 207, Nos. 1787-1797.]

Cases referred to :

- (1) *Vidal v. Vidal and Wilson* (1921), *The Times*, Oct. 13, 1921.
- (2) *Shufflebotham v. Shufflebotham* (1923), 128 L.T. 642 ; 27 Digest 488, 5197.
- (3) *King v. King*, [1943] 2 All E.R. 253 ; [1943] P. 91 ; 112 L.J.P. 89 ; 169 L.T. 251 ; Digest Supp.
- (4) *Johnstone v. Johnstone*, [1929] P. 165 ; 98 L.J.P. 76 ; 140 L.T. 451 ; Digest Supp.
- (5) *Stevenson (otherwise Bowerbank) v. Stevenson*, [1944] P. 52 ; 113 L.J.P. 36 ; 170 L.T. 213 ; *sub nom.* S. (otherwise B.) v. S., [1944] 1 All E.R. 439 ; Digest Supp.
- (6) *Ottaway v. Hamilton* (1878), 3 C.P.D. 393 ; 47 L.J.Q.B. 725 ; 38 L.T. 925 ; 42 J.P. 660 ; 27 Digest 207, 1796.
- (7) *Sanders v. Sanders*, [1911] P. 101 ; 80 L.J.P. 44 ; 104 L.T. 231 ; 27 Digest 443, 4554.
- (8) *Wilkinson v. Wilkinson* (1893), 69 L.T. 459 ; 27 Digest 502, 5375.
- (9) *Williams v. Williams*, [1929] P. 114 ; 98 L.J.P. 40 ; 140 L.T. 383 ; Digest Supp.
- (10) *Robertson v. Robertson and Favagrossa* (1881), 6 P.D. 119 ; 51 L.J.P. 5 ; 45 L.T. 237 ; 27 Digest 472, 4960.
- (11) *Kemp-Welch v. Kemp-Welch and Crymes*, [1910] P. 233 ; 79 L.J.P. 92 ; 102 L.T. 787 ; 27 Digest 442, 4543.

MOTION by wife for security for the costs of her appeal from a judgment of BARNARD, J., who granted a decree *nisi* to her husband on the ground of her cruelty.

A. R. Ellis for the wife.

R. T. Paget for the husband.

Cur. adv. vult.

Feb. 27. MORTON, L.J., read the following judgment of the court. This was an application by an appellant wife for security for her costs in presenting an appeal against the judgment of BARNARD, J., whereby he found her guilty of cruelty and, exercising his discretion in the husband's favour in respect of his own adultery, granted him a decree *nisi*. We have already dismissed the application, but stated at that time that we would give the reasons for our decision later.

The careful researches of counsel for the wife and counsel for the husband have failed to reveal any case in the history of this court in which a party, successful in the court below, has been ordered by this court to give security for the costs of an appeal by the unsuccessful party. This court has, however, considered three times the question whether it could and should order an appellant husband to give security for the costs in this court of a respondent wife. In *Vidal v. Vidal* (1) the petitioner was the husband alleging adultery against the wife and his appeal was against the decision on that issue in his wife's favour. The Court of Appeal ordered the husband to pay £50 into court as security for the wife's costs, and a like sum in respect of the co-respondent. In *Shufflebotham v. Shufflebotham* (2) the wife had been the petitioner and had obtained a decree for dissolution of the marriage, with costs, after a trial which

had lasted four days. She had obtained in the court below an order for security for costs for £150, and she asked this court (i) for security for the balance of costs in the court below not covered by the £150 security, and (ii) for security for costs of the appeal. The court refused to make an order, but *Vidal v. Vidal* (1) does not appear to have been cited. In *King v. King* (3) the husband had petitioned for divorce on the ground of his wife's adultery, and HENN COLLINS, J., dismissed the petition with costs on the ground that the wife had not committed adultery with the co-respondent. The husband appealed to the Court of Appeal. In the court below security for the wife's costs had been ordered, and she now moved for an order for security for her costs of the appeal. In an affidavit sworn by her she stated that she was without means to finance her costs in the appeal. The court held that it had jurisdiction to make such an order, and made an order accordingly, the amount of the security to be fixed by the registrar. In giving the judgment of the court, SCOTT, L.J., said ([1943] 2 All E.R. 253, at p. 254) :

The practice, however, both before and after the [Matrimonial Causes] Acts of 1857 and 1873, has always been only to give the wife security in cases where she has not sufficient estate to pay her own costs. This practice was recently recognised as still right and proper by the Court of Appeal in *Johnstone v. Johnstone* (4) . . .

Later in the judgment SCOTT, L.J., said (*ibid.*, at p. 255) :

We expressly limit our decision to cases like the present because, where the judge, exercising divorce jurisdiction, makes a decree of dissolution on the ground of the wife's adultery against the wife, the doctrine of a common law agency of necessity would seem to be excluded. On the other hand, if a decree which terminates the married status excludes the rule, a solicitor might hesitate to undertake the conduct of an impecunious wife's case if he had only the common law principle of agency upon which to rely to get his costs and were driven to sue the husband ; and it may be that, for the sake of public policy in relation to the protection of the married status, the rule of ordering security should be regarded as, for that very reason, equally enforceable in the case of a wife seeking to appeal from an adverse decision against her. That question we keep open.

The question thus left open, whether this court has jurisdiction to order a respondent husband to provide security for the costs of an appellant wife, and, if so, in what circumstances such jurisdiction should be exercised, is one of great importance, and it may be that if and when it arises, it should be considered by a full Court of Appeal. It is not, however, necessary for us to decide this question in the present case. We think that the jurisdiction, if it exists, is one which should be exercised sparingly and we feel no doubt that it should not be exercised in a case where an appellant wife has sufficient estate of her own to pay her own costs.

In the present case it appeared to us, from the evidence filed, that the wife, who is receiving a weekly sum of £14 4s. gross from her husband under an order of the court, could provide for her costs of an appeal by selling or possibly by pledging, certain jewellery owned by her. Thus there appears to be no good reason for granting the wife's application, which is dismissed with costs.

Application dismissed with costs.

Solicitors : *Hardman, Phillips & Mann* (for the wife) ; *Herbert Oppenheimer, Nathan & Vandyk* (for the husband.)

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

SHARPLIN v. W. B. BAWN & CO., LTD.

[COURT OF APPEAL (Scott, Morton and Somervell, L.JJ.), January 27, 28, 29, 30, February 25, 1947.]

Workmen's Compensation—Compensation—Amount—Partial incapacity—Difference between current and pre-accident earnings—Changes in economic position of labour market—Workmen's Compensation Act, 1925 (c. 84), s. 9 (3) (i).

On a true construction of s. 9 (3) (i) of the Workmen's Compensation Act, 1925, in calculating the weekly payment in the case of partial incapacity, if the workman is *bona fide* earning what he reasonably can earn, it is not open to the employer to diminish the "difference" between this figure and his pre-accident earnings—actual or as adjusted under the Acts—by showing that the whole or part of the difference is due to changes in the "economic position of the labour market" between the two dates. Conversely, when the workman, though on a less well paid type of work as a result of his incapacity, gets more as a result of such changes, the employer gets the benefit of this excess.

Blakemore v. Delta Mill (1919), Ltd. (6) applied.

[AS TO AMOUNT OF COMPENSATION IN CASE OF PARTIAL INCAPACITY, see HALSBURY, Hailsham Edn., Vol. 34, pp. 914-917, paras. 1258-1260; and FOR CASES, see DIGEST, Vol. 34, pp. 414-418, Nos. 3364-3392.]

Cases referred to :

- (1) *Ball v. Hunt (William) & Sons, Ltd.*, [1912] A.C. 496; 81 L.J.K.B. 782; 106 L.T. 911; 5 B.W.C.C. 459; 34 Digest 395, 3228.
- (2) *Jones v. Amalgamated Collieries, Ltd.*, [1944] 1 All E.R. 1; [1944] A.C. 14; 113 L.J.K.B. 49; 170 L.T. 78; 36 B.W.C.C. 195; Digest Supp.; *affg.*, [1942] 2 All E.R. 600; [1943] K.B. 145.
- (3) *Bevan v. Energlyn Colliery Co.*, [1912] 1 K.B. 63; 81 L.J.K.B. 172; 105 L.T. 654; 5 B.W.C.C. 169; 34 Digest 414, 3366.
- (4) *Cardiff Corpn. v. Hall*, [1911] 1 K.B. 1009; 80 L.J.K.B. 644; 104 L.T. 467; 4 B.W.C.C. 159; 34 Digest 402, 3284.
- (5) *Bevan v. Nixon's Navigation Co., Ltd.*, [1929] A.C. 44; 139 L.T. 647; 21 B.W.C.C. 237; Digest Supp.
- (6) *Delta Mill (1919), Ltd. v. Blakemore (1935)*, 104 L.J.K.B. 459; *sub nom. Blakemore v. Delta Mill (1919), Ltd. (1935)*, 28 B.W.C.C. 193; Digest Supp.
- (7) *Lyon v. Taylor Bros. (1928)*, 21 B.W.C.C. 415; Digest Supp.
- (8) *Dykes v. Baird*, 1929 S.C. (Ct. of Sess.) 555; 22 B.W.C.C. 792; Digest Supp.
- (9) *White v. London & North Eastern Ry. Co.*, [1931] A.C. 52; 99 L.J.K.B. 633; 144 L.T. 1; 23 B.W.C.C. 330; Digest Supp.
- (10) *Matthews v. Harland & Wolff, Ltd. (1932)*, 102 L.J.K.B. 170; 25 B.W.C.C. 533; Digest Supp.
- (11) *Hunnisset v. Southend Corpn. (1940)*, 33 B.W.C.C. 50; Digest Supp.
- (12) *Bromley v. Staveley Coal & Iron Co., Ltd., Drew v. Staveley Coal & Iron Co., Ltd. (1923)*, 129 L.T. 620; 16 B.W.C.C. 77; 34 Digest 396, 3238.

APPEAL by the employers from an award of JUDGE ALCHIN at Bow County Court.

At the date of the award the workman, who was then partially incapacitated, was earning at the same rate as he was before the accident, but his actual earnings were less than his pre-accident earnings, the reduction being wholly due to economic causes, *viz.*, the reduction of working hours consequent on the winding-up of war contracts. The county court judge awarded the workman 50 per cent. of the difference between his current and his pre-accident earnings.

Beney, K.C., and *E. M. Jukes* for the employer.

Paull, K.C., *Felix C. Denny* and *R. Marven Everett* for the workman.

Cur. adv. vult.

Feb. 25. SOMERVELL, L.J., read the following judgment of the court. The argument in this case turns on the construction of s. 9 of the Workmen's Compensation Act, 1925, and I will read the relevant parts of s. 9 (1) and (3). The court is not concerned with total incapacity which is dealt with in s. 9 (2). Section 9 (1) provides:

The compensation under this Act where total or partial incapacity for work results from the injury shall be a weekly payment during the incapacity of an amount calculated in accordance with the rules hereinafter contained . . .

By s. 9 (3) :

The rules for calculating the weekly payment in the case of partial incapacity shall be :
(i) If the maximum weekly payment would, had the incapacity been total incapacity, have amounted to 25s. a week or upwards, the weekly payment in case of partial incapacity shall be one-half the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident . . .

A If the workman does not show that "partial incapacity for work results from the injury" under s. 9 (1), then he is entitled to no compensation. If he establishes this, then s. 9 (3) has to be applied.

The findings of the county court judge sitting as arbitrator are as follows :

B (1) that as a result of his accident on Feb. 16, 1944, the workman was totally incapacitated for work of any kind until Sept. 25, 1944 ; (2) that since that date he has been partially incapacitated for work requiring the use of his right hand by reason of a substantial weakening of grip in that hand ; (3) that he is at present earning at least as much as he would have done if the accident had never happened—it was suggested that he had been prevented by his accident from doing certain Sunday work which would have brought him some pay at overtime rates, but I accept the evidence to the contrary given on behalf of the employers ; (4) that his actual earnings are, in fact, less than his pre-accident earnings ; but (5) that, since Nov., 1945, such reduction was and is wholly due to economic causes, namely, the reduction of working hours consequent on the winding-up of war contracts.

C On these findings he awarded the workman 50 per cent. of the difference between his present and his pre-accident earnings and the employers appeal. As there was some dispute about the meaning of finding (3) it is relevant to look at the evidence, from which it is clear that, since the workman had been back at work, he had been employed on lighter work and, according to his own evidence and that of the doctors, the loss of his finger had impaired his grip. He said that he could not do the full heavy work which he was previously doing.

D Counsel for the employer submits, first, that on the judge's findings there was no incapacity for work within s. 9 (1). He accepted LORD LOREBURN's definition of incapacity for work as set out in *Ball v. William Hunt, Ltd.* (1) ([1912] A.C. 496, at p. 499) :

E I think there is incapacity for work when a man has a physical defect which makes his labour unsaleable in any market reasonably accessible to him, and there is partial incapacity for work when such a defect makes his labour saleable for less than it would otherwise fetch.

As the judge awarded the workman half the difference between his pre-accident earnings and the wages he was getting, it is, we think, clear that he found incapacity for work as defined by LORD LOREBURN. Finding (3) simply means
F that he is getting at present from his old employers as much as he would have got from them if he had not been injured. His wage-earning capacity has, however, been diminished and his labour is "saleable" in the market for less than it would otherwise fetch.

The issue on the second and main point is how a reduction in earnings due to economic causes has to be dealt with in applying s. 9 (3). Counsel for the employers submits that on principle, construing the Act as a whole, and on the most recent House of Lords' authority, *Jones v. Amalgamated Collieries, Ltd.* (2), one must imply after the word "difference" the words "resulting from the injury" or words with that sense. If this is right, on the findings here the workman would be entitled to nothing. Alternatively, he submits that the actual earnings must be disregarded and the court must consider what the workman is able to earn, disregarding any diminution in the amount of what
H he is able to earn due to changes in general working or economic conditions since the accident.

The general idea behind each of these two submissions is clearly that the principle of s. 9 (3) of the Act is to give compensation in respect of loss of earnings or earning capacity due to the accident, no more and no less. If this had been the intention, it would, we think, have been comparatively simple to put it into words. It is also, we think, worth noting at the outset that this principle can have no operation where the change in economic conditions results in a general increase of earnings. A workman before his accident is earning £5

a week. After, owing to partial incapacity, he earns £4. Wages rise and he is able to earn £5, but, if uninjured, he would now be able to earn £6. Here is a loss of earning capacity due to the accident, but it is admitted that under the formula in s. 9 (3), though construed as counsel for the employers contends, he can get nothing. It may be the legislature was aiming at simplicity rather than logic.

Counsel for the workman submitted that the county court judge was right. He based part of his argument on the history of the legislation and part on other sections in the present code. Each of these gives some support to his argument. The earlier authorities show that the causes which we have to consider today fell to be considered, not under the words "is able to earn" in para. (2) of sched. I to the Act of 1897 or "is earning or is able to earn" in para. (3) of sched. I to the Act of 1906, but under the discretion entrusted to the judge by both Acts in determining the amount of the difference between that sum and the proper pre-accident figure: see *Bevan v. Energlyn Collieries* (3). That discretion was removed by s. 4 of the Act of 1923 and its place was taken by the fixed proportion of 50 per cent. The legislature removed the words which enabled the extraneous causes in question affecting compensation to be dealt with on the lines for which counsel for the employers contends.

Counsel for the workman also relied on s. 11 (3) of the Act of 1925, which is now extended and replaced by s. 6 of the Act of 1943. These sections contain express provisions enabling the arbitrator to take economic changes into account in so far as these changes consist of a rise or fall in rates of remuneration and provide for a consequential adjustment of the pre-accident earnings. A concrete illustration will explain. Before the accident the workman is earning £6. At the time when compensation is being assessed the £6 figure has fallen to £4 owing to a 33½ per cent. drop in rates of remuneration. The partially incapacitated workman is earning £3. Applying these sections the pre-accident figure is reduced to £4 and the workman's compensation is 50 per cent. of £1. If counsel for the employers is right on the construction of s. 9 (3), this result, where rates were reduced, was already attained without the legislative introduction of these express provisions. The introduction of these provisions seems to us to point to the conclusion that s. 9 (3) is not on its true construction concerned with these economic changes, at any rate, in the application of it to actual post-accident earnings. When the legislature intended that they should come into the assessment of compensation, it used express words and made their application operate to increase or reduce compensation according to whether they had caused an increase or reduction of one element in earnings, namely, rates of remuneration. We only refer to these sections as aids in interpretation as they do not, of course, apply in this case since the reduction was not due to a variation in rates of remuneration.

Turning to the authorities, we will deal first with *Cardiff Corpn. v. Hall* (4), a decision of this court which was approved by the House of Lords in *Bevan v. Nixons Navigation Co., Ltd.* (5). Both cases dealt with a workman who at the material date though partially incapacitated was fit for certain work, but could not obtain employment owing to the then conditions of the labour market. He was not, therefore, earning anything. VISCOUNT DUNEDIN in *Bevan's* case (5) stated the question of principle in these words ([1929] A.C. 44, at p. 49):

The whole controversy turned on the words "is earning or is able to earn." Does "is able to earn" mean is in such a physical condition that he is able to earn and that alone, or does it also include the proviso of employment if the workman fairly attempts to get it?

It was held that the workman was able to earn the sum which he would have received if he could have got employment of the kind for which he was fit. VISCOUNT DUNEDIN had some doubt about the correctness of the decision in the *Cardiff Corpn.* case (4), which, though decided under a different statute, was regarded as applicable to the words in s. 4 of the Act of 1923 now embodied in s. 9 (3) of the Act of 1925. It has, however, not only stood unchallenged for many years, but in VISCOUNT DUNEDIN's view later legislation had been based on its correctness.

It was suggested in argument before us that, in applying the criterion of what the unemployed man was able to earn at the material date, as explained in *Bevan's* case (5), it was not sufficient to consider the wages ruling at the time,

but it was open to the employer, or, apparently, the workman, to show that those wages had been reduced or increased by economic factors since the date of the accident. This contention was based on the following sentence from VISCOUNT DUNEDIN's opinion. Referring to s. 16 of the Act of 1923, the later legislation on which he relied, VISCOUNT DUNEDIN said ([1929] A.C. 44, at p. 53):

It seems to me necessarily to exclude the idea that "able to earn" applies to any circumstances not personal to the man himself.

- A It is not necessary in this appeal to come to a conclusion on this point. It did not arise in *Bevan's case* (5) and we incline to think that VISCOUNT DUNEDIN's sentence must be regarded as confined to the facts with which he was dealing, and not as a ruling on the above suggestion. This is we think borne out by words which LORD BLANESBURGH uses (*ibid.*, at p. 66): "... actual fact, if he is earning or, if he is not earning, estimate of what he is able to earn." We regard *Bevan's case* (5) as a decision solely on the construction of the words "is able to earn," and, therefore, not an authority on the "is earning" problem with which we are dealing. This view of *Bevan's case* (5) is consistent with, and, we think, confirmed by, the decision in *Blakemore v. Delta Mill Co., Ltd.* (6), to which we refer later.

- Before referring to that case it is necessary to refer to two previous decisions, one of this court, *Lyon v. Taylor Bros.* (7), and one of the Court of Session, *Dykes v. Baird (William) & Co., Ltd.* (8). In *Lyon's case* (7) the partially incapacitated workman was working at the same rates as before the accident. Owing to slackness of trade and not to his incapacity he earned 37s. 8d. instead of 50s. which he was earning before the accident. This court held that he was not entitled to any compensation. SCRUTTON, L.J., with whom the other members of the court agreed, construed the words "earns or is able to earn" as meaning "earns, or is able to earn, whichever is the greater." Applying the principle of *Bevan's case* (5), the slackness of trade was not personal to the workman and but for that he would have been able to earn 50s. *Dykes' case* (8) was decided under the Act of 1906, but the decision is applicable to the construction of the words with which we are concerned. But for economic causes, *i.e.*, slackness of trade, the man would have been earning £1 15s. 1d., but he was, in fact, earning £1 10s. 3d. The Court of Session held that under the words "is earning or is able to earn" the proper figure was £1 10s. 3d. In other words, the English Court of Appeal had decided that you add on to what a man is earning what he would be able to earn if trade was not slack. The Court of Session decided that you do not. In *White v. London & North Eastern Ry. Co.* (9) LORD ATKIN doubted the correctness of the decision in *Lyon's case* (7). LORD WARRINGTON expressly approved the decision in *Dykes' case* (8), though he thought *Lyons' case* (7) could be distinguished. This court, in *Matthews v. Harland & Wolff, Ltd.* (10) held that *Lyon's case* (7) must be regarded as overruled by *White's case* (9) and followed *Dykes' case* (8). *Matthews v. Harland & Wolff, Ltd.* (10) was approved by the House of Lords in *Blakemore v. Delta Mill Co., Ltd.* (6).

- The principle there laid down by the House of Lords, in our view, concludes this appeal in favour of the workman. The argument of counsel for the employers involves the conclusion that the principles laid down in *Blakemore's case* (6), which we regard as binding on this court, ought, in the light of *Jones' case* (2), to be regarded as *dicta* not necessary for the decision. We will deal with this argument when we come to *Jones' case* (2). In the Court of Appeal in *Blakemore's case* (6) the Master of the Rolls and possibly SLESSER, L.J., decided the case on its special facts, but the House of Lords, in our view, based its decision on clear principles, deliberately laid down, which, therefore, are binding on this court. We will try to summarise them. The words "is earning or is able to earn" are strictly alternative. The words "is earning" are to be applied when the workman is earning as much as he reasonably can, or, as it is sometimes put, is "bona fide earning" If he is doing this, then the first alternative applies, and the fact that this amount is affected by general economic conditions such as slackness of trade is irrelevant for the purpose of applying s. 9 (3). In short, "is earning" is a statement of actual fact and means what it says, unless the workman's will to earn is in fault. LORD THANKERTON pointed out that, if what we may call the thesis of *Lyon's case* (7) was right, the words "is earning" were unnecessary. The workman's actual earnings would be

merely an item of evidence in deciding what he is able to earn, and the phraseology of the Act of 1897 in which the words were "is able to earn" need not have been altered. LORD THANKERTON says (28 B.W.C.C. 193, at p. 208):

In my opinion the Act provides a simple method though it may not be a logical one, as the actual earnings of the workman are presumably conditioned by the existing economic position of the labour market an element which falls to be excluded in assessing the amount which he is able to earn: *Bevan v. Nixon's Navigation Co., Ltd.* (5).

LORD RUSSELL concurred in LORD THANKERTON's opinion and LORD BLANESBURGH based his opinion on similar reasoning. In *Hunnissett v. Southend Corpn.* (11) this court applied *Blakemore's* case (6) to facts which are, as near as may be, indistinguishable from those of the present case. A plumber was injured and when he resumed work he was incapable of climbing ladders. He, in fact, earned as much as if he had been able to climb ladders, his actual earnings however being less than his pre-accident earnings for reasons unconnected with his injury. He was held entitled to compensation based on this difference. That decision is binding on this court unless overruled expressly—and this is not suggested—or by necessary implication.

Jones v. Amalgamated Collieries, Ltd. (2), on which the employers rely, was dealing with a different problem. A partially disabled workman, while earning £3 15s. 4d. a week, was conscripted and his pay and allowances came to £2 0s. 9d. a week. He claimed that compensation should be assessed on the basis of this latter figure as his actual earnings. In this court MACKINNON, L.J., and GODDARD, L.J., held that the pay and allowances were not earnings within the section, and the question, therefore, was what was he able to earn. He was able to earn £3 15s. 4d. because he had been earning it until the operation of the National Services (Armed Forces) Act, 1939, debarred him from continuing to do so. DU PARCQ, L.J., while recognising that a reduction of wages through a general economic depression did not prevent the actual earnings being still the proper testing figure, held, in effect, that the pay and allowances being wholly unrelated to his capacity or incapacity for work were not what he was "earning" within the meaning of the section. The House of Lords also declined to take the figure of pay and allowances as the figure of what the workman was earning within the meaning of the section, but this decision was not on the basis that the pay and allowances were not earnings. LORD THANKERTON had no doubt that they were earnings within the meaning of s. 9 (3). He said, however ([1944] 1 All E.R. 1, at p. 4):

I am unable to distinguish this case from for instance the case of the workman, sustaining injury from two successive accidents, the first of which leaves him subject to partial incapacity for work, and the second of which increases the partial incapacity. The wage which he may be in fact earning after the second accident would be accepted as the amount of his earnings, but there would necessarily remain an inquiry with a view to allocating the parts of the total reduction which resulted respectively from the injury caused in each accident, so as to ascertain the compensation due by the particular employer against whom the claim was made.

LORD THANKERTON goes on to say that the same principle would apply if the second injury was not an industrial accident and was entirely unconnected with the first injury. He was not, of course, laying down an exhaustive statement of the law of successive accidents in relation, for example, to industrial disease which have given rise to difficult problems. The passage we have quoted is, however, of importance as showing the basis of the *ratio decidendi* in *Jones' case* (2). VISCOUNT SIMON and LORD MACMILLAN also referred to this analogy. LORD RUSSELL based his opinion on very general grounds and among them counsel for the employers particularly relied on certain statements which might be read as expressing a general principle, and so read lend support to his argument, but, if taken in their generality, cannot, in our respectful opinion, be reconciled with *Blakemore's* case (6). That case was cited and is referred to in LORD THANKERTON's opinion, and both he and LORD RUSSELL were parties to the *Blakemore* decision (6). The expressions of opinion in *Jones' case* (2) to which counsel for the employers has called attention cannot, in our view, be read as intended to overrule or throw doubt on the *ratio decidendi* in *Blakemore's* case (6).

The conclusion we come to on the construction of the section in principle and on authority is as follows. If the workman is *bona fide* earning what he

reasonably can earn, it is not open to the employer to diminish the "difference" between this figure and his pre-accident earnings—actual or as adjusted under the Acts—by showing that the whole or part of the reduction is due to changes in the "economic position of the labour market" between the two dates. Conversely, when the workman, though on a less well paid type of work as a result of his incapacity, gets more as a result of such changes, the employer gets the benefit of this excess: see SCRUTTON, L.J., in *Bromley v. Staveley*

- A *Coal & Iron Co., Ltd.* (12) (16 B.W.C.C. 77, at p. 86). Such changes are constantly taking place, and, if the legislature had intended the definite provisions of the section about actual earnings to be modified by economic fluctuations, express words would and could easily have been found to make that intention clear. There may, however, be other causes unconnected with the injury which require, as LORD THANKERTON suggested, an allocation of the total reduction or, as LORD RUSSELL suggested, a consideration of what the workman is able to earn. A second accident or injury is one such cause. Conscription, which, of course, affected a very large number of people, is another. It is not necessary in order to decide the present cases to attempt a formula which would cover all such possible causes.

- The result in the present case is clearly anomalous in that the workman is receiving the same wages as he would have received if uninjured. There are other cases in which part only of the difference is due to his injury and part to other causes. In all such cases the employer is paying compensation for a loss which is in whole or in part not truly attributable to the injury, compensation for which is clearly the main purpose of the Act. As has been pointed out, the anomaly operates in the opposite sense when an employer is by an economic upward change relieved of the obligation to compensate in respect of a loss of earning capacity caused by the injury. It may be that Parliament felt that an examination into these economic changes would complicate the procedure, though so far as changes in rates are concerned some examination has been necessary since 1925, when s. 11 (3) was first enacted. It is also worth noting that in some cases no great difficulty has been found in arriving at the proportion of the difference which could reasonably be attributed to the injury. It seems clear that in 1923 and 1925 Parliament could not have contemplated the great drop in hours worked which resulted from the high overtime worked in the recent war. All these problems will in future be dealt with under the new legislation, but it seemed worth while to add these observations on the working of the old statutory system with which we have had to deal.

- In this appeal, therefore, we agree with the county court judge. Notwithstanding finding (5), the compensation to which the workman is entitled is 50 per cent. of the difference between his actual earnings and his pre-accident earnings and the appeal must, therefore, be dismissed with costs.

F *Appeal dismissed with costs.*

Solicitors: *Carpenters* (for the employers); *W. H. Thompson* (for the workman).

[Reported by C. ST.J. NICHOLSON, Esq., Barrister-at-Law.]

G PEACH v. LOWE.

[COURT OF APPEAL (Scott, Tucker and Cohen, L.JJ.), February 21, 1947.]

- Landlord and Tenant—Rent restriction—Recovery of possession—Premises not in reasonable state of repair—Certificate of sanitary authority—Whether ipso facto bar to landlord's right of possession—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 12; sched. I (b).*
- H *Landlord and Tenant—Rent restriction—Rent—Premises not in reasonable state of repair—Certificate of sanitary authority—Whether obligation to pay suspended in toto—Rent Restrictions (Notices of Increase) Act, 1923 (c. 13), s. 3 (3).*

A certificate issued by a sanitary authority under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 12, that a dwelling house to which the principal Acts apply is not in a reasonable state of repair is not, of itself, *ipso facto*, a bar to the landlord's right of possession. Under

s. 3 of, and sched. I (b) to, the Act the court must consider whether it is reasonable to make an order for possession. The contractual obligation to pay rent is not suspended *in toto* by reason of the failure of the landlord to comply with such a certificate, for s. 3 (3) of the Rent Restrictions (Notices of Increase) Act, 1923, only suspends the right to recover, and consequential remedies for non-payment of, permitted increases in the rent.

[FOR THE RENT AND MORTGAGE INTEREST RESTRICTIONS (AMENDMENT) ACT, 1933, s. 12, see HALSBURY'S STATUTES, Vol. 26, p. 276.

FOR THE RENT RESTRICTIONS (NOTICES OF INCREASE) ACT, 1923 (c. 13), s. 3 (3), see *ibid.*, Vol. 10, p. 363.]

APPEAL by landlord from an order of DEPUTY JUDGE SMYLLIE, at Runcorn County Court, dated Oct. 8, 1946.

The deputy county court judge refused possession of premises, which were subject to the Rent Restrictions Acts on the ground that dilapidations of which the landlord complained were the result of his own neglect to carry out repairs directed by the local sanitary authority, and he refused to give judgment in the landlord's favour for arrears of rent on the ground that the rent was not recoverable while the premises remained in a state of non-repair.

J. H. L. Royle for the landlord.

The tenant did not appear.

SCOTT, L.J. : To make clear the position that has arisen I think I should read, first, the judge's observations when he gave judgment. He said :

These premises were in a state of non-repair. Notice served on the landlord to remedy the defects, yet nothing done. In my judgment, the rent was not recoverable while the premises remained in such condition. The dilapidations complained of by the landlord were and are the result of his own neglect to carry out the repairs directed by the local authority, and, accordingly, the landlord's claim fails.

The reference to the notice served on the landlord to remedy the defects is a reference to a certificate given on Mar. 20, 1943, by the sanitary authority of the district where the house is situated. It purported to be given under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 12, and was as follows :

To all whom it may concern. The sanitary authority of the urban district of Runcorn, having caused the dwelling-house . . . to which the Rent Restrictions Acts apply, to be inspected, and being satisfied that the house, which is situate in the said district, is not in a reasonable state of repair, hereby certify, upon the application of Mr. Philip Harold Lowe, the tenant of the house, that it is not in a reasonable state of repair.

The judge decided that the certificate was, of itself, *ipso facto*, a bar to the landlord's right of possession. In our view, having regard to the pleadings before the judge and the evidence called, there are certain matters with which the judge has not dealt, but which ought to have been dealt with, to enable him to come to a conclusion on the question whether or not the landlord was entitled to possession.

The particulars of claim were these. Paragraph 1 asked for possession. Paragraph 2 alleged that the tenant held the premises of the landlord as tenant from week to week at a weekly rental of 8s. 4d., inclusive of rates. Paragraph 3 alleged that the landlord duly determined the tenancy by serving upon the tenant, on July 15, 1946, notice to quit the premises at the end of the next complete week of the tenancy, but that the tenant still retained wrongful possession. Paragraph 4 alleged arrears amounting to £73 15s. 2d. (that is, nearly four year's rent at that rate), and para. 5 alleged that the condition of the dwelling-house had deteriorated owing to acts of waste by, or the neglect or the default of, the tenant or persons residing or lodging with him, contrary to para. (b) of sched. I to the Rent Restrictions Act, 1933. No written defence was put in, although the defence at the hearing was that there was no right to possession because of the condition of the premises.

Under s. 3 of the Rent Restrictions Act, 1933, there is the familiar provision that no order for recovery of possession of a dwelling-house to which the Rent Restrictions Acts apply shall be made or given unless the court considers it reasonable to make such an order and the court has power so to do under the provisions of the schedule. I turn to the schedule, and there it appears at the

outset that the question of reasonableness is a fundamental issue that the court has to consider. Non-payment of rent is one of the expressed grounds for granting possession. The obligation of repair is not shown in the present case to have been a term of the contract of tenancy. There was no evidence even of demands for a specific amount of rent. Nevertheless, we think, for reasons which will appear, that the case must go back, to be re-tried, and then the question of the amount of rent and non-payment of it, *a fortiori* of arrears, will be investigated.

Whether or not the landlord succeeds in showing what the rent was, so as to enable the court to come to a conclusion as to the *quantum* of rent, there will still remain the question what was the position in regard to the duty of repairs. I think that may probably be found to rest on s. 2 of the Housing Act, 1936, which imposes on the landlord a statutory obligation to keep the house in all respects reasonably fit for human habitation. A contention was put forward on behalf of the landlord that the state of the house was due to the act or default of the tenant, which would come within the proviso to s. 3 (3) of the Rent Restrictions (Notices of Increase) Act, 1923, which says :

Where a tenant has obtained from the sanitary authority a certificate that the house is not in a reasonable state of repair [as was the case here] and has served a copy of the certificate upon the landlord [as was the case here] it shall be a good defence to any claim against the tenant for the payment of any sum which the tenant is by virtue of this Act liable to pay by way of rent or on account of arrears . . . and . . . the production of the said certificate shall be sufficient evidence that the house was and continues to be in the condition therein mentioned unless the contrary is proved : Provided that the foregoing provision shall not apply in any case where and so far as the condition of the house is due to the tenant's neglect or default or breach of express agreement.

It should be borne in mind that that section related only to increases of rent permitted under the Acts of 1920 and 1923 read together where the landlord incurs expenditure in improving the house, but the principle underlying the proviso is relevant to the question whether it would be reasonable, in spite of the condition of the house, to make the order for possession. That will necessarily involve an investigation into who was really responsible for the condition of the house. On that topic we say nothing, but it is a matter that the judge will have to investigate carefully. If he comes to the conclusion that it was the fault of the landlord, he may reasonably say that he will refuse possession. If he comes to the conclusion that it was not the fault of the landlord and that the tenant has been a bad tenant, obviously it would be reasonable to give the landlord possession that he may not lose his rent any longer and that the house may be put into a good condition for somebody else. The case must go back for a re-trial from beginning to end, with due regard to those questions.

TUCKER, L.J. : I agree that there should be a new trial, and that the whole case should be open for re-consideration by the county court judge who has to deal with it. He may have to consider the relationship between the parties—whether there is, in fact, a relationship of landlord and tenant, and, if there is, what are the obligations under the contractual tenancy, if there was one, both with regard to repairs and to the payment of rent. Provided he is satisfied that the relationship of landlord and tenant exists and that by conduct or agreement or otherwise there was an agreement to pay some particular amount by way of rent, he will then have to consider whether there has been a failure to pay the rent, and, if so, whether that failure was of such a kind as to make it reasonable for him to make an order for possession. Where the judge who heard this case went wrong was in holding that the obligation to pay rent, which he assumed to exist, was suspended *in toto* by reason of the failure of the landlord to comply with the notice which had been served on him by the local authority. There is no provision under any of the Rent Restrictions Acts which suspends the need to pay the ordinary contractual rent for failure to comply with such a certificate. The right to recover rent and consequential remedies for non-payment are only suspended in the cases of permitted increases in the rent. The judge may also have to consider what was the contract between the parties as to repairs, and, if there was no contract, what the statutory obligation was on the landlord or on the tenant with regard to repairs and whether or not there has been any neglect or default on the part of the tenant

under para. (b) of the sched. I to the Act of 1933. For these reasons I agree that there should be a new trial as proposed by my Lord.

COHEN, L.J. : I agree.

Appeal allowed with costs.

Solicitors : *Gregory, Rowcliffe & Co.*, agents for *Linaker & Linaker*, Runcorn (for the landlord).

[Reported by C. ST.J. NICHOLSON, Esq., *Barrister-at-Law.*]

A

THOMAS v. HARRIS.

[COURT OF APPEAL (Scott, Tucker and Cohen, L.JJ.), February 20, 1947.]

Contract—Equitable assignment—Erection of tombstone on father's grave—Assurance policies handed to son by father before his death, with request to erect tombstone and pay for it out of the policy moneys—Son's lien on policies for cost of tombstone.

B

A few months before his death, a father handed over certain life assurance policies to his son with a request that after his death the son should erect a tombstone for him and pay for it out of the assurance moneys. The son took the policies and paid the premiums to keep them up, and after his father's death he erected the tombstone as requested. In an action by the father's executrix and sole beneficiary for the return of the policies, the son contended that he had a lien on them for the amount paid for the tombstone :—

C

HELD : there was a binding contract between the father and the son involving an assignment of the policies by way of charge to the extent of the amount paid by the son for the tombstone.

D

[AS TO EQUITABLE ASSIGNMENT, see HALSBURY, *Hailsham Edn.*, Vol. 7, pp. 304-306, paras. 423-425, and Vol. 13, pp. 129, 130. para. 112 ; and FOR CASES, see DIGEST, Vol. 8, p. 445, Nos. 205-209.]

APPEAL by the plaintiff from JUDGE TOPHAM, K.C., at Southampton County Court.

The plaintiff, as executrix of William Harris, brought an action against the deceased's son for the return of certain assurance policies issued in favour of the deceased and detained by the son. The defence was that the son had a lien on the policies for the amount paid by him in respect of a tombstone for the deceased. The judge found that there was a contract between the deceased and his son in regard to the erection of the tombstone, and he held that the son was entitled to be refunded out of the policy moneys.

E

C. A. Emanuel for the plaintiff.

E. S. Fay for the defendant.

F

SCOTT, L.J. : William Harris died on Nov. 27, 1944, having made a will dated June, 1937, appointing the present plaintiff sole executrix. Probate was granted in July, 1945. The plaintiff alleged that the defendant, who was the son of the deceased, detained certain life assurance policies issued by the Manchester Assurance Co. in favour of the deceased, and she claimed the return of the policies or their value and damages for detention. The defence was that the defendant had what he called a lien on the policies in respect of moneys paid by him which were chargeable against the estate of the deceased. The moneys in question were made the subject of a counterclaim by him. There were three items, the only relevant one being the third which was : "Stonemason's account in respect of tombstone and grave, £35 10s." The judge held that the defendant was entitled to the benefit of the assurance moneys to the extent of the tombstone and grave, and that is the only matter in controversy in this court. The deceased was looked after by a step-daughter whom he made executrix under his will by which he left all his property to her. Consequently, the defendant, the son, who had the policies in question in his possession and repaid himself out of the policy moneys for the amount he had paid for the tombstone, has to justify his action in doing so.

G

H

The whole question turns on what happened in July, 1944. The deceased

was then a patient at the West End Institution and on July 29 his step-daughter at his request handed over the assurance policies in question to the son. The judge in his judgment made certain specific findings as to that occasion and as to a previous conversation between father and son. His judgment is short, and I will read the whole.

A I find that deceased in his lifetime asked the defendant to bury him and to erect a tombstone and to pay for it out of the assurance moneys, for which purpose he was to collect the papers. This he did, not knowing that deceased had left any will. I hold that defendant performed these services [*i.e.*, the funeral and the erection of the tombstone] at the request of the deceased, implying an obligation to pay for the services. The direction to take the moneys out of the assurance policies created a charge or lien on the policies.

He therefore, held that the defendant had a lien on the policies for a sum which included the amount payable in respect of the tombstone.

B In my view, that judgment amounts to a finding that a contract was made in July, 1944, between the deceased and his son, and given effect to by the step-daughter, acting as agent for her father in the matter; that, under that oral contract, the son promised his father to see to his funeral and to erect the tombstone; and that, in consideration of that promise, the father, through the step-daughter, gave over the possession of the policies. That the father intended thereby to give to the son a charge on the policies is clear, and that charge would,

C I am satisfied, amount to an assignment in equity of the policies to the extent of the charge on them, and would, as an assignment, be binding on the estate in the hands of the executrix. That that was the nature of the bargain is proved by the fact that the son was given possession of the policies, took them away, and himself paid premiums on them to keep them up. In short, the transaction was a binding contract, made orally, involving an assignment of the policies by way of charge to the extent of the claim in question in respect of

D the tombstone. It follows, therefore, that the claim of the executrix for the amount deducted by the son from the policy moneys fails, because he was entitled to deduct them under the assignment and contract thereby made. The appeal must be dismissed with costs.

TUCKER, L.J. : I agree. I read the judgment of the county court judge as amounting to a finding that there was a contract made between the deceased
E man and the defendant, partly oral and partly by conduct; that there was a request by the deceased in his lifetime to his son to erect a tombstone on his death; that there was a request by the deceased to the son, and an authority conferred by the deceased on the son, to collect the assurance policies, and an authority to him to repay himself the expenses of erecting the tombstone out of those policy moneys. I think that the defendant accepted that offer during the lifetime of the deceased when he collected the policies, and that he
F completed the acceptance of the offer on the death of the deceased by erecting the tombstone. The county court judge has held that the result of those words and that conduct was to create a contract involving an obligation on the part of the deceased to see that the son was paid out of the assurance moneys.

Counsel for the plaintiff has argued that on the evidence there was no intention on the part of the parties to enter into any binding contractual relationship.
G He says there was a mere request by a dying man to his son to put up a tombstone, and that the law will not infer from such a request any binding legal obligation. If the matter had stood there, there would have been a great deal to be said for that argument. In ordinary circumstances I do not think one would infer a binding legal contract if a father asks his son to put up a tombstone and the son, in duty bound, does so, but this case is very different, because I think the inference that the parties were contracting comes from the promise
H and authority conferred on the son to collect the assurance policies and pay himself out of them. In my view, that indicates that the father and the son were entering into an arrangement (which became perfected when the son carried out the father's request) whereby the son was to receive remuneration for the services which he performed pursuant to that request, and I agree that, the son having got possession of the assurance policies in those circumstances with the assent and by the authority of the deceased, the policies were charged to the extent specified in his favour. For those reasons, I agree that the appeal fails.

COHEN, L.J.: I agree. I read the evidence and the judge's judgment in the same sense as TUCKER, L.J., and, so interpreting them, I agree so entirely with his reasons that I do not find it necessary to add any of my own.

Appeal dismissed with costs.

Solicitors: *White & Leonard*, agents for *Charles Ansell Emanuel and Emanuel*, Southampton (for the appellant); *Watkins, Pulleyn & Ellison*, agents for *Hepherd, Winstanley & Pugh*, Southampton (for the respondent).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

A

DUNN v. A. G. LOCKWOOD & CO.

[COURT OF APPEAL (Lord Oaksey and Morton, L.JJ.), February 14, 1947.]

Workmen's Compensation—Course of employment—Accident on way to work—Contractual obligation to proceed by most expeditious route—Workmen's Compensation Act, 1925 (c. 84), s. 1 (1).

B

A workman who lived at W. was employed to work at M., where the employers carried on their business. The terms of the employment were that the workman might, though it was not obligatory, travel from W. to M. by the 7.40 a.m. train from W., which arrived at M. at 8.15 a.m., and that he was to be paid as from 8 a.m. While proceeding one morning from W. station by the most expeditious route to his work he slipped and injured himself.

C

HELD: there was a contractual obligation imposed on the workman by the concession to go to his work as quickly as possible after arrival at M. station; the accident, therefore, arose "out of and in the course of the employment" within the meaning of the Workmen's Compensation Act, 1925, s. 1 (1); and the workman was entitled to an award.

D

Blee v. London and North Eastern Ry. Co. (3) applied.

Allen v. Siddons (1) distinguished.

[AS TO ACCIDENTS ARISING WHILE WORKMAN GOING TO AND FROM WORK, see HALSBURY, Hailsham Edn., Vol. 34, pp. 825-828, paras. 1164, 1165; and FOR CASES, see DIGEST, Vol. 34, pp. 277-279, Nos. 2341-2357.]

Cases referred to:

E

- (1) *Allen v. Siddons* (1932), 25 B.W.C.C. 350; Digest Supp.
- (2) *Alderman v. Great Western Ry. Co.*, [1937] 2 All E.R. 408; [1937] A.C. 454; 106 L.J.K.B. 335; 156 L.T. 441; 30 B.W.C.C. 64; Digest Supp.
- (3) *Blee v. London & North Eastern Ry. Co.*, [1937] 4 All E.R. 270; [1938] A.C. 126; 107 L.J.K.B. 62; 158 L.T. 185; 30 B.W.C.C. 364; Digest Supp.

APPEAL by the workman from an award in favour of the employers made by His Honour JUDGE CLEMENTS at Margate County Court and dated Nov. 14, 1946. The facts appear in the judgment of LORD OAKSEY, L.J.

F

G. H. Crispin for the workman.

J. H. C. Goldie for the employers.

LORD OAKSEY, L.J.: This is an appeal by the workman from Margate county court the judge of which took the view that the case was covered by *Allen v. Siddons* (1). In Dec., 1945, the workman was engaged as a plasterer by the employers, who are a firm of builders and decorators. The workman lived at Whitstable and the employers were carrying on their business at Margate. The terms agreed upon were that the workman might travel from Whitstable to Margate by a train starting from Whitstable at 7.40 a.m. and arriving at Margate at 8.15 a.m. and was to be paid as from 8 a.m. On the morning in question, after he had arrived at Margate and was proceeding to his work—and it is agreed that we must treat it, for the purposes of this appeal, as if he were proceeding by the most expeditious route from Margate station—he slipped and injured himself.

G

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The question is whether that accident arose "out of and in the course of" his employment within the meaning of the Workmen's Compensation Act, 1925, s. 1 (1). In *Allen v. Siddons* (1), the workman was employed on the terms that he should be paid from 7 a.m. and that his hours began at that time, but in practice he was only bound to be at his work at 7.30 a.m., and he could get

there in any way he pleased. He went, in fact, on a motor cycle and he was injured on his way to work. It was held, in accordance with a large number of cases which had decided that a man is not, as a general rule, in the course of his employment when he is on his way to work, that he was not entitled to succeed because he was not in the course of his employment. As LORD RUSSELL OF KILLOWEN put it in *Alderman v. Great Western Ry. Co.* (2) ([1937] 2 All E.R. 408, at p. 412):

A The cases in which men are employed to work at a distance from their homes and have to find lodgings for themselves must be innumerable. Yet there is no case in the books, or at all events none was cited, in which such a one, meeting with an accident, when merely on his way to or from his work, has been held entitled to compensation. In order to entitle him to compensation in such a case, some other element must be present (involving the discharge of a contractual duty to the employer) which in law extends the course of his employment so as to include the moment of time when the accident occurred.

B *Allen v. Siddons* (1) was decided in accordance with that principle on the ground that the workman was only on his way to his work and was not performing any contractual obligation to the employer in getting to his work, although it was within the time of his work because he was paid from 7 a.m. and had not to be there until 7.30 a.m.

C On the other hand, in *Blee v. London & North Eastern Ry. Co.* (3), in which the dictum of LORD RUSSELL OF KILLOWEN which I have just read was cited, the facts were that a man in the service of a railway company was employed on the terms that after he had done his daily work he might be called out on any emergency for which the railway company desired him. If he was called out, it was his duty to go to the emergency as quickly as possible. On the night in question he was called out on an emergency, and he was proceeding as quickly as he could to the work when he was knocked down and injured. The county court judge in that case found that the accident occurred in the course of his employment. It was argued on behalf of the employers that he was just as much on the way to his work at that time as he would have been in an ordinary case where a man was going to his work, but the House of Lords held that, in the special circumstances of that case, because the emergency made it necessary for him to go as quickly as possible to his work although the particular route was not prescribed, going to such an emergency as quickly as possible was in the course of his employment. Adopting the words of LORD RUSSELL, another element was present involving the discharge of a contractual duty to the employer.

E In my opinion, this case falls within the principle of *Blee's* case (3) and the principle which has been laid down in a great number of other cases, namely, that it was in the course of the workman's employment because at the time he was performing a duty which he owed to his employer by virtue of his contract. There was an element present involving the discharge of a contractual duty to the employer. The permission to use the 7.40 a.m. train, although he was to be paid from 8 a.m. and the 7.40 a.m. train only arrived at 8.15 a.m., was a permission which involved the obligation to proceed as quickly as possible to his work by the most expeditious route after he had arrived at Margate at 8.15 a.m. It was in the performance of that duty of getting from Margate station to his work as quickly as possible that the workman was injured.

F In my opinion, this distinguishes the present case from *Allen v. Siddons* (1), where the man's only duty was to be at his work at 7.30 a.m., although he was paid from 7 a.m. He had no duty to proceed by any particular route, or particular way, or at a particular pace. Therefore, at the time he was injured there was no contractual obligation imposed on him. In the present case there was a contractual obligation imposed by the concession of going by the 7.40 a.m. train to go to his work as quickly as possible when he arrived at Margate station. For these reasons, I think the appeal must be allowed.

H MORTON, L.J. : I agree. At first sight this case bears a strong resemblance to *Allen v. Siddons* (1), and it is not surprising that the county court judge thought himself bound by that case, but I entirely agree, for the reasons given, that the present case is distinguishable from *Allen v. Siddons* (1), and falls within the principle laid down in *Blee's* case (3).

It was argued by counsel for the employers that in the present case there was no *de facto* control by the employers of the workman while he was walking to his place of work. In one sense that is true, because the employers were probably not on the spot at the time, but the same could be said of *Blee's* case (3), and I think the words LORD MAUGHAM used in that case are applicable also to the present case. LORD MAUGHAM said ([1937] 4 All E.R. 270, at p. 274):

We can test the view of the arbitrator by supposing that a superior officer of the company happened to meet the workman loitering on his way to the place or diverging from the proper route. Could not the officer properly have ordered the workman to proceed direct to the place to which he has been called? The circumstance as to payment affords, I think, a decisive answer in the affirmative.

So here, I think, it is clear that it would have been within the powers of the employers to direct the workman, if he was diverging from his route, to proceed to his place of work by the most expeditious route. I agree the appeal must be allowed.

Appeal allowed with costs.

Solicitors: *Culross & Trelawny* (for the workman); *L. Bingham & Co.* (for the employers).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

R. v. FURNISHED HOUSES RENT TRIBUNAL FOR PADDINGTON AND ST. MARYLEBONE, *Ex parte* KENDAL HOTELS, LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Cassels and Hallett, JJ.),
March 11, 1947.]

Crown Practice—Certiorari—When order granted—Furnished Houses Rent Tribunal—Furnished Houses (Rent Control) Act, 1946 (c. 34), s. 2.

Certiorari does not lie to bring up and quash a decision of a tribunal constituted under the *Furnished Houses (Rent Control) Act, 1946*, when the decision is good on its face and not outside the jurisdiction of that tribunal.

[AS TO GROUNDS FOR CERTIORARI TO QUASH, see HALSBURY, Hailsham Ed., Vol. 9, pp. 880-889, paras. 1484-1493; and FOR CASES, see DIGEST, Vol. 16, pp. 417-431, Nos. 2763-2918].

Case referred to:

- (1) *Rex v. Minister of Health, ex p. Glamorgan County Mental Hospital (Committee of Visitors)*, [1938] 4 All E.R. 32; [1939] 1 K.B. 232; 159 L.T. 508; 102 J.P. 497; Digest Supp.

MOTION for an order of *certiorari*.

On the application of a tenant, the Paddington and St. Marylebone *Furnished Houses Rent Tribunal* reduced the rent of certain premises. The landlords applied for an order of *certiorari* on the ground that the tribunal, in arriving at their decision, had not considered certain facts which they should have taken into account, and that there was no ground on which the tribunal could have reduced the rent to the amount fixed in their order. The facts appear in the judgment of LORD GODDARD, C.J.

G. H. Crispin for the landlords.

The Attorney-General (Sir Hartley Shawcross, K.C.) and *H. L. Parker* for the tribunal.

LORD GODDARD, C.J.: In this case the counsel for the landlords obtained an order for leave to move for a writ of *certiorari* to bring up and quash a decision of the Paddington and St. Marylebone *Furnished Houses Rent Tribunal*, which was set up under the *Furnished Houses (Rent Control) Act, 1946*. Under that statute, the Minister of Health can appoint tribunals for different districts. Where a tribunal has been appointed the provisions of s. 2 take effect, and under that section either the landlord or the tenant of a furnished letting can refer the question to the tribunal to decide whether the rent paid is a fair and reasonable one or not. Section 2 provides:

(2) Where any contract to which this Act applies is referred to a tribunal, then, unless at any time before the tribunal have entered upon consideration of the reference it is withdrawn by the person or authority by whom it was made, the tribunal shall

consider it and, after making such enquiry as they think fit, and giving to each party (and, if the house is one the general management whereof is vested in and exercisable by a housing authority, to that authority) an opportunity of being heard, or, in his option, of submitting representations in writing, shall approve the rent payable under the contract or reduce it to such sum as they may, in all the circumstances, think reasonable, or may, if they think fit in all the circumstances, dismiss the reference, and shall notify the parties and the local authority of their decision in each case.

- A It will be observed that this subsection leaves entirely to the discretion of the tribunal what rent is to be paid because that matter is to be what they think reasonable. There is no provision in the Act for any appeal either to this court or to any other tribunal, and it is a well-known principle of law that no appeal lies from a decision of a tribunal unless the right of appeal is given by statute.

- B *Certiorari* was moved in this case on the ground that the tribunal have not considered certain matters which they ought to have taken into account in determining whether or not a rent of £5 a week, which was the contract rent between the landlord and tenant, was a fair rent, and it is said there was no ground on which the tribunal could have reduced the rent to what they did, namely, £3 6s. That raises the whole question what are the grounds on which *certiorari* can be moved.

- C *Certiorari* is a very special remedy, and when it is sought in order to bring up the order of a judicial tribunal the question which has to be considered is whether or not the tribunal were acting within their jurisdiction. "Acting within their jurisdiction" is an expression which has been applied to more than one set of circumstances. It is, for instance, applied to a case where it is said that a court is not properly constituted. It may be that justices or other members of a court are alleged to be disqualified or to have a bias in the matter which should have resulted in their not sitting and in those circumstances this court has never hesitated to grant the writ to bring up the order to be quashed because the members of a tribunal had no jurisdiction to give a decision in the case, but it is very old and definite law that *certiorari* to quash proceedings only lies for want of jurisdiction or where the order is bad on its face. It may be bad on its face because, on looking at it, the court can see that the tribunal, in making it, acted outside their jurisdiction, or it may be shown that they decided some question which was not before them. *Certiorari* will lie for other purposes, such as removing cases for trial to the High Court, but to-day, we have only to consider whether or not this order is good on its face and whether it purports to decide a question which it was within the jurisdiction of the tribunal to decide.

- D Counsel for the landlords has cited to us a number of cases, but many of them I need not consider because they deal with *mandamus* and not *certiorari*, and entirely different considerations apply to *mandamus* from those which apply to *certiorari*. Where it has been shown that a tribunal have declined to consider matters which they ought to have considered, or have considered matters which they ought not to have considered, or have not decided the case according to law, this court has in many cases granted *mandamus* to the tribunal commanding them to hear and determine according to law. In this case no *mandamus* is sought, but what is said is that the order is bad because the tribunal have not taken into consideration matters which they ought to have taken into consideration.

- G In the most recent case, *R. v. Minister of Health* (1), GREER, L.J., in the Court of Appeal approved the statement of the law which is contained in HALSBURY'S LAWS OF ENGLAND, Vol. 9, para. 1493, and he said that the result of the cases is correctly summarised there. The paragraph is this :

- H Where the proceedings are regular upon their face and the magistrates had jurisdiction, the superior court will not grant the writ of *certiorari* on the ground that the court below has misconceived a point of law. When the court below has jurisdiction to decide a matter, it cannot be deemed to exceed or abuse its jurisdiction, merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or misdirects itself as to the weight of the evidence, or convicts without evidence.

Those are all matters of appeal. They are not matters in respect of which *certiorari* will lie, nor are they matters which can be brought before the court

on this proceeding merely because the statute gives no right of appeal. We are not concerned with the policy of the statute. We are not concerned with whether it would be a good thing or a bad thing if a right of appeal had been given. We have only to see whether this order is good on the face of it and whether it is an order which it is within the jurisdiction of the tribunal to make.

The main ground on which this application depends is that the chairman of the tribunal, having stated in his affidavit that the tribunal accepted that the figures adduced by the landlords represented the costs actually incurred by them, went on to say:

The tribunal was not in a position to form any judgment whether the rent of Flat No. 10 [the premises in question] bore a proper and fair proportion to the rents receivable in respect of the whole building or what would be a reasonable rent for the other flats. The tribunal, however, considered the cost reasonably involved in running this block of furnished flatlets as well as the value of the accommodation and services provided to this particular tenant.

As we have no jurisdiction to act as a court of appeal, it does not seem to me that it would be useful or desirable that I should express any opinion whether or not those were matters which ought or ought not to have been taken into account by the tribunal. On this application we cannot give a decision which would be binding on any other tribunal as to what they ought or ought not to take into account. Parliament has chosen to make them the absolute masters of the situation and to leave the decision of these cases to them without appeal, and we can only assume that they will act properly, but whether they do or not, it is not a matter on which it would be useful for us to give a decision because we have no power to control them as we have of controlling other inferior courts whose decisions we consider by way of appeal. Therefore, I do not propose to say whether I think they ought or ought not to have taken into account whether the rent of this particular flat "bore a proper and fair proportion to the rents receivable in respect of the whole building." We have only to see whether the order is or is not valid on its face. It is a perfectly good order on its face, and we have only then to consider whether it was within the jurisdiction of the tribunal to entertain this matter. It follows from the fact that the tribunal were exercising the functions with which they had been entrusted by the Act of Parliament that it must have been within their jurisdiction to consider it and to give a decision. What we are really being asked to say is either that they have misconstrued the statute or that they have rejected evidence or misdirected themselves in some way, but even if they came to a decision without evidence, that is not a matter on which *certiorari* can be granted, and it follows that this application must fail.

CASSELS, J.: My Lord has dealt with every point with which I should desire to deal, and I agree with the judgment.

HALLETT, J.: I agree, but there is one more point to which I should like to draw attention. In the chairman's affidavit he discloses that the tribunal refused to take into account items in respect of accountants' fees and solicitors' costs although they accepted that those items had, in fact, been incurred by the landlords. What LORD GODDARD, C.J., has said about our expressing no opinion on the other point, I have no doubt applies also to that. We are expressing no opinion whether the tribunal were right or wrong in refusing to take those items into account. We are merely saying that the legislature has not thought fit to constitute this or any other court an appellate body and we are not going to exceed our powers.

Application dismissed.

Solicitors: *Russell, Sons & Bass* (for the applicants); *The Solicitor, Ministry of Health* (for the tribunal).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

**Re GOLDSMITH'S WILL TRUSTS, BRETT v. BINGHAM
AND ANOTHER.**

[CHANCERY DIVISION (Wynn-Parry, J.), February 25, 1947.]

Wills—Condition—Gift subject to condition precedent—Gift of freehold property after death of testator's widow, subject to payment of £800 to testator's estate within 6 months of testator's death—Whether time specified of the essence of the matter.

A By his will the testator gave to his wife a legacy of £1,000, a life interest in the income of all his real estate, and the residue of his personal estate, and, after her death, certain freehold property to B., subject to the payment by B. of £800 within 6 months of the testator's death to form part of the residuary estate. There was no express gift over of the property in question, but there was a gift over of the residuary estate after the widow's death. The testator died on Nov. 6, 1922, and the widow died on Dec. 7, 1945. On Mar. 5, 1946, B. offered to pay the sum of £800. The question was whether the gift took effect, notwithstanding that the condition as to payment had not been performed within the time specified :—

C **HELD :** on the true construction of the will, the time specified for the payment was of the essence of the matter, because the fulfilment of the condition would have provided a capital sum which, if invested, would produce income for the widow during her life, and, therefore, a performance after her death could not put the parties in the same position as if the will had been strictly complied with. Accordingly, in the events which had happened, the conditional devise had failed and the property had fallen into the testator's residuary estate.

Re Goodwin (1) and Re Packard (2) applied.

D [AS TO TIME OF PERFORMANCE OF CONDITION, see HALSBURY, Hailsham Edn., Vol. 34, pp. 119, 120, para. 153, and pp. 121, 122, para. 155; and FOR CASES, see DIGEST, Vol. 44, pp. 474, 475, Nos. 2923-2934.]

Cases referred to :

- (1) *Re Goodwin, Ainslie v. Goodwin*, [1924] 2 Ch. 26; 93 L.J.Ch. 331; 130 L.T. 822; 44 Digest 474, 2933.
- (2) *Re Packard, Packard v. Waters*, [1920] 1 Ch. 596; 89 L.J.Ch. 301; 123 L.T. 401; 44 Digest 474, 2932.
- (3) *Taylor v. Popham* (1782), 1 Bro. C.C. 168; 44 Digest 469, 2889.
- (4) *Paine v. Hyde* (1841), 4 Beav. 468; 44 Digest 474, 2929.

ADJOURNED SUMMONS to determine whether a gift subject to a condition precedent in the testator's will took effect notwithstanding that the condition had not been performed within the time specified in the will. The facts and the relevant clauses of the will appear in the judgment.

F A. F. Maurice Berkeley for the plaintiff.

C. D. Myles for the defendant, Bingham.

A. J. Belsham for the residuary devisee and legatee.

G WYNN-PARRY, J. : By his will dated Sept. 5, 1922, the testator, Ephraim Thomas Goldsmith, appointed the plaintiff, Charles Edward Brett, and the defendants, James Hobden and Henry Bingham, executors and trustees of his will. By cl. 2 he bequeathed to his wife the sum of £1,000 to be paid to her as soon as possible after his decease. By cl. 3 he gave, bequeathed and devised :

H . . . all my real estate and the residue of my personal estate as to freeholds and copyholds to the use of my trustees in fee and as to personal estate unto my trustees absolutely upon the following trusts : (a) To pay the net income thereof after payment of all rents, rates taxes expenses of management and such outgoings as in the opinion of my trustees are properly chargeable to income to my said wife during her life. (b) After her death to pay out of my personal estate [certain pecuniary legacies]. (c) As to my freehold house Mount Ephraim with the garden and the land (about 5 acres) used and occupied by me therewith upon trust after the death of my said wife for the said Charles Edward Brett during his life and upon his death upon trust for the said Arthur Thomas William Goldsmith in fee simple absolutely. (d) As to my freehold house Seaforth with garden and the land (about 20 acres) used and occupied therewith upon trust after the death of my said wife for the said Henry Bingham in fee simple but subject to the payment by him of the sum of £800 to my trustees within 6 months of my decease to form part of my residuary estate.

By para. (e) he dealt with a newly-built cottage adjoining the property dealt with in the preceding paragraph by devising it after the death of his wife to Edwin Leopold Message in fee simple, subject to this condition :

... subject to the payment by him of the sum of £200 to my trustees within 6 months of my decease to form part of my residuary estate.

He dealt with other properties in paras. (f) and (g), and in para. (h) he proceeded as follows :

And as to all the residue of my estate both real and personal not otherwise hereinbefore disposed of upon trust after the death of my said wife for the said James Hobden absolutely subject to payment of all death duties and other liabilities to which my estate may be subject with the exception mentioned in cl. 4 hereof.

By cl. 4 he provided :

I direct that all the gifts devisees and legacies contained in this my will are to be given and paid free of all duties except the devise to Henry Bingham and the devise to Edwin Leopold Message who are to be severally responsible for the estate succession and other duties (if any) accruing thereon respectively.

The testator died on Nov. 6, 1922, and the 6 months period mentioned in paras. (d) and (e) of cl. 3 of the will expired on May 6, 1923. On Dec. 7, 1945, his widow died. On Mar. 5, 1946, the defendant, Bingham, offered to the other executors a cheque for £800, which they refused. That offer, it will be observed, was made within 6 months of the death of the widow, but, of course, long after the expiration of the period of 6 months from the death of the testator.

Now the first question with which I am concerned is primarily one of construction, and for that purpose it is unnecessary for me to go into the evidence which has been read which deals with the circumstances, according to the recollections of the various deponents, in which it came about that the defendant, Bingham, did not offer payment of the £800 until 1946. The first question which is asked by the summons is :

Whether upon the true construction of the said will and in the events which have happened the conditional devise in cl. 3 (d) of certain freehold property known as "Seaforth" to the defendant Henry Bingham has failed and the said property from and after the death of the said testator's widow has fallen into and forms part of the residuary estate of the said testator and should be held in trust for the defendant James Edward Hobden absolutely [subject, of course, to the condition as to the payment of death duties and other liabilities in cl. 3 (h) of the will], or whether the devise is still operative and effective, in which case the property would now become available for the defendant, Bingham, subject to the payment by him of the £800.

The principle upon which the court has to proceed in considering a gift of this nature, subject to a condition which has not been performed or strictly performed, is stated by ROMER, J., in *Re Goddwin* (1) where he said ([1924] 2 Ch. 26, at p. 30) :

It is well settled by authority that where a gift in a will is made subject to a condition, even a condition precedent, to be performed within a specified time, but the condition is not in fact performed within that time, then, at any rate in the absence of an express gift over, it is always a question for the court to determine whether the time so specified was of the essence of the matter.

It will be observed that in the will before me there is no express gift over. ROMER, J., then proceeded (*ibid.*, at pp. 30, 31) :

In determining that question the court must have regard to what was presumably the intention of the testator in inserting the condition, what it was that he desired to bring about or to guard against ; and if the court finds that a performance of the condition at a time subsequent to the expiration of the period fixed by the testator in substance provides for the very thing that the testator intended to provide for, so that all parties can be put in substantially the same position as they would have been in had the condition been performed within the proper time, time is not regarded as of the essence, and such performance is treated as a sufficient compliance with the condition.

In the case before ROMER, J., he had to consider the question that arose by reason of the failure by the widow of the testator, to whom he had bequeathed an annuity of £500 per annum, to perform the condition upon which that annuity was bequeathed, namely, to discharge his estate from a liability which he had incurred by a previous covenant to pay the lady an annuity of £70. ROMER, J., said ([1924] 2 Ch. 26, at p. 31) :

In the present case there can, I think, be no doubt that the only object of the testator in imposing the condition that the £70 annuity should be released was that the lady should not be paid both the annuity and the £70 a year . . . An execution of a release by her at the present time would, so far as the other parties are concerned, have precisely the same effect as though she had executed the release within the 6 months specified by the testator.

A In *Re Packard* (2), which was followed by ROMER, J., in *Re Goodwin* (1), SARGANT, J., having considered the decision of LORD THURLOW, L.C., in *Taylor v. Popham* (3), said ([1920] 1 Ch. 596, at p. 603) :

B But the really important thing is, that the language of the Lord Chancellor in *Taylor v. Popham* (3) is clearly not limited to cases as to release from debts or payment of money, but applies generally to the performance of a condition precedent outside the time mentioned in the will but under such circumstances that the parties can be placed in substantially the same position as if the terms of the will had been strictly complied with. It seems to me that there is nothing to show that the direction that the settlement should be executed within 12 months is more than a directory provision. It is not of the essence or the substance of the condition ; and it is quite clear that all the parties interested can be placed in precisely the same position as if the condition had been literally and accurately complied with, because the funds, which ought to have been settled within 12 months of the death of the testator, have throughout been treated as if they had been so settled, and they can be now settled in the way required, so that there will be a continuous settlement of the funds as from the death of the testator.

C I was also referred to *Paine v. Hyde* (4), but I think I can confine myself to the few more modern authorities to which I have already referred.

The question then arises : What is the effect of applying the principle that emerges from those two cases to the present case ? Turning back to the judgment of ROMER, J., in *Re Goodwin* (1), there is no express gift over in the present case, and, therefore, the question arises for the court to determine whether the time specified in cl. 3 (d) of the will is of the essence of the matter. The next point to which I have to direct my mind is : What is to be presumed to have been the intention of the testator in making that condition, if any such intention can be extracted from a fair reading of the will ? Counsel for the defendant, Bingham, intimated that he was not in a position to address any argument to me to the effect that the reference to "within 6 months of my decease" should be read as a reference to 6 months from the decease of the widow. The evidence which has been read to me was, to a certain extent, directed towards an attempt to suggest that there had been a slip in the drafting of the will. With that I am not concerned. I have to consider the will as it stands, and it is plain beyond doubt on the language of this will that both in paras (d) and (e) the condition is the payment of the specified sum of money within six months of the decease of the testator. It does not appear to me to be a case in which it is so clear that the testator has made a slip in his will that, although I cannot take it into account for the purpose of construing a gift, yet I ought to hesitate to impute to him a particular intention which can only be imputed to him upon the basis of the language that he has in fact used, language which, it is suggested, is plainly indicative of what he intended. There is room for speculation either way, and, therefore, my duty is to take the will as it stands and ask myself on the basis of the language which the testator has used what presumably was his intention. I think, giving the matter the best consideration I can, that, having regard to the language of this will, it must be treated that the testator intended the £800 mentioned in para. (d) and the £200 mentioned in para. (e) to be paid within 6 months of his death for the purpose of bringing about what was the necessary consequence of those payments, namely, an increase in the income of his estate which would have been invested and which would be income payable to his widow during her life. It was suggested with some ingenuity by counsel for the defendant, Bingham, that the object really was to produce within 6 months of the death of the tenant for life a fund which would be sufficient to discharge the pecuniary legacies payable under cl. 3 (b) on the death of the widow. That was countered with at least equal ingenuity by counsel for the residuary legatee who pointed out that by cl. 2 of the will there was a bequest to the widow of a sum of £1,000 which at least represented the total of the two sums of £800 and £200 referred to in paras. (d) and (e) of cl. 3. It is to be observed that the amount of the pecuniary legacies is less than the total of

those two sums. With regard to the other argument, it will be observed that, whereas that total more than represents the amount of the pecuniary legacies, the direction in cl. 2 is to pay the wife a certain sum as soon as possible after the decease of the testator. I do not think I can place great weight on either argument, but I cannot disregard the consequence that the fulfilment of either of the conditions in question would have been the provision of a capital sum which, if invested, would have produced income which would have been available to augment the amount payable to the widow during the rest of her life.

Having arrived at that point, I again refer to the statement of principle by ROMER, J., in *Re Goodwin* (1). He said ([1924] 2 Ch. 26, at pp. 30, 31):

... if the court finds that a performance of the condition at a time subsequent to the expiration of the period fixed by the testator in substance provides for the very thing that the testator intended to provide for, so that all parties can be put in substantially the same position as they would have been in had the condition been performed within the proper time, time is not regarded as of the essence, and such performance is treated as a sufficient compliance with the condition.

At the same time, I have in mind the observation of SARGANT, J., in *Re Packard* (2) where he said ([1920] 1 Ch. 596, at p. 603):

... the language of the Lord Chancellor in *Taylor v. Popham* (3) is clearly not limited to cases as to release from debts or payment of money, but applies generally to the performance of a condition precedent outside the time mentioned in the will but under such circumstances that the parties can be placed in substantially the same position as if the terms of the will had been strictly complied with.

It is clear that a performance of the condition at this date cannot result in placing these parties in the same position as if the terms of the will had been strictly complied with, for within the phrase "the parties" must be included the life tenant, *i.e.*, the widow, who is now dead. It, therefore, seems to me to follow that, taking the view of the will that I do, I cannot proceed on the basis of attributing no intention to the testator. This is a case in which, applying the principle underlying *Re Packard* (2) and *Re Goodwin* (1), I am not able to say that time is not of the essence.

Accordingly, it follows, in my view, that question 1 of the summons must be answered by declaring that, on the true construction of the will and in the events which have happened, the conditional devise of the property in question has failed and the property has fallen into and forms part of the residuary estate of the testator.

Declaration accordingly.

Solicitors: *Shelton, Cobb & Co.* (for the plaintiff); *Haslewood, Hare & Co.* (for the defendant, Bingham); *Kenneth Brown, Baker, Baker* (for the residuary devisee and legatee).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

PHOENIX ASSURANCE CO., LTD. v. MINISTER OF TOWN AND COUNTRY PLANNING.

[KING'S BENCH DIVISION (Henn Collins, J.), February 12, 13, 14, 20, 1947.]

Town and Country Planning—War damage—Re-development of land—Compulsory purchase—Order by Minister—Powers of Minister—Town and Country Planning Act, 1944 (c. 47), s. 1 (1).

Before the Minister of Town and Country Planning makes an order under the Town and Country Planning Act, 1944, s. 1 (1), declaring land shown to have sustained war damage, with or without other land contiguous or adjacent thereto, to be subject to compulsory purchase he must be satisfied on reasonable grounds that such an order is requisite for the purposes to which the section refers. The matter is not so peculiarly within the administrative capacity of the Minister that the making of the order is purely a matter for his discretion so that a court of law cannot inquire into the grounds on which he satisfied himself or call his jurisdiction into question.

Liversidge v. Anderson ([1941] 3 All E.R. 338) distinguished.

[EDITORIAL NOTE.] This case, with *Franklin v. Minister of Town and Country Planning* (ante, p. 396), decided under the New Towns Act, 1946, limits the powers of the Minister of Town and Country Planning when making orders under that Act and the Town and Country Planning Act, 1944, in the same manner as that in which the powers of the Minister of Health under the Housing Acts have been restricted: in relation to the confirmation of clearance and compulsory purchase orders. The wording of the several statutes differ. Under the Housing Acts the Minister "may" confirm an order after he has considered any objection. Under the Act of 1944 he may make an order where he is "satisfied that it is requisite," while under the Act of 1946 he must be "satisfied that it is expedient." In *Errington v. Minister of Health* ([1935] 1 K.B. 249; 99 J.P. 15) the Court of Appeal held that the Minister exercised a quasi-judicial function in confirming a clearance order under the Housing Acts, and that decision has been accepted and applied in a number of cases ranging from *Offer v. Minister of Health* ([1936] 1 K.B. 40) and *Horn v. Minister of Health* ([1937] 1 K.B. 164; 100 J.P. 463) to the recent *Price v. Minister of Health* (ante, p. 47) and *Summers v. Minister of Health* (ante, p. 184). Unless the decisions in *Franklin v. Minister of Town and Country Planning* and the present case are reversed on appeal, it must now be taken that the same principle governs the exercise by the Minister of Town and Country Planning of his powers under the Acts of 1944 and 1946. A distinction is drawn between the Housing and Town Planning legislation and such a provision as that of reg. 18B of the Defence Regulations which empowered the Home Secretary to make a detention order against any person whom he had "reasonable cause to believe to be of hostile origin or associations." Under that regulation the matter was held to be purely one for the executive discretion of the Home Secretary who could not be called on to give the grounds on which he had reasonable cause of belief: see *Liversidge v. Anderson* ([1941] 3 All E.R. 338). The distinction is based on the fact that Defence Regulation 18B was a temporary measure designed to meet a national emergency, while the Housing Acts and those of 1944 and 1946 are part of the ordinary statute law, and also on the inclusion in those statutes of provisions relating to the holding of public inquiries and the consideration of objections by the Minister. If, it is said, the questions under the Acts of 1944 and 1946 fall to be decided simply in the executive discretion of the Minister all mention of inquiries and consideration of objections was in practice a mere waste of paper.

FOR THE TOWN AND COUNTRY PLANNING ACT, 1944, s. 1 (1) and (7), and sched. I, para. 3 (b), 4, 5 and 6, see HALSBURY'S STATUTES, Vol. 37, p. 423.]

Cases referred to :

- (1) *Liversidge v. Anderson*, [1941] 3 All E.R. 338; [1942] A.C. 206; 110 L.J.K.B. 724; 116 L.T. 1; Digest Supp.
- (2) *Re Ripon (Highfield) Housing Confirmation Order, White & Collins v. Minister of Health*, [1939] 3 All E.R. 548; [1939] 2 K.B. 838; 108 L.J.K.B. 769; 161 L.T. 109; 103 J.P. 331.
- (3) *Point of Ayr Collieries v. Lloyd George*, [1943] 2 All E.R. 546.
- (4) *Local Government Board v. Arlidge*, [1915] A.C. 120; 84 L.J.K.B. 72; 111 L.T. 905; 79 J.P. 97; 38 Digest 97, 708.
- (5) *Errington v. Minister of Health*, [1935] 1 K.B. 249; 104 L.J.K.B. 49; 152 L.T. 154; 99 J.P. 15; Digest Supp.

APPLICATION to quash an order made under s. 1 (1) of the Town and Country Planning Act, 1944. The facts appear in the judgment.

J. Scott Henderson, K.C., and *J. T. Molony* for the applicants.

The Attorney-General (Sir Hartley Shawcross, K.C.) and *H. L. Parker* for the Minister of Town and Country Planning (respondent).

Cur. adv. vult.

Feb. 20. HENN COLLINS, J., read the following judgment. In this case the applicants apply to quash the order made by the Minister of Town and Country Planning on Nov. 6, 1946, entitled the City of Plymouth (City Centre) Declaratory Order, 1946, on the ground that, so far as it relates to the property of the applicants, there was no jurisdiction under the Town and Country Planning Act, 1944, to make it.

The matter arises in this way. There has been extensive war damage in the city of Plymouth, and the local planning authority, taking advantage of the Town and Country Planning Act, 1944, applied to the Minister for an order declaring the area of the city which was delineated in their application to be subject to compulsory purchase. Within that area the property of the applicants lies. It has suffered no war damage, and the plan which the local authority put forward for dealing with the whole area which they are seeking to make subject to compulsory purchase discloses that they intend to leave the applicants'

building standing, and to leave it abutting on a public road though that road is to be laid out afresh and widened by taking in land from the side of the existing road remote from the applicants' building. The evidence given on behalf of the local authority at the public inquiry, which has been made available on this motion, amply bears that out. The local authority desire to have the whole area over which their plan extends in one ownership and to take advantage of the fact that compulsory purchase will enable them to buy more cheaply than they could buy in an open market, but do not propose to do anything with the building other than to apply it to its present uses. The applicants say that in that state of things there is no jurisdiction in the Minister to accede to the application, so far as it relates to the applicants' property, to make the declaratory order of which they complain.

The power conferred upon the Minister in this behalf is to be found in s. 1 (1) of the Town and Country Planning Act, 1944. The subsection is in these terms :

Where the Minister of Town and Country Planning (in this Act referred to as "the Minister") is satisfied that it is requisite, for the purpose of dealing satisfactorily with extensive war damage in the area of a local planning authority, that a part or parts of their area, consisting of land shown to his satisfaction to have sustained war damage or of such land together with other land contiguous or adjacent thereto, should be laid out afresh and redeveloped as a whole, an order declaring all or any of the land in such a part of their area to be land subject to compulsory purchase for dealing with war damage may be made by the Minister if an application in that behalf is made to him by the authority before

a time limited in the Act. Under that subsection the Minister must satisfy himself that there has been extensive war damage in the area, and that war-damaged property, with or without contiguous or adjacent land, requires to be laid out afresh, before he can make the declaratory order. So much is common ground, and it is not disputed by the applicants that their property is adjacent to the damaged area, but they say that the Minister must satisfy himself of all the matters mentioned in the subsection in respect of each piece of property to which the order is to apply, and they contend, first and foremost, that he must do so on reasonable grounds. It is on this last contention that the matter was mainly contested.

On the part of the Minister it was urged that the satisfaction of the Minister on the various matters about which he has to make up his mind is that which founds his jurisdiction to make the declaratory order, and that his satisfaction—for which I will substitute the word "opinion" lest I seem to be disrespectful—his opinion is a matter so peculiarly within his personal, or, at any rate, his administrative, capacity that, as in *Liversidge v. Anderson* (1) the making of the order is a matter for his executive discretion, and that, therefore, a court of law cannot inquire into the grounds on which he satisfied himself or call his jurisdiction in question. Support for that argument was sought by reference to s. 1 (7), which provides that, if the Minister is satisfied that the materials supplied to him by the local authority are adequate for enabling the expediency of making an order to be considered, certain preliminary steps shall be taken. The emphasis was on the word "expediency," but I do not think this furthers the argument at all. Indeed, I think it tends rather the other way. The local authority would, indeed, have a poor case if they could not show that it was even expedient, let alone requisite, that the order should be made, and I do not think the use of the word "expediency" in that subsection weakens or colours the word "requisite" in subs. (1). The preliminary steps to which I have referred include publication by Gazette and local advertisement of a notice describing the land to which the application relates, stating that an application for an order under the Act is about to be considered by the Minister, or naming a place where a copy of the application and relevant maps and descriptive matter may be seen. A notice is also to be served on such persons as the Minister may specify, and thereupon, if any objection is duly raised to the application, the provisions of sched. I are to apply.

Pausing there for a moment, those provisions make it appear that the public notice is definitive, not only of the general scope, but also of the details, of the proposed lay-out at least so far as the local authority is concerned, and that

it is only in relation to that particular lay-out that powers are sought, and they cannot, by embracing in the scheme property which, in fact, falls outside the provisions of s. 1, get compulsory powers over it on the ground that their plans might hereafter be modified so as to bring the property within the provisions of s. 1. They could not, for instance, say that their submitted plan may hereafter be so altered that the new road will run through, and not in front of, the applicants' property, and so justify the expediency of their scheme as regards the applicants' building. Whether the Minister can do so is another matter.

A That depends on the more basic question which I have formulated, but, for the moment, I am only saying that I find no support in s. 1 (7) for the argument that the Minister's "satisfaction" is a matter of executive discretion. It is, however, worth observing that, by para. 3 (b) of sched. I, once a declaratory order is made, objection to a compulsory purchase order in respect of any property may be treated as irrelevant, with the result that, though by some alteration of the lay-out on which the application for powers was founded the land in question has ceased to satisfy the requirements of s. 1, it can be acquired compulsorily.

B This observation has, I think, a double bearing. The Attorney-General would have it that any planning must at all times be fluid, and that it was, therefore, necessary to read s. 1 as giving the Minister, as the ultimate arbiter, a purely executive discretion. I think there are limits, so far as objectors are concerned, to its fluidity. The other bearing is this. The statute is one which C impinges on the right of the owners of property, it may be very heavily, as in the instance I have given. It is, therefore, to be read rather in favour of the individual than against him. No such considerations as those present in *Liversidge v. Anderson* (1) are present. This is not a measure by way of preventing a public danger when the safety of the State is involved, and considerations which operated in that decision have no place in this matter.

D The presumption is, therefore, rather against the argument on behalf of the Minister than in favour of it. There are certainly no express words which compel the construction he contends for unless they are the words "where the Minister is satisfied that it is requisite." I think that those words *prima facie* mean satisfied on reasonable grounds of the facts to which the section refers. The existence of war damage is not a matter of opinion, nor is the question whether land is to be laid out afresh, and I have given the grounds for my opinion that the proposed plan is that from which the requirement for a fresh lay-out is to be deduced. Furthermore, when one turns to sched. I, one finds that a code is laid down for dealing with objections which are not withdrawn. Although in some cases, as provided by para. 4, the Minister may decide to overrule the objection without more material from the objector than his written objections, yet para. 5 provides that the Minister shall, subject to the foregoing, afford the objector an opportunity of appearing and being heard by a

E F person appointed for the purpose and shall afford the same opportunity on the same occasion to the authority making the application, and, finally, that he may, by para. 6, order a public inquiry. Why is he required by statute to hear objections or to hear both sides if he hears one, if his functions are purely executive? A careful executive officer would, no doubt, avail himself of all these facilities to help him in his decision, but why should the legislation have made it incumbent on him if in the last resort he can properly form his opinion without any grounds at all? It seems to me little to the point to say that a responsible Minister will not act or form an opinion on insufficient grounds, for it is clear to me on the evidence adduced on one side or the other on the motion that he has done so in this case. The applicants' property is not to be laid out afresh, and there is no evidence before me that it requires to be. Though the Attorney-General stated that the Minister did not wholly accept the lay-out propounded by the

G H local authority, he did not go the length of saying that this particular land required to be laid out afresh, nor was any evidence adduced on the part of the Minister to that effect.

The argument on behalf of the Minister really amounts to this, that s. 1 means that, if the planning authority have made an application which conforms to and have taken the steps required by s. 1 (4), (5) and (6), the Minister may, in his absolute discretion, make a declaratory order in respect of all or any of the land embraced by the application. Those, however, are not the words of the section, and, in my judgment, that is not what it means. For these reasons

I think the order should be quashed so far as it relates to the property of the applicants, with costs.

Order quashed.

Solicitors: *Ravenscroft, Woodward & Co.*, agents for *Woolcombe & Yonge*, Plymouth (for the applicants); *Treasury Solicitor* (for the Minister).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re BALL, HAND v. BALL.

[CHANCERY DIVISION (Roxburgh, J.), January 21, 1947.]

Wills—Construction—“Dependants.”

There is not sufficient certainty about the word “dependants” in a will to enable a court to give effect to it.

[AS TO “DEPENDANTS,” see WORDS AND PHRASES, Vol. 2, pp. 68, 69.]

ADJOURNED SUMMONS to determine a question arising under the will of Charles Cornelius Jannaway Ball. By his will, made on Oct. 7, 1935, the testator gave a freehold house and his furniture to his wife during her widowhood and after her death or remarriage to his son, Charles Ball, “or his dependants equally.” The testator died on Nov. 11, 1940, and his son, Charles, died intestate on Dec. 11, 1940, leaving a widow and three children. The testator’s widow died on Apr. 3, 1945. The house and furniture had been sold and the question was who was entitled to the proceeds.

L. R. Norris for the executrix.

A. A. Baden Fuller for the son’s children.

R. L. Stone for the son’s widow.

ROXBURGH, J.: I now have to determine the destination of the proceeds of the sale of the house and the furniture, having regard to the fact that the son survived the testator but predeceased the testator’s widow.

It is surprising that the word “dependants” has, apparently, not been considered in any reported case on the construction of a will. It has been given statutory definition in the Workmen’s Compensation Act, 1925, s. 4, and in the Inheritance (Family Provision) Act, 1938, s. 1, but those two definitions are mutually exclusive and that shows that I could not apply either of them as a suitable definition for the word “dependants” in a will. Counsel for the three children of the son, Charles, has suggested two possible definitions. First: “A person who to some extent depends on others for the provision of the ordinary necessities of life,” and, secondly: “A person to some extent maintained by another.” If that is the best that can be done in the way of definition—and I have no reason to think that anything better can be done—there is not sufficient certainty about the word “dependants” in a will to enable the court to give effect to it. Therefore, as the gift to “dependants” in the present case is a substitutionary gift and is, in my judgment, incapable of taking effect, the gift to the son, Charles Ball, takes effect as an absolute and indefeasible gift, and I so hold.

Declaration accordingly. Costs to be taxed as between solicitor and client in due course of administration.

Solicitors: *Lovell, Son & Pitfield*, agents for *Paris, Smith & Randall*, Southampton (for all parties).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

inguished, and Doubled by SIR
MOND EVERSHED, M.R. TIDE-
INVESTMENT AND PROPERTY
DINGS, LTD. v. WELLWOOD.
2] 2 All E.R. 514.

J. SMITH & CO., LTD. v. KIRBY
DIVISION (Hilbery, J.), February 18, 19, 1947.]

*Landlord and tenant—Rent restriction—Rent—Recovery of possession—Costs—
Amount of rent claimed, £370—Action brought in High Court—Whether
claim arising out of Rent Acts—Increase of Rent and Mortgage Interest
(Restrictions) Act, 1920 (c. 17), s. 17 (2).*

A In an action by landlords claiming (i) arrears of rent (amounting to over
£370) under a lease and mesne profits, and (ii) recovery of possession of
premises which were within the Rent Restrictions Acts, judgment was
given for the landlords. The tenant contended that, since the action was
brought in the High Court, the landlords were not entitled to costs by
reason of the Increase of Rent and Mortgage Interest (Restrictions) Act,
1920, s. 17 (2).

B HELD : (i) the claim, being for arrears of rent under a lease, arose out of
the lease and not out of the Increase of Rent and Mortgage Interest
(Restrictions) Act, 1920, and was for a sum beyond the limit of the juris-
diction of the county court, and, therefore, it could not have been brought
in the county court, notwithstanding that the premises were within the
Rent Restrictions Acts, and an action for possession alone should have
been brought in the county court.

C (ii) Section 17 (2) of the Act of 1920 applied only to cases where the
whole claim arose out of the Act, and it did not, therefore, apply to this
claim.

Russoff v. Lipovitch ([1925] 1 K.B. 628) *distinguished*.

[AS TO PROCEEDINGS ARISING OUT OF THE RENT RESTRICTIONS ACTS, see HALSBURY,
Hailsham Edn., Vol. 20, p. 335, para. 402; and FOR CASES, see DIGEST, Vol. 31,
D pp. 584, 585, Nos. 7332-7334, and 7343-7348.]

Case referred to :

(1) *Russoff v. Lipovitch*, [1925] 1 K.B. 628; 94 L.J.K.B. 355; 132 L.T. 789; 31
Digest 585, 7343.

E ACTION by landlords claiming (i) arrears of rent under a lease and mesne
profits, and (ii) recovery of possession of composite premises (*i.e.*, a house and
shop), which were within the Rent Restrictions Acts. The amount of rent
claimed was over £370. Judgment was given for the plaintiffs and the question
arose whether, since the action was brought in the High Court, the plaintiffs
were entitled to recover costs by virtue of the Increase of Rent and Mortgage
Interest (Restrictions) Act, 1920, s. 17 (2).

H. C. Leon for the plaintiffs.

H. V. Lloyd-Jones for the defendant.

F HILBERY, J. : The last question which arises is one on the question of
costs. Counsel for the defendant contends that, as this action is one to recover
possession of premises which are within the Rent & Mortgage Interest (Restric-
tions) Act, 1920, since the action is brought in the High Court, the plaintiffs
are not entitled to recover any costs. That, he says, is by virtue of s. 17 (2),
of the Act, which provides :

G A county court shall have jurisdiction to deal with any claim or other proceedings
arising out of this Act or any of the provisions thereof, notwithstanding that by reason
of the amount of claim or otherwise the case would not but for this provision be within
the jurisdiction of a county court, and, if a person takes proceedings under this Act
in the High Court which he could have taken in the county court, he shall not be entitled
to recover any costs.

H Counsel for the defendant argued that, as this case involves an application
for possession of the premises and is a proceeding arising out of the Act or any
of the provisions of it—though, like SCRUTTON, L.J. (in *Russoff v. Lipovitch* (1))
I cannot discover why both these phrases are used, since a proceeding cannot
arise out of the Act except because of the provisions of it—the county court
has jurisdiction, notwithstanding that, by reason of the amount of claim or
otherwise, the case would not, but for this provision, be within the jurisdic-
tion of a county court.

I do not think *Russoff v. Lipovitch* (1) determines the point I have to decide,
namely, whether this action arises out of the provisions of the Act. It is true

that, if this action had been a claim for possession of the premises, since the premises are within the Act, the decision of *Russoff v. Lipovitch* (1) would have decided the matter and it must have been held by me that it was a claim or other proceeding arising out of the Act, but this action was for two things. It was an action claiming, in the first place, the arrears of rent and mesne profits, to the extent of the amount for which I have had to give judgment, £445 by the time of the trial and £370 2s. 6d. at the date of the writ. That was not a claim which arose out of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. It arose out of the lease, and could never have been brought in the county court because it was outside the amount which is the limit of the jurisdiction of the county court. The claim for possession was a claim which the county court could have entertained, and which the county court alone should have entertained if it had stood alone, but the action was for arrears of rent and, in the second place, for possession, and, although the premises are within the Act, and, therefore, the claim in respect of the possession arises out of the Act, yet, as the claim for the rent arises out of the lease, the whole action is not one to which s. 17 (2) applies. That sub-section applies to a claim or proceeding arising out of the Act and provides that the county court shall have jurisdiction to deal with such a claim. It is true that the sub-section gives the county court jurisdiction to deal with such a claim, notwithstanding that, by reason of the amount of the claim or otherwise, the county court would not otherwise have jurisdiction. It is the amount of the claim arising out of the Act which, if in excess of the county court jurisdiction, is not to prevent the county court having jurisdiction. That sub-section deals with a case where the whole claim arises out of the Act.

In my view, therefore, this claim cannot be said to be within that sub-section, and there must be judgment for the plaintiffs for costs.

Judgment for the plaintiffs for costs.
Solicitors: *Pengelly & Co.* (for the plaintiffs); *Huntley, Son & Phillips* (for the defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Applied. BENNETT v. MILLETT. [1949] 1 K. B. 362

Overruled. GRAHAM AND SCOTT (SOUTHGATE), LTD. v. OXLADE. [1950] 1 All E.R. 856.

Overruled. GRAHAM & SCOTT v. OXLADE [1950] 2 K. B. 257

GIDDYS v. HORSFALL.

[King's Bench Division (Lewis, J.), February 6, 7, 12, 13, 1947.]

Agency—Remuneration—Commission—Estate agent—Contract to pay commission on introduction of "party prepared to purchase"—Willing purchaser found—Vendor's refusal to complete.

A firm of estate agents, having received instructions to sell a house, sent to the intended vendor printed terms of commission containing reference only to commission on sales and lettings, with a covering letter stating that there was enclosed "a copy of our terms of commission which are on the usual scale and which would become payable by you in the event of our being instrumental in introducing a party prepared to purchase on the terms of your instructions or on terms acceptable to you." The agents obtained a prospective purchaser and terms were agreed, but the vendor withdrew before the contract was signed.

HELD: the contract being for the payment of commission on the introduction, not of a purchaser in the sense of a person ultimately purchasing, but of a person prepared to purchase, the agents were entitled to their commission.

[AS TO REMUNERATION OF AGENTS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 256-263, paras. 431-436; and FOR CASES, see DIGEST, Vol. 1, pp. 488-503, 508-518, Nos. 1664-1728, 1753-1801.]

Cases referred to:

- (1) *Luxor (Eastbourne), Ltd. v. Cooper*, [1941] 1 All E.R. 33; [1941] A.C. 108; 110 L.J.K.B. 131; 164 L.T. 313; 57 T.L.R. 213; 46 Com. Cas. 120; Digest Supp.
- (2) *Jones v. Lowe*, [1945] 1 All E.R. 194; [1945] 1 K.B. 75; 114 L.J.K.B. 164; 172 L.T. 18; Digest Supp.
- (3) *Trollope (George) & Sons v. Martyn Bros.*, [1934] 2 K.B. 436; 103 L.J.K.B. 634; 152 L.T. 88; Digest Supp.
- (4) *Harrods, Ltd. v. Geneen*, [1938] 4 All E.R. 493; 55 T.L.R. 139; Digest Supp.

ACTION tried by LEWIS, J.

The plaintiffs who were estate agents, claimed from the defendant commission on a contract to obtain a prospective purchaser for the sale of a house. The facts appear in the judgment.

John Busse for the plaintiffs.

B. M. Goodman for the defendant.

LEWIS, J.: The plaintiffs are the well-known firm of Giddys, who are auctioneers and estate agents, and the defendant is Mrs. Horsfall, a widow, of "Redlands," Maidenhead Court, Berkshire. The plaintiffs sue her for commission which they allege to be due to them in respect of certain work which they say they did for her under a contract in relation to the house, "Redlands," in which Mrs. Horsfall still, apparently, lives.

THE statement of claim puts the plaintiffs' case in three different ways. First, it is said that there was an agreement to pay commission amounting to £136 5s. 0d. on certain terms and that there has been a breach of the agreement, and that amount, the work having been done by the plaintiffs to earn that commission, the defendant has not paid. Alternatively, the plaintiffs say that they are entitled to that sum as a reasonable amount for their work and labour in and about negotiations for the sale of "Redlands," and in the further alternative they plead that they are entitled to a sum, preferably the same sum by way of damages on the ground that the defendant prevented them from earning their commission under the contract which it is said they entered into. But shortly, the issue I have to try is whether the plaintiffs are right in saying that a contract was entered into with the defendant under which she agreed to pay the plaintiffs commission at a certain rate and according to a certain scale if they introduced to her a person who was ready and willing to purchase the house, "Redlands," at a price acceptable to the defendant and on the agreed terms and conditions as to possession and other similar things. There is no dispute about the figures. The sum claimed, £136 5s. 0d., is agreed as a figure, so that, if the plaintiffs are right in their contention as to what the contract was and in saying that they did what they were employed to do, there is no question that they are entitled to that amount. Put, again, shortly, the defendant's answer to the claim of the plaintiffs is this: "I never agreed, as you said I did. In so far as the written documents are concerned, they do not mean what you, the plaintiffs, say they mean, and you have not done, on my interpretation of the contract, what you undertook to do, and I do not owe you anything."

[HIS LORDSHIP said that the defendant wished to sell her house "Redlands," and she approached the plaintiffs with that object. A representative of the plaintiffs viewed the premises and a figure of £6,000 was mentioned. He continued:—] On June 12, 1945, after the inspection of the house the plaintiffs wrote a letter to the defendant referring to the interview they had had with her. The last paragraph of the letter, it is said, contains the terms on which the plaintiffs undertook the business. That paragraph says this:

We take this opportunity of enclosing herewith a copy of our terms of commission which are on the usual scale and which would become payable by you in the event of our being instrumental in introducing a party prepared to purchase on the terms of your instructions or on terms acceptable to you.

Enclosed in that letter was a printed document headed "Terms of Commission," and in that document there is no reference to any commission payable to the agents except on sales or lettings and so on—nothing which suggests that the plaintiffs would be entitled to any commission unless the matter went through. On receipt of that letter and enclosure the defendant did nothing. She did not write accepting it and she did not write quarrelling with it.

One of the matters I have to decide is what the last paragraph of the letter of June 12 means. Having arrived at the proper construction to put on it, I have to enquire whether what happened afterwards amounted to a performance by the plaintiffs of what they were to do. [HIS LORDSHIP said that the price at which the property was to be offered was reduced on the plaintiffs' advice to £5,250 and later to £4,950, to which figure the defendant agreed. A Mrs. Stow made an offer to the plaintiffs to purchase at the latter price "subject to contract," but when the defendant was informed she said she required £5,250.

The plaintiffs were able to obtain Mrs. Stow's acceptance of the increased figure and she paid a deposit, but, after certain negotiations as to the date of possession, the defendant informed the plaintiffs that she was not prepared to proceed with the sale.] There was, undoubtedly, an agreement by the defendant to sell this property for £5,250 with vacant possession on Sept. 30. The defendant backed out of it. It was, no doubt, as between the defendant and Mrs. Stow, an agreement from which the defendant was entitled to back out, because she had stipulated that the agreement should be subject to contract and no contract had been prepared or completed. That, however, is not the question I have to decide. I have to decide whether the plaintiffs have earned their commission. That depends, of course, on what the terms of the contract with regard to commission were. A

It is said on certain authorities which are well known, particularly *Luxor (Eastbourne), Ltd. v. Cooper* (1) in the House of Lords, that when a commission is to be payable on introducing a purchaser something more may have to be done than merely producing a person who is prepared to purchase. The use of the phrase "the purchaser" contemplates a sale and the commission agent is not entitled to his commission unless the person he puts forward as a prospective purchaser does purchase, but in the present case, on the terms of the last paragraph of the letter of June 12, that was not the contract between the plaintiffs and the defendant. The agreement is contained in this paragraph: B

We [i.e., the plaintiffs] take this opportunity of enclosing herewith a copy of our terms of commission which are on the usual scale and which would become payable by you in the event of our being instrumental in introducing a party prepared to purchase on the terms of your instructions or on terms acceptable to you. C

It does not say: "The commission will be payable in the event of Messrs. Giddys introducing a purchaser." It says: "Introducing a party prepared to purchase on the terms" laid down. In my view, there is a wide difference between a contract which contains a clause "commission is due on my introducing a purchaser" and "commission is due on my introducing a person who is ready and willing to purchase on your conditions." In the latter case, so long as the person produced is a willing purchaser or is prepared to be a willing purchaser on the terms set out, the estate agents have earned their commission, whether or not there is a sale to that person. I am satisfied that that is the right view to take of the construction of that contract and one which is supported by *Luxor (Eastbourne), Ltd. v. Cooper* (1), which was considered in *Jones v. Lowe* (2), in what with respect I venture to think was an admirably clear judgment of HILBERY, J. He pointed out passages in their Lordships' speeches which bear out the proposition that there can be a contract by a would-be vendor with estate agents to this effect: "I will pay you commission if you will introduce a person who is prepared to purchase," on certain terms. That is a different contract from one in which a house agent says: "I will introduce to you a purchaser and then I am entitled to my commission." In the latter case he has not introduced a purchaser until the person introduced has purchased. The latter does not become a purchaser until the sale is complete, and it is a very different matter from agreeing to pay a commission to an estate agent if he produces a would-be purchaser. That distinction was pointed out in *Luxor (Eastbourne), Ltd. v. Cooper* (1), and I would refer to the passages in their Lordships' opinions which HILBERY, J., cited in *Jones v. Lowe* (2). HILBERY, J., said ([1945] 1 K.B. at p. 75): D E F G

It seems to me hard, if an agent has done to the full extent what the parties contemplated that he should do, that he should not be entitled to say: "I have done what I contracted to do because I have introduced someone willing to purchase although he never in fact has become the actual purchaser." I do not feel, however, that it is open to me to put that construction on the words of the contract in the present case [the words of the contract in that case were: "in the event of my introducing a purchaser"] because I think that the observations made in the House of Lords, and particularly those of LORD RUSSELL OF KILLOWEN and LORD ROMER, in *Luxor (Eastbourne), Ltd. v. Cooper* (1) show that they were clearly of opinion that if an agent is employed to introduce a purchaser for a house and before the purchaser has entered into a binding and legal contract, the house is withdrawn from the market, the agent cannot say that he has earned his commission. LORD RUSSELL OF KILLOWEN said: "I do not assent to the view, which I think was the view of the majority in the first *Trollope* case (3), that a mere promise by a property owner to an agent to pay him a commission if he introduces a purchaser for the property at a specified price, or at a H

minimum price, ties the owner's hands, and compels him (as between himself and the agent) to bind himself contractually to sell to the agent's client who offers that price, with the result that if he refuses the offer he is liable to pay the agent a sum equal to or less than the amount of the commission either (a) on a *quantum meruit* or (b) as damages for breach of a term to be implied in the commission contract. As to the claim on a *quantum meruit*, I do not see how this can be justified in the face of the express provision for remuneration which the contract contains."

A A little later on HILBERY, J., still citing the speech of LORD RUSSELL OF KILL-OWEN, says ([1945] 1 K.B. at p. 76):

Later in his speech, LORD RUSSELL OF KILLOWEN said: "It is possible that an owner may be willing to bind himself to pay a commission for the mere introduction of one who offers to purchase at the specified or minimum price; but such a construction of the contract would in my opinion require clear and unequivocal language." There, again, having regard to the former passage I have read, the learned lord is drawing a distinction between the case of "introducing a purchaser" and one in which the contract is for the introduction of a person who is "willing to buy." LORD ROMER was clearly of the same opinion as LORD RUSSELL OF KILLOWEN. He said: "Where an owner of property employs an agent to find a purchaser, which must mean at least a person who enters into a binding contract to purchase, is it an implied term of the contract of agency that, after the agent has introduced a person who is ready, willing, and able to purchase at a price assented to by the principal, the principal shall enter into a contract with that person to sell at the agreed price subject only to the qualification that he may refuse to do so if he has just cause or reasonable excuse for his refusal?"

C In that passage LORD ROMER is again contrasting the situation of an agent employed to find a purchaser who becomes entitled to his commission on introducing a purchaser who enters into a binding contract with that of an agent who has only got so far as to find someone who is ready, willing and able to purchase, and his observations afford the clearest indication that he was of the same opinion as LORD RUSSELL OF KILLOWEN.

D Those decisions make it clear that in a case like the present before an agent is entitled to get his commission from the vendor it must be clearly shown that the contract was: "I, the agent, am entitled to get my commission if I introduce to you somebody who is able and willing and is prepared to buy your house." If, however, that is the form of contract, it is not necessary that the person introduced by the agent should become the actual purchaser or enter into a binding contract to purchase.

E The question I have to ask myself, if that is a correct statement of the law, as I understand it to be, is: Is this contract clear? It is said that the last paragraph of the letter of June 12 is not clear. It is suggested that the result of the enclosure in that letter of the printed document containing the terms of commission (which were only applicable to commission paid on sales), and of reading that document with the last paragraph of the letter is that it is not clear that the estate agents were saying: "We shall earn our commission if we introduce to you a person who is willing to purchase."

F I have considered that particular clause and it seems to me it is perfectly clear. It says: "We take this opportunity of enclosing herewith a copy of our terms of commission which are on the usual scale." If the paragraph had ended there, the recipient of that letter would immediately have seen that certain percentages on the price or rent obtained were charged for selling or letting. That would be saying: "We, the estate agents, do not claim our commission unless there is a sale or, in the case of a letting, there is a letting—a sale to a person we have introduced, or a letting to a person we have introduced."

G If, as I say, the last paragraph of the letter of June 12 had ended where I broke off, a great deal might be said for the contention that the plaintiffs earned their commission only if there were a sale, but the paragraph goes on, and, I venture to think, underlines the position clearly: "[the commission] would become payable by you in the event of our being instrumental in introducing

H a party prepared to purchase on the terms of your instructions." It does not say: "would become payable by you in the event of our being instrumental in introducing a purchaser." Then it might very well be said, on the authority of the case in the House of Lords, that that means a purchaser who actually either purchases or, at all events, enters into a binding contract to purchase. It might be the fact that, as Mrs. Stow did not, in fact, purchase and did not even enter into a binding contract, the plaintiffs should be held to be wrong, but looking at that paragraph, I think it is abundantly clear that the plaintiffs were saying: "The scale commission—the arithmetic of it—is to be found on

the printed circular which we enclose, and commission at that rate will be payable by you if we introduce a *bona fide* person who is prepared to pay and is capable of paying the price you are asking for 'Redlands.' " Mrs. Stow was perfectly able and willing and capable. She was anxious to buy and I am constrained to say that the plaintiffs are entitled to the commission which they claim. Therefore, there will be judgment for the amount of £136 5s. 0d.

Judgment for the plaintiffs with costs.

Solicitors: *Paisner & Co.*, agents for *K. R. Thomas & Son*, Maidenhead (for the plaintiffs); *W. C. Crocker* (for the defendant).

[Reported by F. A. AMIES, Esq., *Barrister-at-Law.*]

STARKEY v. WHITWICH COLLIERY CO., LTD.

[COURT OF APPEAL (Scott and Somervell, L.JJ. and Romer, J.), January 15, 16, 17, February 26, 1947.]

Workmen's Compensation—Termination of compensation—Objection by workman—Reference to medical referee—Medical referee's certificate—Interpretation by registrar—Arbitration proceedings started by workman—Jurisdiction of judge to entertain pending decision by registrar—Workmen's Compensation Act, 1925 (c. 84), ss. 12 (3), 19 (2).

On Jan. 26, 1945, employers served on a workman notice under the Workmen's Compensation Act, 1925, s. 12 (3), of their intention to terminate, on grounds set out in an accompanying doctor's certificate, weekly payments which were being made to him in respect of injuries sustained as the result of an accident while in their employment. On Jan. 29, notice was given by the workman objecting to the termination, accompanied by a doctor's certificate disagreeing with the employers' doctor. On Feb. 16, an application, signed by both parties, was made to the court for a reference to a medical referee under s. 19 (2) of the Act, and on Feb. 24 the employers paid into court a sum representing the disputed compensation. On Mar. 3, the medical referee's certificate was given, and on Mar. 23, the employers applied to the registrar for repayment of the amount in court on the ground that, according to the certificate, the workman was no longer incapacitated. At the request of the workman, who disagreed with this interpretation of the certificate, the registrar postponed indefinitely the hearing of the employers' application. On Oct. 25, 1945, the workman started arbitration proceedings, but the county court judge refused a hearing on the ground that he had no jurisdiction.

HELD, by SOMERVELL, L.J., and ROMER, J.: From the moment when the employers made a payment into court under s. 12 (3), the registrar was clothed with exclusive jurisdiction (subject to appeal) to determine the appropriate destination of the money so paid into court, and, as a necessary foundation for his decision, to determine the effect of the medical referee's certificate, and, therefore, the judge was entitled to refuse to hear the arbitration proceedings in which the interpretation of the certificate was relevant.

Per SCOTT, L.J. (dissentiente): The county court judge ought to have exercised his discretion by staying the arbitration to keep alive the workman's right to ask for an award in the event of the proceedings under s. 12 resulting in a decision that there was continuing incapacity due to the accident, in however small a degree.

Rhodes v. Digby Colliery Co., Ltd. ((1926) 19 B.W.C.C. 283) criticised and explained.

[AS TO REFERENCE TO A MEDICAL REFEREE, see HALSBURY, *Hailsham Edn.*, Vol. 34, pp. 989-994, paras. 1351-1359; and FOR CASES, see DIGEST, Vol. 34, pp. 376-378, Nos. 3051-3062.

FOR THE WORKMEN'S COMPENSATION ACT, 1925, s. 12, see HALSBURY'S STATUTES, Vol. 11, p. 551.]

Cases referred to :

- (1) *Rhodes v. Digby Colliery Co., Ltd., Wilson v. Digby Colliery Co., Ltd.* (1926), 19 B.W.C.C. 283, C.A. ; 34 Digest 451, 3697.
- (2) *Crewe v. John Rhodes, Ltd.* (1925), 133 L.T. 650 ; 18 B.W.C.C. 303, C.A. ; 34 Digest 377, 3055.
- (3) *Pudney v. France (William), Fenwick & Co., Smith v. Leach & Co.*, [1925] 1 K.B. 346 ; 94 L.J.K.B. 513 ; 132 L.T. 430 ; 17 B.W.C.C. 241, C.A. ; 34 Digest 380, 3081.
- (4) *Tempus Shipping Co., Ltd. v. Trott* (1929), 141 L.T. 19 ; 22 B.W.C.C. 181, C.A. ; Digest Supp.
- (5) *Ocean Coal Co. v. Davies*, [1927] A.C. 271 ; 96 L.J.K.B. 364 ; 136 L.T. 449 ; 19 B.W.C.C. 429, H.L. ; Digest Supp.

APPEAL by the workman from an award of DEPUTY-JUDGE TURNER at Ashby-de-la-Zouch County Court, dated Apr. 18, 1946. The judge held that he had no jurisdiction to hear arbitration proceedings when the matter in dispute was subject to such order as the registrar might make on the effect of a medical referee's certificate. The workman appealed from that decision. The facts appear in the judgments of SOMERVELL, L.J., and ROMER, J.

S. R. Edgedale for the workman.

F. W. Beney, K.C., and *Gilbert Dare* for the employers.

Cur. adv. vult.

Feb. 26. SCOTT, L.J. : I will ask SOMERVELL, L.J. to read the first judgment. SOMERVELL, L.J. read the following judgment. This is an appeal by the workman from a decision of the county court judge who dismissed an application for arbitration under the Workmen's Compensation Act, 1925, in the following circumstances.

The workman was a coal miner employed by the respondents on and before Sept. 29, 1942. On that date he was, while kneeling at the coal face in the course of his employment, bruised by a fall of stone and sustained serious injuries. From that date until Jan. 25, 1943, full compensation was paid by the employers under the Act. After that date partial compensation was paid. There was no award or recorded agreement. On Jan. 26, 1945, the employers served on the workman a notice under the Workmen's Compensation Act, 1925, s. 12 (3), of their intention to end the weekly payments after 10 days, on the grounds set out in an accompanying doctor's certificate. These were in substance that the injury arising from the accident was in the left ankle and that the workman had wholly recovered from that injury. Section 12 provides :

An employer shall not be entitled otherwise than in pursuance of an agreement or arbitration to end or diminish a weekly payment except in the following cases : . . . (3) where the medical practitioner who has examined the workman under section eighteen of this Act has certified that the workman has wholly or partially recovered, or that the incapacity is no longer due in whole or in part to the accident, and a copy of the certificate (which shall set out the grounds of the opinion of the medical practitioner) together with notice of the intention of the employer at the expiration of ten clear days from the date of the service of the notice to end the weekly payment, or to diminish it by such amount as is stated in the notice, has been served by the employer upon the workman : Provided that—(i) in the last-mentioned case, if before the expiration of the said ten clear days the workman sends to the employer the report of a duly qualified medical practitioner (which report shall set out the grounds of his opinion) disagreeing with the certificate so served by the employer, the weekly payment shall not be ended or diminished, except in accordance with such report, or if and so far as the employer disputes such report, except in accordance with the certificate given by the medical referee in pursuance of section nineteen of this Act ; and (ii) where an application has been made in pursuance of the said s. 19 to refer the dispute to a medical referee, it shall be lawful for the employer, pending the settlement of the dispute, to pay into court—(a) where the notice was a notice to end the weekly payment, the whole of each weekly payment becoming payable in the meantime ; (b) where the notice was a notice to diminish the weekly payment, so much of each weekly payment so payable as is in dispute ; and the sums so paid into court shall, on the settlement of the dispute, be paid to the employer or to the workman according to the effect of the certificate of the medical referee, or, if the effect of that certificate is disputed, as in default of agreement may be determined by the registrar or, on appeal, the judge.

On Jan. 29 notice was given on behalf of the workman objecting to the termination of the payments accompanied by a doctor's certificate disagreeing with the employers' doctor. On Feb. 16, in accordance with the procedure laid down in s. 12, the workman and the solicitors for the employers signed an

application to the court for a reference to a medical referee under s. 19 (2). On Feb. 24 the employers paid into court a sum representing the disputed compensation in respect of five weeks from Feb. 6 to Mar. 13. On Mar. 3, 1945, the medical referee gave his certificate. The medical referee's certificate *inter alia* recommended that the workman should be provided with a flat foot support for the foot which was injured. The employers having made arrangements to provide this, applied on Mar. 23, 1945, to the registrar for the repayment of the disputed compensation deposited in court, on the ground that on the certificate the workman was no longer incapacitated. The workman through his solicitor did not accept this view of the certificate, and there was, therefore, a dispute as to its effect, and the registrar fixed Apr. 19 for both parties to attend in order that he could deal with the matter under the provisions which I have read. On Apr. 13, 1945, the workman's solicitors asked the registrar to "hold up this question" until he heard from them again. The workman consulted fresh solicitors, and on Oct. 25, 1945, the workman started arbitration proceedings, which were stated to be as to the amount or duration of the compensation payable. In their answer dated Dec. 1, the employers *inter alia* took the point that the matter was subject to such orders as the registrar might make with respect to the money in court on the effect of the medical referee's certificate and, therefore, the judge had no jurisdiction to make an award. The matter finally came on for hearing on Apr. 8, 1946. The judge in substance accepted the employers' contention, and held that the present proceedings were misconceived and that the application must be dismissed with costs. From that decision the workman appeals.

It is, I think, convenient to formulate in outline the argument as put forward for the employers before considering the counter-arguments. The employers have invoked the procedure of s. 12, which confers jurisdiction on the registrar to determine the dispute as to the effect of the certificate on the lines as laid down by SCRUTTON, L.J., in *Rhodes v. Digby Colliery Co., Ltd.* (1). The referee's certificate is admittedly not only a relevant but a conclusive document in any arbitration proceedings. If these proceedings are allowed to continue, its effect, the determination of which is the issue under the proceedings pending before the registrar under the expressly conferred statutory jurisdiction, will arise for determination. The county court judge was, therefore, right in refusing to entertain or proceed with the application, the registrar not having exercised his jurisdiction.

Counsel for the workman emphasised a number of points with which I agree. A workman, if he so desires, is entitled to get an award. If, under s. 12, the result is a decision of disablement, total or partial, there is no procedure under s. 12 for embodying that result in an award. The jurisdiction of the registrar is based on and limited to the money (if any) in court. The award to which the workman is entitled, again assuming disablement, will extend *in futuro* until one or other of the conditions laid down in the Act for altering it is fulfilled. With this I agree. I think that the workman would have a right to apply for an award governing future payments if, as a result of the s. 12 procedure, he remains entitled to some compensation. In so far as the headnote to *Rhodes v. Digby Colliery Co., Ltd.* (1) suggests the contrary, I think it goes beyond the decision and is wrong. That case, as it seems to me, lays down the principle that the medical certificate, if there is no dispute as to its effect, or the registrar's or judge's decision as to the effect of that certificate if there is a dispute, is conclusive in any subsequent arbitration proceedings until a change of circumstances can be proved. This, I think, is the principle also as stated by ATKIN, L.J., in *Crewe v. John Rhodes, Ltd.* (2) (18 B.W.C.C. 303, at p. 315).

The real question is whether the judge was right in holding that the arbitration could not be held pending the decision of the registrar. If, after the effect of the certificate has been determined by registrar or judge, the workman desires to have an award, he is, of course, entitled to obtain one if under the certificate he can substitute a claim for compensation. Counsel for the workman referred to and relied on various authorities. *Pudney v. France (William), Fenwick & Co.* (3) laid down that where all that has happened under s. 12 (3) is the serving of the notice by the employer, the workman who had not served his counter certificate within the period stipulated is not debarred from bringing arbitration proceedings. That case and the reasoning in it does not really

help here, and counsel did not suggest it was conclusive. In *Tempus Shipping Co., Ltd. v. Trott* (4), the s. 12 procedure had been operated and a medical referee's certificate had been obtained, but no money had been paid into court. The jurisdiction of the registrar to determine the effect, if disputed, of the certificate did not, therefore, arise as it is based on money having been paid into court. The court held that in these circumstances any question arising on the certificate was for the judge either in a review under s. 11 or in an original arbitration under s. 21. The point that arises here did not, therefore, arise.

A I cannot find anything in what was said by the Lords Justices to throw doubt on the conclusion to which I have come in this case. I think the judgment of GREER, L.J., though it does not cover this case, on the whole supports my conclusion. Counsel also relied on *Ocean Coal Co. v. Davies* (5), where the employer contended that the man had recovered and stopped payments. He did not operate s. 14 of the Act of 1923, the predecessor of s. 12. The employer

B took proceedings by way of review on Sept. 21 to have the compensation terminated as from Sept. 3, the date when the employers' doctor had certified that the workman had recovered. The only question was whether the workman, who admitted before the review proceedings that he had entirely recovered by Sept. 3, could claim compensation from Sept. 3 till Oct. 27, the date of the hearing, on the ground that, although he had recovered, no step under the Act had been taken justifying the termination of payments. The issue is far

C removed from that with which we are concerned, and I do not think the decision or anything said in it really assists.

The judge was, in my opinion, right in refusing to hear the arbitration proceedings, on the ground that the effect of a document, which was a relevant document in these proceedings, was in issue in proceedings before a court which had statutory jurisdiction to deal with the issue, and, so far as the money in court is concerned, must deal with it. Not only was the application made to the registrar prior in date to the application for arbitration, but I think the statute contemplates that where a medical certificate comes into existence under s. 12, with its reference to s. 19, a dispute as to its effect is to be determined under the procedure laid down in s. 12 on the issue as to the disposal of the money in court, where money has been paid into court, and not in other proceedings. The judge could, I think, have stayed or adjourned the application, but he was entitled to come to the conclusion that in the circumstances it was misconceived and dismiss it as he did.

It is worth noting that there would not appear to be any great substance in the issue which we have to decide. If, as I hold, the employer is right, the effect of the certificate will be determined in the first place by the registrar with a right of appeal to the county court judge. If the workman is right, the effect of the certificate will be determined by the county court judge, not

F necessarily the same individual, sitting as arbitrator.

The appeal ought, therefore, in my judgment, to be dismissed.

SCOTT, L.J. : I will ask ROMER, J., to read his judgment.

ROMER, J., read the following judgment : I agree with the conclusions which have been expressed by SOMERVELL, L.J. Throughout the hearing of this appeal I felt, as I still feel, great difficulty in appreciating what useful

G purpose the issue by the workman of his application for arbitration on Oct. 25, 1945, was intended at that time to serve. The position as between himself and the employers was then as follows. The employers, having taken the view that the workman had recovered from the injury which he had suffered on Sept. 29, 1942, took the appropriate steps, on Jan. 26, 1945, to bring into operation the machinery provided by the Workmen's Compensation Act, 1925, s. 12. On Jan. 29, 1945, the workman served the counter-notice envisaged by the section,

H relying upon the report of his own doctor, whose view of the workman's condition differed from that which had been expressed in the medical report obtained by the employers. On Feb. 16, 1945, a joint application was made by employers and workman for a reference of the matter pursuant to s. 19 of the Act to a medical referee, and this application resulted in the certificate of Mar. 3, 1945, which was considered by the county court judge. Although both parties had co-operated down to Feb. 16, in utilising the s. 12 procedure, it is clear, I think, on the authorities, that it still remained open to the workman to jettison that procedure and proceed to arbitration instead, had he desired to do so. On

Feb. 24, 1945, the employers made a payment into court under s. 12 (3). From that moment onwards, in my judgment, the registrar was clothed with exclusive jurisdiction (subject to appeal) to determine the appropriate destination of the money so paid into court and, as a necessary foundation for his decision, to determine, in the event (which happened) of dispute, the effect of the medical referee's certificate.

On the latter point his decision, or that of the county court judge if taken to appeal, would, I think, be decisive for the purpose of any subsequent arbitration proceedings: see *Crewe v. John Rhodes* (2), and *Rhodes v. Digby* (1). The registrar gave an appointment for an inquiry into these matters but, at the request of the workman, the hearing thereof was, by agreement, deferred indefinitely. At no time prior to Oct. 25, 1945, when the workman issued his application for arbitration, had he any reason to suppose that the employers had abandoned, or were intending to abandon, the s. 12 procedure. The exclusive jurisdiction of the registrar, to which I have referred, was, accordingly, still alive. Had he been given an opportunity of exercising it he might have attributed to the medical referee's certificate an effect favourable or unfavourable to the workman. If unfavourable, then (subject to appeal) *cadit quæstio*. If favourable, then ground for applying for an award would have resulted. Without, however, giving the registrar an opportunity of considering the certificate at all the workman applied for arbitration. This application could only result in an award if the referee's certificate was interpreted favourably to the workman, and it was made to a tribunal (namely, the county court judge) which at that time had no jurisdiction to decide that question one way or the other. By para. 2 of their answer to the application the respondents pleaded that "the judge has no jurisdiction to make an award on this application." That plea, couched as it was in the present tense, was, I think, well founded; for the making of an award at that time involved the exercise by the judge of jurisdiction which was statutorily vested in another tribunal, namely, the registrar. This view of the matter was accepted by the judge, who, accordingly, dismissed the application for want of current jurisdiction. It was conceded by counsel for the employers, on the hearing of the appeal before us, that the judge might, alternatively, have stayed the application, allowing it to remain on the file until the registrar had discharged his functions under s. 12. This concession was rightly made because the judge might well, at some time thereafter, have acquired full power to deal with the application and make an award. I do not think, however, that he was wrong in concluding that he had not, at the time when the application was before him, the necessary jurisdiction to enable him to deal with it or in making an order for its dismissal on that ground.

SCOTT, L.J.: I am in general agreement with the judgment of SOMERVELL, L.J., with which ROMER, J., concurs, but I think that the judge ought to have exercised his discretion by staying the arbitration to keep alive the workman's right to ask for an award in the event of the proceedings under s. 12 resulting in a decision that there was continuing incapacity due to the accident, in however small a degree. This being the position, I cannot agree that the judge was right in upholding the employers' contention that he had no jurisdiction, for, so long as the s. 12 procedure was incomplete, he had no right to assume that it would, as an inevitable and foreseeable result, end in a decision *inter partes* wholly terminating the workman's right, not merely to a present payment week by week for some measure of incapacity, but even to a declaration of liability. Unless, when the workman started his proceeding for arbitration, he had no right under the Act even to launch it, the judge was, for the reasons I have already given, clothed with jurisdiction, and in holding that he had none was misdirecting himself in law.

My own view is that this court ought, therefore, to set aside his judgment and substitute a stay, pending the termination of the s. 12 proceeding in a decision by the registrar, or, on appeal from him, by the judge, with liberty to either party to apply in the stayed arbitration, but my brethren differ, and the judgment will, therefore, be as they think right.

Appeal dismissed with costs.

Solicitors: *Bennett, Ferris & Bennett*, agents for *Bray & Bray*, Leicester (for the workman); *Peacock & Goddard*, agents for *Elliott Smith & Co.*, Mansfield (for the employers). [Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

RICHES v. WESTMINSTER BANK, LTD.

[HOUSE OF LORDS (Viscount Simon, Lord Wright, Lord Porter, Lord Simonds, Lord Normand), January 23, 24, 27, 28, March 21, 1947.]

Income tax—Assessment—Interest of money—Interest included in judgment for debt or damages—Income Tax Act, 1918 (c. 40) sched. D, para. 1 (b); All Schedules Rules, r. 21—Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 3 (1).

In an action against the respondents as judicial trustees of the will of R., deceased, the appellant established a claim to a sum of £36,255 representing a debt. In giving judgment for the appellant for that amount, the judge exercised his discretion under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3, by awarding the appellant an additional sum of £10,028 as interest, being 4 per cent. per annum on the principal sum from the date when the cause of action arose to that of the judgment. The respondents paid to the appellant the principal sum, but paid only £5,014 of the additional amount, claiming that the £10,028 was taxable income within the Income Tax Act, 1918, sched. D, from which they were bound to deduct tax at the standard rate in force for the year 1943-1944.

HELD: (i) the additional sum awarded under the Act of 1934, was "interest of money" within the meaning of the Income Tax Act, 1918, sched. D., para. 1 (b). The proposition that interest is awarded as damages imported the justification for the award, but did not affect the quality of interest as such, and it was irrelevant that the additional sum only came into existence when the court exercised its discretion to award it, for it represented the total of periodical accretions of interest during the whole time in which the payment of the debt was withheld.

Re National Bank of Wales Ltd., ([1899] 2 Ch. 629) overruled in part.

[AS TO INTEREST ON MONEY, see HALSBURY, Hailsham Edn., Vol. 23, pp. 174-180, paras. 253-260; and FOR CASES, see DIGEST, Vol. 35, pp. 177, 178, 182-185, 190, 191, Nos. 64-74, 117-142, 188-193.]

AS TO INCOME TAX PAYABLE ON INTEREST, see HALSBURY, Hailsham Edn., Vol. 17, pp. 178-180, 232-236, paras. 372-376, 471-475; and FOR CASES, see DIGEST, Vol. 28, pp. 63, 64, Nos. o.-t., Digest Supp., Income Tax, 373a, 428a.]

Cases referred to:

- (1) *Re National Bank of Wales, Ltd.*, [1899] 2 Ch. 629; 28 Digest 71, 373; *sub nom. Re National Bank of Wales, Cory's Case*, 68 L.J.Ch. 634.
- (2) *Simpson v. Exors of Bonner Maurice* (1929), 14 Tax Cas. 580; Digest Supp.
- (3) *Page v. Newman* (1829), 9 B. & C. 378; 4 Man. & Ry. K.B. 305; 7 L.J.O.S.K.B. 267; 35 Digest 179, 85.
- (4) *London, Chatham and Dover Ry. Co. v. S.E. Ry. Co.*, [1893] A.C. 423; 63 L.J.Ch. 93; 69 L.T. 637; 58 J.P. 36; 35 Digest 183, 123.
- (5) *Glenboig Union Fireclay Co., Ltd. v. Inland Revenue Commissioners*, [1922] S.C. (H.L.) 112; 12 Tax Cas. 427; Digest Supp.
- (6) *Inland Revenue Commissioners v. Barnato*, [1936] 2 All E.R. 1176; 155 L.T. 211; 20 Tax Cas. 455; Digest Supp.
- (7) *Webster v. British Empire Mutual Life Assurance Co.* (1880), 15 Ch.D. 169; 49 L.J.Ch. 769; 43 L.T. 229; 35 Digest 184, 140.
- (8) *Ryley v. Master, Sheba Gold Mining Co. v. Trubshawe*, [1892] 1 Q.B. 674; 61 L.J.Q.B. 219; 66 L.T. 228; 35 Digest 191, 191.
- (9) *Cook v. Fowler* (1874), L.R. 7 H.L. 27; 43 L.J.Ch. 855; 35 Digest 177, 67.
- (10) *Vyse v. Foster* (1872), L.R. 8 Ch. App. 309; 42 L.J.Ch. 245; 27 L.T. 774; 43 Digest 916, 3571.
- (11) *Inland Revenue Commissioners v. Ballantine* (1924), 8 Tax Cas. 595; 28 Digest 63, t.
- (12) *Schultze v. Bensted (Surveyor of Taxes)* (1915), 7 Tax Cas. 30; 28 Digest 63, g.
- (13) *Moss Empires, Ltd. v. Inland Revenue Commissioners*, [1937] 3 All E.R. 381; [1937] A.C. 785; 106 L.J.P.C. 138; 157 L.T. 396; 21 Tax Cas. 264; [1937] Digest Supp.
- (14) *Sweet v. Macdiarimia (or Henderson)* (1920), 7 Tax Cas. 640; 28 Digest 63, r.
- (15) *Carmichael v. Caledonian Ry. Co.*, 8 M., H.L. 108.
- (16) *Blair's Trustees v. Payne* (1884), 12 R. (Ct. of Sess.) 104; 22 Sc.L.R. 54; 42 Digest 103, r.
- (17) *Lee's Trustees v. Dun*, [1912] S.C. 50.

APPEAL by the defendant from a decision of the Court of Appeal, reported [1945] 2 All E.R. 111, affirming a decision of EVERSHEDE, J., reported [1945]

1 All E.R. 466. The plaintiff bank sought a declaration to determine the question whether a sum of money awarded as interest pursuant to the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3, and included in the total sum for which judgment was pronounced in favour of the defendant against the plaintiffs in another action between the same parties, was, or was not, "interest of money" within the meaning of the Income Tax Act, 1918, sched. D, and as such subject to tax. The facts appear in the opinions of their lordships.

Frederick Grant, K.C., and *N. E. Mustoe* for the appellant.

Dovan, K.C., and *L. C. Graham-Dixon* for the respondents.

VISCOUNT SIMON: My Lords, the question which the House has to decide has not, it seems, come previously before the courts. It is whether a sum of money, awarded under the powers conferred by the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3 (1), as interest, and included in the total sum for which judgment is given, is "interest of money" within the meaning of sched. D to the Income Tax Act, 1918. If it is, the defendant, when paying the judgment debt, is entitled to deduct income tax on the amount of this award of interest, and the plaintiff must "allow such deduction" on receipt of the balance, while the defendant will retain what is deducted if he has paid it out of profits or gains brought into charge to tax (r. 19 of "All Schedule Rules"), or will account for it to the Revenue in so far as the payment is not made out of profits or gains brought into charge (r. 21 of "All Schedules Rules").

The facts which give rise to this question may be shortly stated as follows. The appellant had an agreement with one Ridsdel that, in consideration of the appellant introducing to him a transaction for the purchase of a block of shares, Ridsdel would pay to the appellant half of any profits which he realised on the resale of the shares. Ridsdel resold the shares at a profit, but fraudulently pretended that the sum which he thereafter paid over represented the whole of the appellant's share of the profit. Later, the appellant ascertained that the profit of which he was to receive one half was much greater than Ridsdel had represented, and after Ridsdel's death he brought an action before OLIVER, J., against the respondents as judicial trustees of Ridsdel's estate for the balance due to him, which was ascertained to be a sum of £36,255. The judge, exercising his power under s. 3 of the Act of 1934, in addition to giving judgment in the appellant's favour for this amount, awarded an additional sum of £10,028, being the equivalent of interest on £36,255 at 4 per cent. per annum from June 14, 1936 to May 14, 1943, so that the total sum for which judgment was given was £46,283. The respondent bank has paid to the appellant the amount due under the judgment except that it has deducted £5,014 representing income tax at the rate of 10s. in the £ on the additional sum of £10,028.

The appellant contends that the additional sum of £10,028, though awarded under a power to add interest to the amount of the debt and though called interest in the judgment, is not really interest such as attracts income tax, but is damages. The short answer to this is that there is no essential incompatibility between the two conceptions. The real question, for the purpose of deciding whether the Income Tax Acts apply, is whether the added sum is capital or income, not whether the sum is damages or interest. Before the coming into force of the Act of 1934, the rule at common law prevailed that when an action for the payment of a debt succeeded the court could not add interest on the debt down to judgment unless interest was payable as of right under a contract expressed or implied. Provisos (b) and (c) of s. 3 show that these exceptions were not touched by the Act of 1934 and the discretion conferred on the court by the enacting words is a discretion to add interest when judgment is given for a debt or damages, although there is no contractual right to interest. The added amount may be regarded as given to meet the injury suffered through not getting payment of the lump sum promptly, but that does not alter the fact that what is added is interest. This is the view taken by EVERSLED, J. and by the Court of Appeal (DU PARCQ, and MORTON, L.JJ. and COHEN, J.) and this view, in my opinion, is correct.

Two decided cases which might seem to give support to the argument of

counsel for the appellant are *Re National Bank of Wales, Ltd.* (1) and *Simpson v. Exors. of Bonner Maurice* (2). In the former, R. S. WRIGHT, J., had before him a case in which an ex-director of the bank had been ordered to pay to the liquidator of the company a sum of money together with interest thereon at 5 per cent. per annum on the ground that he had been guilty of misfeasance in sanctioning the payment of dividend out of capital. The judge declined to allow this individual to deduct income tax from the interest he was ordered to pay. He is reported as saying, ([1899] 2 Ch. 651), that it is not a question of contract at all and that the order made had the effect that the company had had its capital withheld and had suffered damages equivalent to 5 per cent. per annum for that reason. The judge added : (p. 651)

I can see no reason why it should not get the whole of the damages back. It is called "interest" but it is really damages for withholding its capital from the company.

These observations have long been considered as of doubtful validity and the time has come to say that they are wrong. If damages are increased by adding interest on a principal sum, that does not prove that such interest is not liable to tax. *Simpson v. Exors. of Bonner Maurice* was of a very special character. It arose under art. 297 of the peace treaty with Germany after the 1914-1918 war. Article 297 provided that the nationals of allied and associated Powers should be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests in Germany. Before the war a British subject had deposited securities, stocks and shares in banks in Germany. He died during the war, and as a result of the peace treaty claims on the part of his representatives were admitted in respect of amounts representing in part the capital value of these securities and in part compensation under the treaty computed on the basis of interest on certain amounts. The decision of ROWLATT, J., that this compensation could not be regarded as interest was confirmed by the Court of Appeal. The treaty did not give to the claimants any right to interest as such and the view taken was that the whole amount was compensation such as was authorised by the treaty. ROWLATT, J. observed (14 Tax Cas. 593) that the case was :

... like damages for detention of a chattel, and unless it can be said that damages for detention of a chattel can be called rent or hire for the chattel during the period of detention, I do not think this compensation can be called interest.

I do not consider that this decision can be regarded as leading this House to a conclusion in favour of the appellant.

Counsel for the appellant advanced a further argument that the added sum was not in the nature of "interest" in the sense of that expression in the Income Tax Acts because the added sum only came into existence when the judgment was given and from that moment had no accretions under the order awarding it. (Interest on a judgment debt is, of course, a separate matter and counsel did not challenge the view that this latter interest was subject to tax). But I see no reason why, when the judge orders payment of interest from a past date on the amount of the main sum awarded, (or on a part of it) this supplemental payment, the size of which grows from day to day by taking a fraction of so much per cent. per annum of the amount on which interest is ordered, and by the payment of which further growth is stopped, should not be treated as interest attracting income tax. It is not capital. It is rather the accumulated fruit of a tree which the tree produces regularly until payment. I move that the appeal be dismissed with costs.

LORD WRIGHT : My Lords, this appeal raises the question whether a sum of £10,028 awarded to the appellant as interest pursuant to the Law Reform (Miscellaneous Provisions) Act, 1934, (hereinafter called the Act), s. 3 (1), and included pursuant to that section in the total sum for which judgment in the King's Bench Division was given in favour of the appellant, is "interest of money" within the meaning of the Income Tax Act, 1918, sched. D, para. 1 (b), which enacts (*inter alia*) that tax under this schedule shall be charged in respect of " (b) all interest of money."

The appellant brought the action against the judicial trustees of one Ridsdel, claiming one half of the profits realised by Ridsdel by the sale on joint account with the appellant of certain shares in 1936. The action was commenced in

1939 when the appellant discovered that Ridsdel had not disclosed the true amount of the profit realised. The judge at the trial by his judgment given on May 17, 1943, found in favour of the appellant, holding that £36,255 was due on balance to him and in addition awarded him £10,028 in exercise of his discretion under the Act, as being interest at 4 per cent. per annum on £36,255 from June 14, 1936, when the profits were realised by Ridsdel, to May 14, 1943. The Court of Appeal affirmed that judgment. The respondent claimed that he had satisfied the judgment by a payment of £41,269, which was arrived at after deduction of £5,014 representing income tax on the sum of £10,028 pursuant to the Income Tax Act, 1918, All Schedules Rules, r. 21. The appellant claimed that income tax was not deductible and the respondent then brought the action out of which this appeal arises claiming that the payments made to the appellant satisfied the judgment. The dispute involved the question whether the sum of £10,028 was interest under the Act.

The main questions in the appeal may be described as being whether the sum of £10,028 awarded as part of the judgment was interest under the Act and, if so, whether it fell within the words of the Income Tax Act, 1918, sched. D, para. 1 (b), which have been quoted above. Both courts below (as already stated) answered both questions in the respondent's favour. Their judgments deal so admirably with the issues that I should have been content to agree with them without more, but, having regard to the general importance of the questions, I add a brief statement of my reasons for agreeing.

The contention of the appellant may be summarily stated to be that the award under the Act cannot be held to be interest in the true sense of that word because it is not interest but damages, that is, damages for the detention of a sum of money due to the respondent from the appellant and hence the deduction made as being required under the All Schedules Rules of the Income Tax Act, 1918, r. 21, is not justified because the money was not interest. In other words, the contention is that money awarded as damages for the detention of money is not interest and has not the quality of interest. EVERSLED, J., in his admirable judgment, rejected that distinction. The appellant's contention is, in any case, artificial and is, in my opinion, erroneous because the essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation. From that point of view it would seem immaterial whether the money was due to him under a contract, express or implied, or a statute, or whether the money was due for any other reason in law. In either case the money was due to him and was not paid, or, in other words, was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation whether the compensation was liquidated under an agreement or statute, as, for instance, under the Bills of Exchange Act, 1882, s. 57, or was unliquidated and claimable under the Act as in the present case. The essential quality of the claim for compensation is the same and the compensation is properly described as interest. For reasons that go back far in history the distinction between interest proper as it has been called, that is, interest due under a contract, statute or the like, and interest by way of damages, that is, not due under an agreement express or implied has since very early days been recognised in England whether in the ecclesiastical or common law courts. Moneylending was condemned by the mediaeval mind as usurious (TAWNEY, *RELIGION AND THE RISE OF CAPITALISM*, at pp. 54 and 55). The reproach of usury was not answered by saying the interest was due under a contract. Tawney states (p. 54):

What remained to the end unlawful was interest as a fixed payment stipulated in advance for a loan of money or wares without risk to the lender.

The profits should go, it was said, to the borrower since he makes the loan profitable by his work. These ideas could not survive the exigencies of modern commerce, but they did, and still in a sense do, influence the rules relating to interest. The legislature found it necessary to intervene in 1833 by means of the Civil Procedure Act (Lord Tenterden's Act) of that year which qualified

the old English rule that *prima facie* money claims do not carry interest. Before that date it had been held as, for instance, in *Page v. Newman* (3), that a common law court in awarding damages was not entitled to award interest in addition in the absence of express or implied contract or statute. The Admiralty Court, however, claimed and exercised that right. The court of equity also, when making a money decree, held itself entitled to award interest for the period between the time when the money was due and the date of the decree, when it thought that proper in order to effect a *restitutio in integrum*.

The Civil Procedure Act, 1833, corrected to some extent the limitations of the common law courts' powers in this matter. By s. 28 of that Act the jury were to be entitled, if they should think fit, to allow interest to the successful plaintiff in a limited class of cases, that is, where the debt was a sum certain under a contract in writing payable at a time certain or, if otherwise, made payable by a demand in writing fixing a certain date and notifying the debtor that in default interest would be claimed. Section 29 similarly enabled the jury to give damages "in the nature of interest" in certain torts and also on claims on policies of insurance. The element of discretion found in the earlier Act was preserved by the Act of 1934. The Act was general in its terms. It made no distinction between interest and damages in the nature of interest. The word, indeed, was used indifferently. The essential similarity of different types of interest is put beyond doubt by s. 3 (1) (b) of the Act which, after para. (a) has excluded power to give compound interest, provides that the Act is not to apply to any debt where the interest is payable as of right. This would include all cases of what is called interest proper, under a contract or the like, so that the interest particularly dealt with by the Act is what has been called interest by way of damages. The category (c) included in s. 3 (1) of the Act was necessary to exclude interest awarded on the dishonour of a bill of exchange the award of which, though often described as damages, is now statutory. The award is not in the discretion of the court where the interest is payable as of right. It is clear that the Act used the word "interest" in its widest sense, including both interest proper and interest by way of damages. It is not a consolidating Act, but a reforming or amending Act. It is intended to enlarge the powers of the court. In 1893 this House reviewed the then existing position as it stood at common law and the established principle up to that date.

LORD HERSCHELL, L.C., in *London, Chatham & Dover Ry. Co. v. S.E. Ry. Co.* (4) said ([1893] A.C. 440) that the words of Lord Tenterden's Act (the Act of 1833) kept claims for interest within very narrow limits which to him seemed too narrow for the purposes of justice, but he held that the authorities which he cited made it impossible to reopen the question or to hold that in the circumstances before the House in that case interest could be awarded. The interest in question was an instance of what has been called interest by way of damages, but it may be noted that throughout such interest is still described as interest, even though the court was debarred from awarding it by the then state of law. The case itself was typical. A large sum of money was due but was not paid for a substantial period. The decision was that, as it was not within the express terms of the Act of 1833, no interest could be awarded. The purpose of the Act of 1934 was to remove the fetters still left under Lord Tenterden's Act and to effect the reform which the Lord Chancellor thought that justice required. In my judgment, the Act has done so.

The question that remains is whether the interest is within the scope of the charging words of the Income Tax Act, 1918, sched. D, cited above which charges "all interest of money." In my opinion, there is no incompatibility for this purpose between interest proper and interest by way of damages especially since the Act of 1934, and, as I think, before that Act. Thus, there does not seem to be any reason why the sum in question should not be taxed. I do not repeat the reasoning which I have sought to explain in the earlier part of this judgment. It is true that in *Re National Bank of Wales* (1), WRIGHT, J., distinguished damages from interest. The judge held that the debtor should repay 5 per cent. per annum on sums which he had wrongfully withheld. He said ([1899] 2 Ch. 651): "it is called interest but is really damages." If the judge was meaning that such damages were not capable of being treated as interest, he was, in my opinion, guilty of an error in law, even before the Act of 1934. I do not think it necessary to express any opinion on the actual decision of

that case which turned on its particular facts. The same may be said of various decisions under the Income Tax Act, 1918, determining whether particular payments were interest within sched. D. The distinction through these cases is whether the payments were payments of profits, that is, were income, or were payments on capital account estimated in terms of interest. This latter type of case is less frequent in the books, but a good illustration is to be found in *Glenboig Union Fireclay Co., Ltd. v. Inland Revenue Commissioners* (5), in which it was held that the sum there awarded was, in truth, though described as interest, only a method of determining the value of the fireclay sterilized in the hands of the company for which it was entitled to compensation. That was a payment on capital account. It was for the destruction of a capital asset, which was indeed the source of profits but could not be regarded as income. On the other side of the line is *Inland Revenue Commissioners v. Barnato* (6), where the payment was a sum of compound interest which had been made to the taxpayer in commutation of his share of profit in a partnership. It was a sum of profit, not capital. I need not go through the numerous cases which have been cited to illustrate the circumstances under which a sum has been taxed as income or has been held immune on the ground that, whether called interest or not, it was really a payment on capital account. In regard to some of these decisions opinion may differ as to the exact result arrived at on the facts, but they all agree in using the word "interest" and in drawing as the relevant distinction that between capital and income. This distinction depends on substance, not on the mere name. A

Of some minor contentions which have been raised, I shall briefly advert to one. It was said that the sum in question could not be interest at all because interest implies a recurrence of periodical accretions, whereas this sum came to existence *uno flatu* by the judgment of the court and was fixed once for all. But in truth it represented the total of the periodical accretions of interest during the whole time in which payment of the debt was withheld. The sum awarded was the summation of the total of all the recurring interest items. D
The objection fails. In my opinion, the appeal should be dismissed.

LORD SIMONDS: LORD PORTER, who is unable to be here, has asked me to say that he has read and agrees with the opinion I am about to deliver.

My Lords, this appeal, which is brought from an order of the Court of Appeal affirming an order of EVERSLED, J., raises for the first time a question of some general importance arising under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3. E

The appellant, in the year 1936, entered into an agreement with one Ridsdel under which, in consideration of his introducing to Ridsdel a transaction which involved the purchase of a block of shares in a certain limited company, Ridsdel was to pay him one half of any profits which might be made on a resale of the shares. Ridsdel bought the shares and resold them at a profit of £93,350, but he paid to the appellant sums amounting to £10,420 only, alleging that the profit was no more than £20,840. On Apr. 2, 1939, Ridsdel died, and the appellant, having discovered shortly afterwards that the profit was far greater than was alleged, on Apr. 2, 1942, commenced an action in the King's Bench Division against the respondent as judicial trustee of Ridsdel's last will in which he claimed (*inter alia*) an account of the profits made on a resale of the said shares and payment of the difference between the sum already received by him and one half of the profits found to have been made on taking such account. F

It is unnecessary to say anything more about this action, which was vigorously defended, except that OLIVER, J., gave judgment for the appellant for the sum of £36,255 (being the difference between the sum of £10,420 already received by the appellant and £46,675, *i.e.*, one half of the profit of £93,350 admittedly made by Ridsdel), together with a further sum of £10,028 (making £46,283 in all) which the judge in the exercise of his discretion awarded as interest under the section to which I have referred. This sum of £10,028 represents interest at 4 per cent. per annum on £36,255 from June 14, 1936 (when that sum should have been paid), to May 14, 1943 (the date of judgment). G
From this judgment the respondent appealed to the Court of Appeal, but his appeal was dismissed. H

In July and August, 1943, the respondent paid the appellant sums amounting to £41,269, made up of the sum of £36,255, of a sum for interest on the judgment after the date of judgment and of a sum of £5,014, being the sum of £10,025 included in this judgment as interest after deduction of income tax therefrom at the standard rate then prevailing of 10s. in the £. For this balance of £5,014 the respondent held itself accountable to the Crown. The respondent made this deduction under the All Schedules Rules of the Income Tax Act, 1918, r. 21, and it is common ground that the deduction, if permissible, must be made under this rule. The appellant, however, contended that the deduction was not permissible and threatened to levy execution under the judgment unless the balance of £5,014 was paid to him. To avert this event the respondent commenced an action in the Chancery Division against the appellant, claiming that the judgment had been satisfied by the payments already made. In this action *EVERSHED, J.*, gave judgment for the respondent.

B The Court of Appeal unanimously affirmed his decision. Hence this appeal.

My Lords, to me the case appears a very plain one, and but for the novelty and importance of the point I should have been content to adopt without further words of my own the reasons and conclusion of the judges in the courts below. The question may be simply stated. It is whether, where in an action for the recovery of any debt or damages the court exercises its discretionary power under s. 3 of the cited Act and orders that there shall be included in the sum for which judgment is given interest on the debt or damages, the sum of interest so included is taxable under the Income Tax Acts.

C I will remind your Lordships first of the provisions of the Income Tax Act, 1918, under which, if at all, this sum is taxable. Under s. 1 of the Act tax is charged on profits and gains described or comprised in the scheds. A, B, C, D, E, contained in sched. I to the Act and in accordance with the rules respectively applicable to those schedules. By sched. D, para. 1 (b), it is enacted that tax under this schedule shall be charged in respect of "(b) All interest of money . . ." I do not think it necessary to make further reference to the provisions of the Income Tax Act. It is sufficient to say that in order to attract tax it must be established that the sum in question was income, and that it was that species of profit or gains which answers the description "interest of money."

E It is convenient now to set out the section of the Act of 1934 under which payment was ordered :

3. (1) In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment : Provided that nothing in this section—(a) shall authorise the giving of interest upon interest ; or (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise ; or (c) shall affect the damages recoverable for the dishonour of a bill of exchange.

(2) Sections 28 and 29 of the Civil Procedure Act, 1833, shall cease to have effect.

F My Lords, I do not think that it could readily have occurred to anyone that interest awarded under this section was not "interest of money" within the taxing provision, were it not that behind it there lies a history to which I must shortly refer. Taken by itself, the section provides in unambiguous terms that, where judgment is given for a principal sum, the court may order that it shall be an interest-bearing principal sum. The principal sum is "money" and the interest on it is "interest of money." I can see no reason why it should not be "interest of money" for the purposes of tax. That the word "interest" is used in no unusual sense plainly appears from provisos (a) and (b) where it can only have its familiar meaning. It has, however, been urged by counsel for the appellant that this view of the section, simple and straightforward as it is, ought not to be entertained by your Lordships, and, as I have said, he invokes the history of this branch of the law to support his argument. My Lords, while I am ever prepared to consider any statute in the light of pre-existing law, I must admit to a reluctance to be diverted by the shadow of the past from the plain meaning of plain words. So it is that in this case I get little help from the Aristotelian view of the sterility of money or the mediæval conception, embodied in some of our earliest statutes, that the increase of money by way of

interest is indefensible usury or even from the way in which in statute and in judicial utterance reference is made to "compensation" or "damages" when interest becomes payable otherwise than under a contractual obligation. The stages of the appellant's argument clearly appear in his formal reasons. They may be thus summarised. First, he says that interest awarded under the Act of 1934 is of the same character as interest awarded under the Civil Procedure Act, 1833, ss. 28 and 29; secondly, that interest awarded under those sections was an award of damages or in the nature of damages; and, thirdly, that an award of damages, or in the nature of damages, is not "interest of money" within the meaning of the Income Tax Acts."

The first stage in this argument does not carry me far. By s. 3 (2) of the Act of 1934 the relevant sections of the earlier Act are repealed. The character of the interest to be awarded under s. 3 (1) is surely to be ascertained from the words of that subsection rather than from those of the sections which it supercedes, but, assuming that the later statute is to be interpreted in the light of the earlier one, it can only be to s. 28 that reference may be made. It will be observed that in the section we have now to construe "debt" and "damages" are joined together. Whether the principal sum, for which judgment is given in respect of debt or damages, interest may be awarded in respect of that sum. This may be contrasted with the earlier statute, which, by s. 28, provided for the allowance of "interest" simpliciter, but, by s. 29, provided for the giving of "damages in the nature of interest." I should not be prepared to concede that it makes any difference for the purposes of income tax whether a sum of money is called "interest" or "damages in the nature of interest" or "interest in the nature of damages," but the appellant's argument ties him to s. 28 which refers to the allowance of "interest" and nothing else.

I come then to the second stage and ask: What is the character of interest allowed under the Act of 1833, s. 28? Here the argument is that, call it interest or what you will, it is damages and, if it is damages, then it is not "interest in the proper sense" or "interest proper," expressions heard many times by your Lordships. This argument appears to me fallacious. It assumes an incompatibility between the ideas of interest and damages for which I see no justification. It confuses the character of the sum paid with the authority under which it is paid. Its essential character may be the same, whether it is paid under the compulsion of a contract, a statute, or a judgment of the court. In the first case it may be called "interest", and in the second and third cases "damages in the nature of interest," or even "damages," but the real question is still what is its intrinsic character, and in the consideration of this question a description due to the authority under which it is paid may well mislead. I will illustrate my meaning by a citation from LORD HERSCHELL's speech in *London, Chatham and Dover Ry. Co. v. S.E. Ry. Co.* (4) ([1893] A.C. 437):

But, my Lords, the appellants contended that even although they might not under the terms of Lord Tenterden's Act be entitled to interest, yet interest might be given by way of damages in respect of the wrongful detention of their debt. I confess that I have considered this part of the case with every inclination to come to a conclusion in favour of the appellants, to the extent at all events . . . of giving them interest from the date of the action; and for this reason, that I think that when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use. Therefore, if I could see my way to do so, I should certainly be disposed to give the appellants, or anybody in a similar position, interest upon the amount withheld from the time of action brought at all events. But I have come to the conclusion, upon a consideration of the authorities, agreeing with the court below, that it is not possible to do so, although no doubt in early times the view was expressed that interest might be given under such circumstances by way of damages.

I note in passing that what LORD HERSCHELL would fain have done was done by the section now under review, but my purpose in citing this passage is to show that interest may be none the less interest because it is awarded by way of damages. So, again, in *Webster v. British Empire Mutual Life Assurance Co.* (7), where a claim was made for interest on certain policy moneys, but the policy contained no provision for interest, JAMES, L.J., said (15 Ch.D. 174):

A policy of assurance does not bear interest. That is conceded on all hands. In

itself, there is neither an express nor an implied contract to pay interest on the amount payable. Under the Act 3 and 4 Will. 4, c. 42, whether it comes within any common law principle or not, anything in the nature of interest can only be given, in my view, as damages for the wrongful detention of money which ought to have been paid.

A These and similar observations, which I might multiply (*e.g.*, in a line of cases concerned with "specially indorsed" writs, see *Ryley v. Master* (8), were cited on behalf of the appellant to show that a sum awarded as interest under the Act of 1833, s. 28, is in essence not "interest proper" but damages. But, to my mind, the answer is given by EVERSHED, J., in his judgment in words which I cannot improve on and, therefore, adopt ([1945] 1 All E.R. 472):

... the proposition that interest is awarded as damages or by way of damages, as in the case of *Cook v. Fowler* (9) imports the justification for the award or for the rate awarded, but does not affect the quality of interest as such ...

B Perhaps the position may become even clearer if for "damages" the word "compensation" is substituted. It would be difficult, I suppose, in a case where a man, being deprived of the use of his money, was awarded interest by way of compensation, to say that what he was awarded was not interest but something else. That is the very language of equity: *cf. Vyse v. Foster* (10). In that case as JAMES, L.J., points out (L.R. 8 Ch. App. 328) the executors or trustees had committed a breach of trust by allowing trust money to remain outstanding on the personal security of persons engaged in trade. They were bound, therefore, to make good the trust funds and interest. The language that JAMES, L.J., employs is illuminating. He says (p. 333):

This court is not a court of penal jurisdiction. It compels restitution of property unconscientiously withheld; it gives full compensation for any loss or damage through failure of some equitable duty; but it has no power of punishing anyone.

D The trustee must pay interest to his *cestui que trust* (I say nothing of his alternative remedy) to compensate for the interest he has lost. It might equally well be called damages or interest by way of damages. It is inherently a sum of money of precisely the same character as the interest awarded in a court of law under the Civil Procedure Act, 1833.

E My Lords, having discussed in a general way the nature of a sum of money awarded as interest under the Civil Procedure Act, 1833, s. 28, I turn to the cases decided under the Income Tax Acts to see whether they assist the appellant. I find in them just what I expected to find. The question in each case is whether the receipt is of an income or a capital nature. That is the test for income tax purposes, not whether it is called "interest" or "damages." Thus, in *Inland Revenue Comrs. v. Ballantine* (11), arbitrators to whom a claim for (*inter alia*) "additional costs, loss and damages" was referred awarded an amount which included a sum described as interest. The Court of Session having concluded that what was described as interest was, in fact, part of the total sum awarded by way of damages rejected the claim of the Revenue to tax on it. As COHEN, J., has observed ([1945] 2 All E.R. 120), the matter is summed up in the judgment of the LORD PRESIDENT where he says (8 Tax Cas. 612):

... if the decree was substantially one of damages, the interest ordered to run on it was just part of the damages and not therefore chargeable to income tax.

G Again in *Glenboig Union Fireclay Co., Ltd. v. Inland Revenue Comrs.* (5) the claim to tax was rejected because, though certain sums were described as interest, yet in substance a capital sum of compensation was awarded, the element of interest being introduced in *modum aestimationis*. So, also, in *Simpson v. Exors. of Bonner Maurice* (2) tax was held not to be exigible on any part of a sum which was paid by way of compensation under art. 297 (e) of the Treaty of Versailles. It is sufficient to cite a sentence from the judgment of LAWRENCE H.L.J., in that case to show how different were its circumstances from those where interest was allowed under the Civil Procedure Act, 1833, or is ordered under the Act of 1934. He said (14 Tax Cas. 605):

Article 297 of the Treaty says nothing about the payment of interest, and the money paid under the direction of the Mixed Arbitral Tribunal was paid as compensation and not as interest.

Numerous cases also were cited which fell on the other side of the line, *i.e.*, in which sums of money described and paid or received as interest were held

to be "interest of money" and taxable as such. I will mention only two of them. In *Schultze v. Bensted* (12) the question was as to the liability to tax of interest on a sum which a negligent trustee had failed to get in and which he had been ordered to make good to the trust estate, a state of affairs strictly comparable with that to which I referred when observing on *Vyse v. Foster* (10). The trustee having duly paid the interest, it was, in the words of LORD JOHNSTON (7 Tax Cas. 34):

... a surrogatum for that which ought to have termly reached the hands of the trustees and have been applied by them as income . . . A

It was, accordingly, liable to tax. In *Inland Revenue Commissioners v. Barnato* (6) the circumstances were very similar. There, too, the defendants became bound under a consent order founded on certain admissions to pay, not only a principal sum, but interest on it, and compound interest at that, and it was held that such interest was liable to tax. This decision, if I may say so with respect, was plainly right. It illustrates the proposition that that which reaches the hand of the recipient as interest on a principal sum is income liable to income tax, notwithstanding that it may come to him in a single sum and as the result of a hostile suit. B

I have left to the last a case rightly relied on by the appellant. I refer to *Re National Bank of Wales, Ltd.* (1). In that case a director, having been found liable to refund to the company the principal sum of £37,000 (being the amount of certain dividends improperly paid out of the funds of the company), was ordered also to pay interest at the rate of 5 per cent. from the dates when the dividends were paid. A question arose on settling the minutes of judgment whether income tax should be deducted from the interest so ordered to be paid. WRIGHT, J., declined to allow tax to be deducted saying that it was not a question of contract at all, that the matter must be regarded as if the director had fraudulently given away £37,000 of the capital of the company, that the company had by its capital being withheld all those years suffered damages equal to 5 per cent. per annum and that he saw no reason why it should not get the whole of the damages back. He concluded ([1899] 2 Ch. 651): C

It is called "interest" but it is really damages for withholding its capital from the company. I have tried to find some authorities on the question, but I am unable to find any. D E

I agree with counsel for the appellant that, if this case was rightly decided, he is entitled to succeed here, but the reasoning of WRIGHT, J., cannot, in my opinion, be supported and his decision must be overruled.

It was further urged on behalf of the appellant that the interest ordered to be paid to him was not "interest of money" for the purpose of tax because it had no existence until it was awarded and did not have the quality of being recurrent or being capable of recurrence. This argument was founded on certain observations of LORD MAUGHAM in *Moss Empires, Ltd. v. Inland Revenue Commissioners* (13) ([1937] A.C. 795) in regard to the meaning of the word "annual." It would be sufficient to say that we are here dealing with words in the Income Tax Act which do not include either "annual" or "yearly," but in any case I do not understand why a sum which is calculated on the footing that it accrues *de die in diem* has not the essential quality of recurrence in sufficient measure to bring it within the scope of income tax. It is surely irrelevant that the calculation begins on one day and ends on another. It is more important to bear in mind that it is income. F

Finally, it is right to say a very few words on a point taken by DU PARCQ, L.J., in his judgment and for that reason, but, as I understand it, for that reason only, put forward in this House on behalf of the appellants. The learned Lord Justice expressed a doubt, which argument did not dispel, whether a defendant who is required by the order of the court to pay a judgment debt for a fixed sum which includes interest can be said to be making a payment of interest when he pays that sum. The liability to pay interest, he suggested, is superseded by, or merged in, the judgment debt. This opens an attractive vista, e.g., to mortgagees, who, by persuading their mortgagors to allow judgment to be recovered against them for the interest from time to time due, might thus escape liability to tax on that interest, but, with great respect to G H

the learned Lord Justice, I do not think that the suggestion is well founded. No doubt, for some purposes an obligation of lower degree is merged in one of higher degree, a doctrine presumably based on the policy of avoiding multiplicity of suits, but I do not think that this has any relevance as between third parties as *e.g.*, between the creditor and the Crown when the question is whether a certain sum is capital or income and if income whether it is taxable income in the hands of the creditor. The question is the same and must be determined by the same considerations whether the sum is paid voluntarily or under an order of the court.

I would add that, having had the privilege of reading the speech which LORD NORMAND is about to deliver, I wish to express my concurrence in his observations on the cases decided by the Court of Session on this subject. In my opinion, the appeal should be dismissed.

LORD NORMAND : My Lords, I respectfully agree with the opinion of my noble and learned friend on the Woolsack and also with that of LORD SIMONDS. I propose merely to add some observations on the Scots Law as it is affected by the decision in this appeal and on the Scots cases cited by counsel.

Claims for interest may arise in Scots Law *ex pacto*, *ex lege* or *ex mora*. Interest *ex pacto* is beyond question income in the hands of the recipient. The same may be said of interest *ex lege*, and it was so decided in *Sweet v. McDiarmid* (14). Interest *ex mora* corresponds to the interest awarded to the present appellant under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3. That interest ran from the date at which the principal sum was first wrongfully withheld from the appellant and it is wrongful retention of the debt from the creditor that is the legal ground for an award of interest *ex mora* in Scotland (*Carmichael v. Caledonian Ry Co.* (15), LORD WESTBURY, p. 131). The correspondence is not complete—for example, interest is awarded by the Scottish courts as of right, whereas in England the award depends on the exercise of a discretion which the statute has committed to the jury or the court. Nevertheless, the principle of the decision in this appeal will apply to interest awarded *ex mora* in Scotland.

The retention of the principal sum in the present instance was fraudulent, but the award of interest either under the statute in England or *ex mora* in Scotland does not depend on proof of fraudulent retention or of negligent retention of the principal. The commonest example, indeed, of an award of interest *ex mora* is a decree for interest from the date of citation in an action in which the pursuer has successfully sued for the disputed amount due to him on an open account, where there is neither averment nor proof of fraud or negligence (*Blair's Trustees v. Payne* (16)). The wrongful withholding is then merely the refusal of the creditor's demand contained in the summons and the implied denial of his right. Even when there is no proof of fraud or negligence the interest awarded is sometimes spoken of as damages both in England and in Scotland, but in Scotland, at least, it would, I think, be more appropriately described as compensation. This matter of terminology is, however, of no great importance, for the liability of a payment to income tax does not depend on whether or not it is a payment of damages, but on whether or not it is received as income. The interest payments which were the subject of litigation in *Schulze v. Bensted* (12), had been decerned for in an action (*Lee's Trustees v. Dun* (17)), raised by trustees against the representatives of a deceased trustee of the same estate. It was an action of damages based on negligence. In allowing the Revenue's claim to income tax on this interest, the LORD PRESIDENT cited with approval the definition of interest in BELL'S DICTIONARY, "interest of money may be defined to be the creditor's share of the profit which the borrower or debtor is presumed to make from the use of the money," and he treated the interest awarded as the just recompense to the creditors for being deprived of the use of the money or in other words as interest awarded *ex mora*. He held, accordingly, that this interest was received by the creditors as the fruit or income of the principal sum which ought to have been paid to them on the date from which the interest ran. LORD JOHNSTON, agreeing with the LORD PRESIDENT's conclusion, said (7 Tax Cas. 34) :

When it [the interest] reached the hands of the trustees it was a *surrogatum* for that which ought to have termly reached the hands of the trustees and have been applied by them as income, in which case it would have been subject to income tax, and when it

did reach their hands, I think they were equally bound to apply it in accounting with the beneficiaries as income, and I am unable to see any sound reason for holding that it did not become liable to income tax in the hands of the trustees when received.

LORD JOHNSTON, in the course of his opinion, took occasion to say that where a pursuer recovers damages with interest from the date of decree he did not think that that interest was chargeable. I do not agree with LORD JOHNSTON on this point, and I am of opinion that in such a case the interest, even if it is properly to be considered as part of the damages, is nevertheless received as income by the creditor in the judgment debt. However that may be, *Schulze v. Bensted* (12), is authority for the proposition that interest awarded *ex mora*, even in an action of damages, is income and not capital in the hands of the creditor and is subject to income tax. In short, it decided practically the same point as has arisen in the present appeal and it decided it in complete accordance with the opinion which has been expressed by my noble and learned friend.

There are cases in which a calculation of interest is used as a means of arriving at a capital sum of damages. *Inland Revenue Commissioners v. Ballantine* (11), is an example. In that case an arbiter having a duty to award a sum as compensation for "outlays and loss" assessed it in the form of annual interest, and it was held that, though the compensation was described as interest and though it was calculated as interest is calculated, the creditor received it as capital. Similarly, in *Glenboig Union Fireclay Co. v. Inland Revenue Commissioners* (5), a sum received by a company as compensation for deprivation of a capital asset and calculated on the basis of the annual profits which the company might have expected to earn by exploiting the asset was treated as a capital sum, but while there may be difficulty in deciding in particular cases whether a payment described and calculated as interest is not in truth a capital payment, it is now settled that interest awarded *ex mora*, whether it is to be regarded as damages or not, is income of the creditor.

Appeal dismissed with costs.

Solicitors: *Last, Riches & Co.* (for the appellant); *Kenneth Brown, Baker, Baker* (for the respondents).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

NEILD v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Greene, M.R., Morton and Somervell, L.JJ.),
March 7, 11, 1947.]

Revenue—Excess profits tax—Exemption—Profession—Profits dependent on personal qualifications—Questions for consideration—Finance (No. 2) Act, 1939 (c. 109), s. 12 (3).

Revenue—Appeals—Case Stated—Reference back—Reasonable doubt about finding.

To determine whether, and to what extent, a taxpayer is entitled to the benefit of the exemption from excess profits tax contained in s. 12 (3) of the Finance (No. 2) Act, 1939, consideration must be given not only to the question whether or not the profits comprised in the assessment arose from the carrying on by the taxpayer of a profession, but, if so, also whether or not the profits of the profession were dependent wholly or mainly on his personal qualifications.

In appeals by way of Case Stated by Commissioners of Income Tax although, in many cases, it is necessary and proper for the court itself to place a construction on what the commissioners have stated in the Case, there is a statutory right to refer back to the commissioners matters which are not found with sufficient clarity, and this power is one which ought to be exercised by the court whenever there is a clear doubt as to what the finding of the commissioners means.

[FOR THE FINANCE (No. 2) ACT, 1939, s. 12 (3), see HALSBURY'S STATUTES, Vol. 32, p. 1193.]

Case referred to:

(1) *Inland Revenue Comrs. v. Mawse*, [1919] 1 K.B. 647; 88 L.J.K.B. 752; 12 Tax Cas. 749; Digest Supp.

APPEAL by the Crown, from a decision of MACNAGHTEN, J., dated July 26, 1946, and reported [1946] 2 All E.R. 405.

The taxpayer, who was a member of the British Optical Association and also of the Worshipful Company of Spectacle Makers, employed mechanics, and he and they made spectacles in accordance with his own prescriptions and in some cases in accordance with the prescriptions of others. He exhibited in a shop window at the entrance to his premises optical frames without glasses and unpriced, and he advertised in the local press. If a person troubled about his eyesight called on him, he would examine the patient's eyes and ascertain whether there was any disease. If he found that the patient was suffering from some eye disease, he would advise him to go and consult an oculist. If, on the other hand, he thought there was no disease, he would prescribe spectacles, and spectacles in accordance with that prescription would then be made, fitted to a frame, and sold to the customer for the sum of 10s. 6d.

The taxpayer was assessed to excess profits tax in the sum of £1,402 for the chargeable accounting period ended Apr. 5, 1943, that amount being arrived at by deducting his standard profits, £1,500, from his net profits of £2,902. The General Commissioners, on an appeal by the taxpayer, held that £750 out of that profit was "professional" and the remainder trading profit, but did not say whether they affirmed or reduced the assessment. At a further hearing, held at the request of the parties, the commissioners determined that the appeal should be dismissed on the ground that the taxpayer's business was mainly of a "commercial" nature. MACNAGHTEN, J., held that, on the facts found by the commissioners, the £750 which, in their opinion, was due to the carrying on of the profession of an oculist, ought to be deducted from the sum representing the combined profits of both the profession and the trade carried on by the taxpayer, and made an order that the assessment be reduced by £750. The Crown appealed.

D. L. Jenkins, K.C., J. H. Stamp and Reginald P. Hills for the Crown.
J. W. P. Clements for the taxpayer.

LORD GREENE, M.R. : The taxpayer appealed to the General Commissioners for the city of Lincoln against an assessment to excess profits tax in respect of profits derived from his activities as an optician. The ground of the appeal was that he was carrying on a "profession" within the meaning of sub-s. (3) of s. 12 of the Finance (No. 2) Act, 1939. That section, after charging excess profits tax on the excess over the standard profits derived from a "trade or business," provides, in sub-s. (3), that :

The carrying on of a profession by an individual or by individuals in partnership shall not be deemed to be the carrying on of a trade or business to which this section applies if the profits of the profession are dependent wholly or mainly on his or their personal qualifications. . .

The questions, therefore, before the commissioners were whether or not the profits comprised in the assessment arose from the carrying on of a profession, and, if so, whether or not the profits of the profession were dependent wholly or mainly on the taxpayer's personal qualifications. Those two questions are both questions of fact, subject to this, that, as in all questions of fact, whether they are propounded by a statute or whether they are propounded under some principle of law outside a statute, they can only be answered within certain limits. In other words, it has always been in such a case for the court to say whether there was evidence sufficient in law to support the conclusion of fact.

The commissioners held a first hearing on Feb. 15, 1945. They heard the evidence and, they expressed their view in these words :

The commissioners held that £750 of the profit of £2,902 for the chargeable accounting period ended Apr. 5, 1943, was professional and the remainder trading profits.

It is to be observed that that finding does not answer either of the two questions which it was relevant for the commissioners to consider. It was suggested that, in giving that opinion, they were, in effect, finding that, even if the activities of the taxpayer were professional, nevertheless the profits were not wholly or mainly dependent on his personal qualifications. Whatever they may have meant, they have not said that, and it is a little difficult to see exactly how their minds were working and whether they were directing their attention to the first question : Aye or no, was it a profession ?, or the

second question: Aye or no, were the profits of that profession wholly or mainly due to personal qualifications?, or, thirdly, whether by that finding they were intending to say that there were two separate activities each of which could be severed from the other so that you could treat the professional activity as falling within sub-s. (3) and the other activity as not falling within sub-s. (3) but remaining within sub-s. (1). The last was the view the learned judge took, but, there again, it is not what they said. I think it right to say that, although in many cases it is necessary and right for the court to place a construction on what commissioners have said, it must always be remembered that a Case stated by commissioners is not like a will, phrases in which the court has to interpret one way or the other without calling up the ghost of the testator to say what he meant. There is a statutory right to refer back to the commissioners' matters which are not found with sufficient clarity in Cases Stated, and that seems to me to be a power in the court which ought to be exercised wherever the court finds that there is a reasonable doubt what the finding of the commissioners means. It might lead to great injustice to one side or the other if the court, treating the matter, so to speak, as though it was a will requiring interpretation, put its own conclusions on what the commissioners meant. I do not mean, of course, that in every case where there might be thought to be some arguable point of interpretation the Case ought to be remitted. There must be something which raises a clear doubt in the minds of the court whether the finding means one thing or another.

In the present case the language that is used appears to me to indicate one of two things. Either the commissioners did not appreciate what the questions were to which they ought to direct their minds, or, if they did, in using language which is not the language of the section, they were intending to come to some conclusion other than that which the section appears to contemplate. I find it very difficult to interpret exactly what they meant. There is a further doubt in regard to the view that the learned judge took. I am not expressing an opinion one way or the other, but it arises in this way. The parties rightly took the view that the first finding of the commissioners was not sufficient to dispose of the appeal, and by agreement they resolved to go back to the commissioners and invite them to complete the task which they had left only half performed. There was, accordingly, an adjourned hearing where various contentions were put forward, and the commissioners gave this decision:

That the appeal be dismissed, as in their opinion the taxpayer's business was mainly of a commercial nature and, therefore, liable to excess profits tax.

There again, that is not an answer to either of the questions which the statute requires to be considered, and, just as in the former instance I expressed no opinion what the finding meant, so now I express no opinion what the finding meant. I content myself with pointing out that it is not the finding which the statute requires, and, for my part, I find it difficult, with any real degree of conviction, to put a meaning on the findings of the commissioners, particularly when we have got to reconcile the first finding with this later one. In that connection, one of the points to which, perhaps, the learned judge did not pay sufficient attention lies in the fact that in the later finding the commissioners speak of "the taxpayer's business," which would appear to suggest that they were regarding the business as one entity and not as two severable entities, and that introduces a further ambiguity and doubt about the meaning of what they said in their earlier decision.

These matters of doubt are all the more puzzling in view of the simplicity of the question. I will not say the answer was an easy one, but the question was an easy one. Once the facts were found by the commissioners, the answer to the question called, not for any complicated expression of opinion, but for a mere simple finding of fact one way or the other. That being so, after having the benefit of a discussion with counsel on both sides we have come to the conclusion that MACNAGHTEN, J. ought to have sent the matter back if he thought, as he did think, that the commissioners were intending to find it was a case of severance, as in *Maxse's* case (1), so that they could state exactly what they did mean. That is the course that we propose to take on all the issues which arise—to send the Case back to the commissioners to elucidate their finding by answering the proper questions to which their minds ought to be directed.

One further point was raised by counsel for the taxpayer, but he did not press it, *viz.*, that in the circumstances the first finding of the commissioners was the only one that had any validity in law, because, he said, when they had found that they were *functi officio* and could not, even by consent, resume the hearing. But when it was pointed out to him (as MACNAGHTEN, J. thought) that the first decision of the commissioners by no means fulfilled their statutory duty, he felt himself compelled to treat the Case (as he had agreed to treat it)

- A as a continuation of the original hearing in order that the commissioners might dispose of the whole appeal. The language in which they have done that, taking the document as a whole, appears now to contain such an element of doubt and obscurity as to leave it uncertain in my mind whether the commissioners have, so to speak, pleaded themselves within the section, either in whole or in part, and counsel for the Crown very properly thought that, in fairness to the taxpayer, these matters should be sent back to the commissioners that they may give a clear answer to the questions which the statute requires them to answer.

The appeal will stand over generally, and in the meantime this Case is remitted to the commissioners who are to take the matter further into their consideration and answer the following questions and report thereon to this court, *viz.*, (a) whether the profit the taxpayer appealed from, or any, and, if so, what, part thereof, was derived from the carrying on of a profession. (b) If question (a) is answered in the affirmative, whether the profit so derived was dependent wholly or mainly on the personal qualifications of the taxpayer.

MORTON, L.J. : I agree.

SOMERVELL, L.J. : I agree.

Case remitted.

- D Solicitors : *Solicitor of Inland Revenue* (for the Crown) ; *Waterhouse & Co.*, agents for *Andrew, Race, Midgley & Hill*, Lincoln (for the taxpayer).
[Reported by F. GUTTMAN, ESQ., *Barrister-at-Law.*]

E ATTORNEY-GENERAL v. NORTHWOOD ELECTRIC LIGHT AND POWER CO., LTD.

[COURT OF APPEAL (Lord Greene, M.R., Morton and Somervell, L.JJ.), March 3, 4, 1947.]

Revenue—Stamp duty—Receipt—Electricity pre-payment meter card—Entry by collector—Stamp Act, 1891 (c. 39), s. 103 (1).

- F O., a consumer of electricity supplied by the defendant company, paid in advance for his supply by means of coins inserted in a pre-payment meter. On Mar. 8, 1944, a collector employed by the company called at O.'s house, inspected the meter, took out the coins, and entered in the "amount due and collected" column of his pre-payment collection sheet the sum of £2 7s. 11d., which was the balance due to the company after deducting rebate and a small amount put back into the meter. In the final column of his pre-payment collection sheet the collector wrote his initials. A carbon copy of the various entries made on the sheet appeared on a pre-payment meter card which was enclosed in an envelope and left on O.'s premises, the envelope stating on its face that the card was the property of the company. In a suit to recover a fine under the Stamp Act, 1891, s. 103 (1), for giving a receipt liable to duty and not duly stamped,
- G
- H HELD : the phrase "gives a receipt" in s. 103 of the Stamp Act, 1891, must bear its ordinary *prima facie* meaning—*viz.*, that the receipt is given in such a way that it can be retained by the recipient and will be available to him at any time as evidence of the payment which he has made, and the entry in the column "amount due and collected" in the circumstances in which O. had the pre-payment meter card in his possession was not a receipt given to him within the meaning of the sub-section.

Qu. : whether a receipt given subject to a condition that it shall be returned to the giver of the receipt at the expiration of some period, or on

some other condition, can ever be a receipt which is "given" within the meaning of the Stamp Act, 1891.

Decision of MACNAGHTEN, J. ([1946] 2 All E.R. 324), affirmed.

[AS TO OFFENCES IN RELATION TO STAMPS, see HALSBURY, Hailsham Edn., Vol. 28, pp. 437-439, paras. 945-947; and FOR CASES, see DIGEST, Vol. 39, pp. 296, 297, Nos. 764-768.]

Cases referred to:

- (1) *A.G. v. Carlton Bank*, [1899] 2 Q.B. 158; 68 L.J.Q.B. 788; 81 L.T. 115; 63 J.P. 629; 39 Digest 294, 748.
- (2) *Day v. Glaister* (1900), 2 F. (Ct. of Sess.) 963; 37 Se.L.R. 736; 8 S.L.T. 55; 39 Digest 293, 734x.
- (3) *General Council of the Bar (England) v. Inland Revenue Comrs.*, [1907] 1 K.B. 462; 76 L.J.K.B. 212; 96 L.T. 267; 71 J.P. 117; 3 Digest 333, 231.

APPEAL by the Crown from a decision of MACNAGHTEN, J., dated July 22, 1946, and reported ([1946] 2 All E.R. 324). The facts appear in the headnote and in the judgment of MACNAGHTEN, J., who held that the company had not given a receipt liable to duty and were, therefore, not liable to a fine under the Stamp Act, 1891, s. 103 (1).

The Solicitor-General (Sir Frank Soskice, K.C.) and C. H. Stamp for the Crown.

Sir Roland Burrows, K.C., and C. Fletcher-Cooke for the company.

LORD GREENE, M.R.: The document which is said by the Crown to contain a receipt within the meaning of s. 101 of the Stamp Act, 1891, and to have been given by the Northwood Electric Light and Power Co. to the consumer, contains a number of recorded particulars. The body of it comprises 14 columns in which there are figures and records which are important for the regulation and control of the consumption of the current by the consumer. There are other particulars, but the Crown picks on one of those columns, "Amount due and collected," and claims that the entries in that column constitute receipts, and that, in the circumstances in which the consumer has this card in his possession, they are receipts given to him within the meaning of the schedule to the Stamp Act, 1891, and s. 103 of the Act which imposes the relevant penalty.

The document, taken as a whole, appears to me clearly to be framed and filled in for purposes other than those of acknowledging the receipt of money, but that does not necessarily result in it not being or containing a receipt. Taking the document as a whole and remembering that the entries on it are reproduced on two other documents with which the consumer is not concerned, but which are kept for the purposes of the company's records, its general object appears to be what I may call administrative. The card and the other two documents are filled up to enable the checking by the company of its returns of the current consumed by the consumer and the money collected from the slot at the meter. It also has a useful function from the point of view of the consumer. I can find no contractual right on the part of the company to leave the card on the consumer's premises, nor can I find any contractual right on the part of the consumer to require that the company should leave it on his premises, but no sensible consumer would object to the company leaving it there, and no sensible company would, I imagine, arbitrarily take it away. It is mutually convenient to the company and the consumer that the consumer should have this record because, by looking at it, he can see what current he has consumed, what amount he has put in the box, what has been collected from him, what rebates he has been allowed, and generally can check his position. It is suggested that the endorsement on the envelope in which the card is supposed to be kept on the consumer's premises records some kind of contract between the company and the consumer with regard to the retention of the card and gives to the consumer some sort of right as against the company to insist on keeping the card. The envelope, the terms of which we are to assume the consumer in question here was acquainted with, states on its face: "This envelope and card are the property of the Northwood Electric Light and Power Co., Ltd. Please keep them clean and where they can soon be found." Then comes this which is particularly relied on: "The entries on the card enable the consumer to check the quantity charged for and record the amount of money collected from the meter." The word "record" refers to the words "The entries on the card." That is a statement of the convenient purposes which this card will serve from the consumer's

point of view. The words do not suggest—but this is not by any means conclusive—that one function of the document is to act as a receipt given by the company to the consumer.

- It is suggested that there is to be inferred from the language used some sort of contract under which the consumer is entitled to say to the company: "This document is my voucher and I am entitled as between you and me to keep it as a voucher." It is not suggested that he can claim to keep it for ever, because, again, it is common ground that, when a tenancy changes and one consumer goes away and is replaced by another, the old consumer does not take his card. It runs, so to speak, with the house. Accordingly, the consumer has, it is said, a limited property in the card in the sense that he is entitled to insist on keeping it so long as he is in the house. I do not myself put his rights as high as that. I can discover no right in him to hold this document for five minutes if the company chooses to take it away from him. Indeed, to say that he is entitled to hold it for longer is in a sense really begging one of the questions which we have to decide, for this reason. Assuming this to be a receipt given within the meaning of the Act, if the right of the consumer to keep this card against the will of the company is non-existent, or even if it is existent for a limited period, that is to say, until the card comes to an end and is filled up, or until the consumer leaves the premises and gives up taking the supply, then this card fails to give to the consumer what a receipt in the ordinary acceptation of that word gives. It is true it might enable him, if he found himself in dispute with the collector, to refer the collector to the card, but it certainly cannot operate in a way that a receipt ordinarily operates. One of the objects of a receipt, as, indeed, the Act contemplates, is that it can be produced as evidence in a court of law. If it is not stamped, it cannot be so produced. The Act, therefore, recognises the use of such a document in a court of law as being one of the things which one would expect the holder of a receipt normally to enjoy. Unquestionably, if you say a person has given you a receipt for something, what you mean is that he has given you something in the plenary sense which you can keep as your own and produce on occasion when required and, particularly, in a court of law.

It is said that this document is a receipt within s. 101 (1), and the words mainly relied on are these:

- For the purposes of this Act the expression "receipt" includes any note, memorandum, or writing whereby any money amounting to £2 or upwards . . . is acknowledged or expressed to have been received or deposited or paid . . .

- It is common ground that, before duty is attracted to a document which fulfils that description, the document must be "given." That is to be found in the schedule which imposes a duty of what is now 2d. on a "receipt given for, or upon the payment of, money amounting to £2 or upwards." Under s. 103 (1) a person only becomes liable to a fine if he "gives a receipt liable to duty and not duly stamped." That is what it is said the company gave here by this document.

- I do not find it necessary to go into the question whether this document is, in itself, a receipt within the meaning of s. 101 (1). I may, however, call attention to the fact that, to be a receipt, it must be a document whereby the receipt or deposit or payment of money is acknowledged or expressed. As was pointed out by LORD RUSSELL OF KILLOWEN, C.J., in *A.-G. v. Carlton Bank* (1) ([1899] 2 Q.B. 165), the words "acknowledged or expressed" do appear to mean "acknowledged or expressed to somebody"—one would think acknowledged or expressed to the person paying or depositing money. That means that the document must, so to speak, have a bilateral operation. A mere entry in a man's own book in which he notes up against a debt owing to him that it has been paid is not an acknowledgment or expression to anybody, but a mere note made for his own convenience. On the other hand, to take the example put by MORTON, L.J., in the course of the case, if he tears out the sheet from his book and gives it to the payer, the document which started by being a unilateral document may, by that very act, acquire the quality of an acknowledgment or expression.

This case might be considered from the point of view of whether the action of the company in relation to its card as between itself and the customer imports that bilateral quality of acknowledgment or expression, having regard to the absence of any right on the part of the consumer to keep it, but I need not go into that rather subtle aspect of the case because to attract duty the document

must be "given." It is not, I think, to be disputed that, when one considers that word in this context in relation to a document of the character of a receipt, the qualities and advantages of which are well known, one of them being, as the statute itself contemplates, its production in a court of law, *prima facie*, nobody can be said to have "given" a receipt if he attaches a condition under which the right of the recipient to keep it is in some way limited or circumscribed. It was suggested that cases might be thought of in which a document so limited or circumscribed might, nevertheless, amount to a receipt. I am not concerned to dispute that. In fact, one example is quite common—a deposit receipt, which will frequently, if not generally, bear on its face some such statement as that "the money deposited will be handed back against the surrender of this receipt." That is a case where the right of the person to whom the receipt is handed is circumscribed in the sense that in certain conditions he has to hand it back, but a deposit is rather a special type of transaction, quite unlike the ordinary payment of a debt, because, once the money deposited has been paid back, the usefulness of the receipt comes to an end for all practical purposes. In the case of a debt that is not true, because a debt may be claimed again. Examples were put of cases where receipts might be given on the terms that they should be handed back to the giver within quite a short period. It was said, if a man's tailor handed to him a document, on the face of it a receipt, with a condition imposed that the customer should hand it back to the tailor after six months, he would, nevertheless, be said to have given a receipt provided—and this is important—that the customer had in some way conducted himself so as to effect what amounted in law to a waiver of his right to demand an unconditional receipt. One, of course, can think of absurd cases like that, but it might very well be that a tailor who endeavoured to impose such conditions on his customers would find a very powerful reaction on their part. I am not, however, disposed to dispute the proposition, for the purposes of this argument, that, if a payer clearly waives any right to an unconditional receipt and accepts the document on the terms that it shall not be his but that he shall hand it back after a limited period, such a thing can be a receipt "given." What I am concerned to point out is that that is not the natural meaning of the word, and that, if such a case would still fall within the meaning of the word "gives" in the Act, it could only so fall if the *prima facie* meaning of the word was clearly excluded on the facts. It seems to me that, to deprive the payer of his right to an unconditional unlimited receipt, there would have to be some clear acceptance on his part of the condition which it is sought to impress on the giving of the document.

What is the position here? The document can be taken away by the company at any moment. Even if the construction put forward by the Crown is right, when the customer leaves the house he ceases to have any right to have this document at all. The document for mutual convenience is kept and used on the consumer's premises. He is not given the opportunity of insisting on a receipt. If the argument is true that he has waived his right to a receipt, the waiver must have resulted from the fact that he has had imposed on him a document which is put into his custody for quite temporary purposes. How that can amount to a waiver I am unable to understand. Moreover, the argument, with all respect to the Solicitor-General, cannot be successful for another reason. When one looks at s. 103 one finds these two subsections. First, there is the one under which the present claim is brought:

If any person (1) gives a receipt liable to duty and not duly stamped . . .

It is said that the company gave to the customer here a receipt liable to duty, and the word "gives" for that purpose is construed as covering the leaving of this document on the premises of the customer in the circumstances which I have stated. It is said that it is given notwithstanding the fact that the waiver of what might be called a *prima facie* plenary right to an unconditional customer has no right to keep it as against the company, and that there is a receipt. According to the Crown, the subsection has been satisfied and a receipt has been given. Then we come to sub-s. (2):

In any case where a receipt would be liable to duty [any person] refuses to give a receipt duly stamped.

It is conceded that that subsection comes into operation when the customer

demands what I call a plenary unconditional receipt, and that in this case the customer could say to the company: "Please give me a receipt which I can keep, something quite different from this document, a receipt which is to be my property." It is admitted that in response to that request the company could not impose a condition that the customer's right to keep the document should in any way be limited. Accordingly, if the Crown is right, this curious position would arise. First, a stamp has to be placed on this card whenever the collector makes the relevant entry in respect of a sum of more than £2. The customer next day can say to the company: "Give me an unqualified receipt," and the company would be bound to give him such an unqualified receipt under a penalty of £10 if it refused. Accordingly, the Crown would obtain two sums of 2d. each in respect of the same payment. This involves, be it observed, giving a different meaning to the word "give" in sub-s. (2) from what it has in sub-s. (1), because in sub-s. (2), admittedly, it must mean "give out and out, give without any condition or limitation as to the recipient's right to keep it." On the other hand, if the Crown is right, in sub-s. (1) the words "gives a receipt" are satisfied by something much less, namely, the dealing with a card such as this so that the customer's right to keep it is momentary only, because the company can take it away whenever it pleases, or, anyhow, can take it away directly the customer leaves the house, and thereby deprive the customer of the benefit which the ordinary plenary, unconditional receipt would confer on him. I cannot, in relation to one transaction and one sum of money, construe the phrase "gives a receipt" in one sense in sub-s. (1), and in a different sense in sub-s. (2). It appears to me that in this case there are no circumstances from which the customer can be said to have any choice in the matter so far as keeping this card is concerned, though, I suppose, he could say to the company: "Take it away. I do not want it," but he has no right to demand that he can keep it as long as he likes. I can find nothing in the circumstances which, in the remotest degree, could be construed as a waiver by the customer of his right to demand a full receipt or as in any way an acceptance binding on him of something less than a full receipt.

That being, so, it seems to me that the phrase "gives a receipt" must bear its ordinary *prima facie* meaning, namely, that the receipt is given in such a way that it is and will be available to the recipient for the purpose which it purports to effect whenever he may choose to want it for that purpose.

There is one other matter which I should mention because it does, I think, strengthen the argument—if, indeed, it requires strengthening—and that is the language of sub-s. (2) of s. 101 which provides:

The duty upon a receipt may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the receipt is given before he delivers it out of his hands.

Can it be said that the company has delivered this card out of its hands when it retains the property in the card and can take it back at any moment when it likes, or, at any rate, at the moment the customer leaves the house? It seems to me, giving the language its ordinary meaning, that that cannot be said.

In the cases where this section has come under construction, and there are only a few, it seems to have been assumed by the judges who have dealt with it that a person to whom a receipt is "given" is meant to retain it. That phrase "retain it," and another phrase "to be kept as evidence of payment by the recipient" appear in the judgment of LORD RUSSELL OF KILLOWEN, C.J., in *A-G v. Carlton Bank* (1), but I think that in the judgments of the Court of Session in *Day v. Glaister* (2) there is an even clearer expression that that is the fundamental conception. There, dealing, of course, with a different class of case from this one, LORD TRAYNER describes the operation of the statute in this language (37 Sc.L.R. 738):

It appears to me that what the statute provides for is limited to any note, memorandum, or writing given by one person to another, to be retained by the recipient as his voucher, either of the discharge of a payment made, as in the ordinary case of a payment of a debt, or acknowledgment of an obligation undertaken in respect of the receipt of money, as in a deposit. Sections 102 and 103 of the Act appear to me plainly to refer to "receipts" which have passed from one person to another, and those are, in my opinion, the kind of notes or memoranda to which s. 101 alone refers.

I need not quote more from those judgments. Although the point that we have to decide was not, of course, before the judges in those cases, it is significant that the language that they use makes it clear that, in their opinion, they are dealing with something which any ordinary person, understanding the language of business, would regard as "giving" a receipt—not something conditional, but something outright. In my opinion, the learned judge was perfectly right, and this appeal must be dismissed with costs.

MORTON, L.J.: The writing in question in this case does not require a stamp under the Stamp Act, 1891, unless (a) it is a receipt, and (b) it has been "given" within the meaning of sched. I. A creditor, who has been paid money, may write on a sheet of paper: "I acknowledge that I have received £1,000 from A.B. who owed me that sum," but, unless and until that piece of paper is given to A.B., the debtor, it requires no stamp. I do not pause to consider whether the document which I have described is a document "whereby any money is acknowledged or expressed to have been received" within s. 101 while it still remains in the creditor's desk and has not been given to the debtor. Coming to the facts of the present case, I feel grave doubt if the relevant entry on the card is a "receipt" within the definition in s. 101. It is an entry on a document belonging to the company, made by an employee of the company by way of record in the course of his duty. It is stated in the Case that:

Save in this respect that the collector's duty is to perform the acts stated [including making the entry on the card in question] the collector has no authority to give receipts on behalf of the company.

I think, if I may respectfully say so, that there is great force in the observations of LORD TRAYNER with regard to this matter in a passage in *Day v. Glaister* (2), which was not read by the Master of the Rolls. In referring to s. 101 of the Stamp Act, LORD TRAYNER says (37 Sc.L.R., 737):

... it is obvious that the language is capable of covering more than it was intended to express. For, taken literally, it would cover and include any note or memorandum which a man might make in his own books acknowledging receipt of £2 or upwards from another. This is plainly not intended by the Act. An entry in his cash book made by A. to the effect that he has received £60 from B. would fall within the meaning of the words of the Act descriptive of a receipt, but are plainly not within its intention or meaning.

To that, I would add that LORD TRAYNER, apparently, had not in his mind at that moment the further point that a receipt must be "given" before it requires a stamp. That is pointed out by BRAY, J., in *General Council of the Bar (England) v. Commissioners of Inland Revenue* (3), ([1907] 1 K.B., 477), where he says:

It is plain that the attention of LORD TRAYNER was not called to the words of the schedule "receipt given."

Let me assume, however, that the entry in question does amount to a receipt within the meaning of the Act. Was it ever "given"? In my view, it clearly was not. It was contained in a card, deposited in the flat whereof Mr. Oliver was the occupant. If Mr. Oliver, the consumer, left the flat, he had no right to take the card with him. That is recognised in the Case:

The electricity pre-payment meter card is the property of the company. It remains at the premises on change of occupancy.

For the reasons already given by the Master of the Rolls, I think that Mr. Oliver could not have objected if the company had taken the card away. There is nothing in the contract between the parties, consisting of an application by Mr. Oliver and a document containing the conditions of supply, which says that Mr. Oliver is to be entitled to retain this document. If there is some agreement outside the conditions of supply, I do not at the moment see what the consideration was for that agreement, nor do I see any reason why it should be implied from the circumstances. However, let me again make an assumption in favour of the Crown's contention. Let me assume that Mr. Oliver could have objected to the removal of that card. The fact remains that the card was the company's property, and that Mr. Oliver only had the

very limited right to insist that it should remain in the flat while he was an occupier. In my view, there was still no "giving" of the receipt to Mr. Oliver.

A The argument of the Solicitor-General and Mr. Stamp involves them in a number of difficulties which I shall not examine in detail, but I will refer to one, taking, first, their own definition of what the word "gives" means in the statute. "Gives," they said, means "delivering or making available for use as a voucher." I then drew attention to the fact that that definition did not define the period for which the document was to be made available for use as a voucher, but I received the reply that the definition was quite general and quite simple. If the document was made available for use as a voucher, it was a receipt within the meaning of the Act and it must be stamped. To test this argument, I shall take the case of a debtor who owes £1,000 and pays it in full. The creditor hands to him a receipt—I will call it a receipt B for the moment—with a note on it: "This document remains the property of the creditor and has to be returned to the creditor at the end of six months." There is no assent by the debtor, let me assume, to this limitation of time, but that is the only receipt which he gets. Has the debtor been given a receipt within the Stamp Act? At first sight I think the Solicitor-General was inclined to answer that he had not. If that is the right answer, it seems to me to follow C that Mr. Oliver was not given a receipt in the present case. Later, both the Solicitor-General and Mr. Stamp were inclined to answer "Yes" to the question just stated. They were then asked: "Supposing that the receipt is stamped, as you say it ought to be, and the debtor subsequently, either before or after the expiration of the six months, says: 'Now, I want you to give me a receipt which I can keep,' would a refusal of that request involve an offence by the creditor under s. 103 (2) of the Act?" They replied that it D would, because the creditor could not have refused to make the receipt available *simpliciter* and without any condition. If that is so, it leads inevitably to the conclusion that counsel for the Crown are attributing a meaning to the phrase "give a receipt" in sub-s. (1) of s. 103 different from that which they attribute to the same phrase in sub-s. (2). That is an illustration of the difficulties arising from the contention of the Crown.

E I would add that I would like to reserve for consideration if and when the point arises the question whether a receipt given subject to a condition that it shall be returned to the giver of the receipt at the expiration of some period, or on some other condition, can ever be a receipt which is "given" within the meaning of the Stamp Act. That question does not arise in the present case, in my view, because the so-called receipt was never given to the consumer at all. Therefore, I have formed no view on that question. I agree F that the judgment of the learned judge was right, and that this appeal should be dismissed.

SOMERVELL, L.J.: I agree with the judgments which have been delivered, and the reasons and conclusions which have been come to. MACNAGHTEN, J., said ([1946] 2 All E.R., 326):

G In my opinion, the word "gives" in s. 103 means what it says—that the person to whom it is given can keep it as his own.

H It was pointed out in the course of the argument that the actual piece of paper may not be originally the property of the payee. It may be produced by the payer. I think the learned judge clearly meant that a receipt is given when, after the transaction has taken place between the parties, the payer is in possession of a document which must be a receipt within s. 101 and which he can keep as his own. I do not exclude the possibility of a special arrangement clearly made between the parties, such as was referred to by the Master of the Rolls as appearing in what I think is the normal form of receipt when a deposit is made and what is called a deposit receipt is given. I should also like to say that there is no suggestion in this case that the position as already explained by the Master of the Rolls was a colourable arrangement arrived at between the parties to avoid the payment of duty.

The Solicitor-General pressed on us—indeed, I think it was the foundation of his argument—that the word "given" in its context in the schedule to the Stamp Act, 1891, should be read as meaning "made available." I join

issue with the argument at that initial point. There are many cases which one can think of in which something might be made available in the ordinary sense of that word, of which no one could say that it had been given. One example is as good as another. A man might, for instance, have a circular saw and think it right to make it available to his neighbour for his use for a limited time, but it would clearly be an inapt use of the word "given" to say that he had "given" the saw to his neighbour. I prefer the meaning which MACNAGHTEN, J., places on the word in its context, and I think that is the meaning which it has. So construed, for the reasons which have been given by my brethren, it seems to me impossible to say that a receipt was given to the consumer in this case.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Sydney Morse & Co.* (for the company).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

SKELDING v. PERRINS.

[COURT OF APPEAL (Scott and Somervell, L.JJ., and Romer, J.), February 26, 1947.]

Workmen's Compensation—Compensation—Industrial Disease—Cataract—Compensation only payable for 4 months from date of disablement unless workman has undergone operation—Proviso enabling arbitrator to continue payments if "satisfied on the advice of the medical referee that an operation could not for medical reasons be performed within 4 months"—"Could not for medical reasons"—Workmen's Compensation Act, 1925 (c. 84), s. 43, sched. III—Workmen's Compensation (Industrial Diseases) Consolidation Order, 1929 (S.R. & O., 1929, No. 2), para. (3), proviso (a)—Workmen's Compensation (Cataract) Order, 1932 (S.R. & O., 1932, No. 424).

A workman was certified, under the Workmen's Compensation Act, 1925, as suffering from cataract, owing to the nature of his work. The medical referee stated that, although an operation could be performed within 4 months from the date of disablement, there were, in his opinion, medical reasons why such an operation should not be performed within that time :

HELD : an operation could not be performed for medical reasons within the meaning of proviso (a) to the Workmen's Compensation (Industrial Diseases) Consolidation Order, 1929, para. (3) (as amended by the Workmen's Compensation (Cataract) Order, 1932), if medical opinion, as stated by the medical referee, regarded it as inadvisable, and the workman was, therefore, entitled to compensation under the proviso. The object of para. (3) was to put pressure on a workman suffering from cataract to take medical advice whether he should undergo an operation and only to deprive him of compensation if he refused to undergo it against medical advice.

[FOR THE WORKMEN'S COMPENSATION (INDUSTRIAL DISEASES) CONSOLIDATION ORDER, 1929, AS AMENDED BY THE WORKMEN'S COMPENSATION (CATARACT) ORDER, 1932, see WILLIS'S WORKMEN'S COMPENSATION, 37th Edn., p. 720].

APPEAL by the employer from an award of His Honour JUDGE LANGMAN, made at Stourbridge County Court on June 6, 1946, allowing a workman's claim for compensation under the Workmen's Compensation (Industrial Diseases) Consolidation Order, 1929, para. (3), proviso (a) (as amended).

Beney, K.C., and E. G. H. Beresford for the employer.

A. P. Marshall for the workman.

SCOTT, L.J. : This case depends entirely on the correct interpretation of a paragraph in the Workmen's Compensation (Industrial Diseases) Consolidation Order, 1929 (as amended by the Workmen's Compensation (Cataract) Order, 1932, extending the provisions of s. 43 of and sched. III to the Workmen's Compensation Act, 1925, to various diseases which were not in the original schedule. The particular disease in question is eye cataract. The Order provides :

(1) Subject to the modifications hereinafter specified the provisions of the Workmen's Compensation Act, 1925, s. 43, shall extend and apply to the diseases, injuries, and

processes, specified in . . . the schedule annexed to this Order, as if the said diseases and injuries were included in . . . sched. III to the Act . . .

Para. (3) of the Order is in the following terms :

A person suffering from cataract shall not be entitled to compensation under the provisions of the said section on account of that disease . . . for more than 4 months unless he has undergone an operation for cataract. Provided (a) that where the judge, committee or arbitrator is satisfied on the advice of the medical referee that an operation could not for medical reasons be performed within 4 months from the date of disablement, compensation may be continued for such further period and subject to such conditions as the judge, committee or arbitrator may direct.

There is a second limb which I do not think adds anything to the first limb of the proviso on the question of interpretation that we have to deal with today.

The workman in question had a cataract in the left eye, in respect of which he was duly certified in accordance with the schedule and compensation was paid for a time. He consulted an ophthalmic surgeon, the matter was referred to the medical referee, and the referee affirmed the decision of the certifying surgeon that he was suffering from cataract and thereby incapacitated.

Referring to the words in the proviso "on the advice of the medical referee that an operation could not for medical reasons be performed within 4 months . . ." the employer says that in this case an operation could be performed, and that argument was submitted to the court although it was quite clear from the decision of the medical referee that it was, in the view of the doctors, inadvisable to perform the operation. The eye in question was the left eye, and the right eye was not then substantially affected by cataract. On Apr. 4, 1945, the referee, dismissing the appeal from the certifying surgeon's certificate of disablement of the workman, certified in the following terms :

He is suffering from cataract caused by exposure to rays from molten or red hot metal and is thereby disabled from earning full wages at the work he was employed upon. He is fit for light work which does not involve exposure to rays from molten or red hot metal. Left eye : mature cataract. Vision perception of light. Right eye : signs of early cataract formation.

The county court judge remitted the matter to the referee for further information explanatory of his certificate. On that, the referee said :

(i) I do not consider there were any medical reasons for performing an operation on this man's left eye before July 11, 1945. (ii) As there are no medical reasons for an operation, then the question of the delay in operating being due to the inability to obtain a bed or place in hospital does not arise.

I read the second reason simply to make it quite clear that the negative opinion of the first paragraph meant a positive opinion that there were no medical reasons for an operation. July 11, 1945, was the date of the expiry of the 4 months' period.

The matter came to this court on appeal by the employers, and we thought some further elucidation was desirable. The first question we addressed to the referee was :

Whether an operation could or could not for medical reasons have been performed before July 11, 1945.

The answer was—

An operation could have been performed on the left eye and there are no medical reasons why such operation *could* not have been performed. In my opinion, however, medical reasons do exist why such operation *should* not have been performed.

In a separate explanatory paragraph he adds :

The operation would, undoubtedly, have improved the vision of the left eye, though further optical assistance would have been necessary to render the eye effective. Even with optical assistance, however, the eye could not be made to focus with the right eye. Each eye could be utilised independently, probably with equal efficiency, but in the ordinary course of nature, the applicant would use the right eye to the exclusion of the left.

I construe that answer as amounting to a statement that medical advice was against an operation. On that it is contended by counsel for the employers that the proviso in para. 3 of the Order must be read in a strictly literal sense, namely, that, if it is surgically possible to operate, then, unless the operation is performed,

the four months limitation extinguishes the workman's right, even although competent medical advice was against performing the operation because, regarding the case as a whole, there was no sufficient justification, on balance, for performing it.

In construing the proviso, it is right to have regard to the fact that there had, when the delegated legislation was passed, been a long series of cases coming up to this court in which it had been held that, where a workman refused to undergo an operation, the onus of proving that the workman's refusal was unreasonable was on the employer. I think in the case of cataract that refusal to submit to operation was the mischief aimed at by the terms of the Order, which was intended to put pressure on the workman to take medical advice whether he should undergo an operation, but only to deprive him of compensation if the doctors were of opinion that an operation should be performed and if he then refused to undergo it. In the present case, the medical referee has in terms advised that there were no reasons in favour of the operation. In my opinion, that is enough to satisfy the proviso, and there must be judgment in favour of the workman.

SOMERVELL, L.J.: I agree. It is said that we are construing "could" in the relevant provision of the schedule as "should." The addition of the words "for medical reasons" seems to me in effect to make this the proper construction. It cannot have been intended to force on the workman an operation which is medically inadvisable, nor is there any method of forcing a doctor to perform an operation which he thinks inadvisable. It does not seem to me that we are putting a forced construction on the words if we hold that an operation cannot be performed for medical reasons if medical opinion, under this provision, as stated by the medical referee, regards it as serving no useful purpose or otherwise inadvisable.

ROMER, J.: I agree.

Appeal dismissed with costs.

Solicitors: *Waterhouse & Co.*, agents for *Buller, Jeffries and Kenshole*, Birmingham (for the appellant); *Hatchett Jones & Co.*, agents for *William Waldron & Son*, Brierley Hill, Staffs. (for the respondent).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

SAGE v. SAGE.

STOCKBRIDGE v. STOCKBRIDGE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), March 5, 12, 1947.]

Divorce—Parties—Co-respondent—Naming and making alleged adulterer co-respondent—Discretion of court to dispense with necessity—"Special grounds"—Burden of proof—Matters for consideration of court—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 177 (1)—Matrimonial Causes Rules, 1944, r. 5.

In applications under s. 177 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, and r. 5 of the Matrimonial Causes Rules, 1944, for relief from the need to name an alleged adulterer and make him a co-respondent, unless the husband discharges the burden, which is on him, by showing "special grounds," the Act requires that the alleged adulterer be made a co-respondent. The mere fact of the prevalence at any particular time of a particular class of cases does not afford any valid reason for relaxing, in favour of the husband, the plain requirements of the Act and rules. The court must be satisfied on the facts of each particular case that special grounds exist. Though it is the duty of the court, in the exercise of its discretion, to strike a balance between the need of safeguarding the public interest, on the one hand, and of avoiding unnecessary hardship to the litigants, on the other, the public interest is the paramount consideration. Mere proof of hardship to the parties is not enough by itself to constitute special grounds. The husband must also satisfy the court on the facts of the particular case that the risk of presentation of a false case, or of other injury to the public interest, is so small as to be almost negligible.

Where a child was born to the wife on June 6, 1945, and it could be shown that the husband was overseas from May, 1940, to May, 1945, and the wife had made a written confession in which she gave the name of the alleged adulterer, but stated that he was a Canadian and she did not know his address and that adultery took place on only one occasion during an interval at a dance, and the husband's solicitor had sworn an affidavit in which he said that he could not think of any inquiries which might be made with a view to ascertaining the identity of the alleged adulterer.

A **HELD**: there being no hope of ascertaining the identity of the alleged adulterer or of obtaining evidence against him and as the possibility of collusion between the husband and the wife or of connivance on the part of the husband could be disregarded, leave would be given to proceed without making the alleged adulterer a co-respondent, but, as a name had been furnished by the wife, it would not be right to dispense with naming the alleged adulterer in the petition as being "a man whose name is stated by the respondent to be A.B., but whose identity is unknown to the petitioner."

C Where, however, a child was born to the wife on July 13, 1945, and it could be shown that the husband was overseas from March, 1943, until after that date, and the wife had disclosed in writing the name and address in England of the alleged adulterer and had stated that, while she had not actually cohabited with him, adultery had taken place on a number of occasions at the house where she had lodged while her husband was away, but she was unable to furnish the name and address of any witness who could speak of the association, and the court was not satisfied that all reasonable efforts had been made to obtain evidence against the alleged adulterer,

D **HELD**, while the probability of collusion or connivance was extremely slight it could not be completely disregarded as in the previously mentioned case, and in view of that fact and the fact that it did not appear that all reasonable efforts had been made to obtain evidence against the alleged adulterer, leave would not be given to dispense with making him a co-respondent and still less with naming him in the petition.

E **[EDITORIAL NOTE.** As is clear from the terms of the statute and the statutory rule and from the authorities the question whether leave shall be given to a husband petitioner to dispense with naming an alleged adulterer in the petition or making him a co-respondent is entirely one for the discretion of the court to be exercised on the particular facts of the case, but practitioners, when considering whether or not applications for leave should be made, should find of considerable assistance the five matters indicated by WILLMER, J., in the latter half of his judgment.

F AS TO NECESSITY TO MAKE EVERY ALLEGED ADULTERER CO-RESPONDENT, see HALSBURY, Hailsham Edn., Vol. 10, p. 700, para. 1040; and FOR CASES, see DIGEST, Vol. 27, pp. 384-388, Nos. 3779-3829].

Cases referred to:

(1) *Eastham v. Eastham*, [1943] 1 All E.R. 659; [1943] P.53; 112 L.J.P. 69; 168 L.T. 348; Digest Supp.

(2) *Saunders v. Saunders*, [1897] P.89; 66 L.J.P. 57; 76 L.T. 330; 27 Digest 385, 3784.

G (3) *Jones v. Jones*, [1896] P.165; 65 L.J.P. 101; 75 L.T. 190; 27 Digest 385, 3782.

(4) *Edwards v. Edwards & Wilson*, [1897] P. 316; 67 L.J.P. 1; 77 L.T. 406; 27 Digest 385, 3788.

(5) *Gleed v. Gleed* (1927), 43 T.L.R. 678; Digest Supp.

APPLICATIONS, referred by the registrar, for leave to proceed with petitions for divorce without naming the alleged adulterers.

H *John B. Lately* for the husbands.

WILLMER, J., read the following judgment: I have before me two applications by husbands for leave to proceed with their petitions without naming the alleged adulterers. Both cases are of a type which is now common in this court, for in both it is sought to prove the alleged adultery by furnishing evidence (a) that the wife has given birth to a child, and (b) that the husband was at all material times absent on military service overseas, so as to preclude the possibility of his being the father of the child. In each case the name of an alleged adulterer has been furnished by the wife, but in neither case is the husband acquainted

with him, and in both it is said that it will not be possible for the husband to offer any evidence of the adulterer's guilt. It is in these circumstances that the husbands ask to be relieved of the obligation of naming the alleged adulterer. So much is common to both cases, but there are, as I think, material differences between the facts of the two cases, to which I will refer in a moment. The cases have been referred to me by the registrar before whom they came in the first instance, because (so I was informed) there is a large number of similar cases now awaiting decision, and it was hoped that my decision in these two cases might afford some guidance in dealing with the other cases. In view of the importance of the matter I thought it right to call for argument in open court, and I have taken time to consider my decision.

The applications are made under s. 177 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, the material words of which are as follows :

On a petition for divorce presented by the husband . . . the petitioner . . . shall make the alleged adulterer a co-respondent unless he is excused by the court on special grounds from so doing.

It is also necessary to refer to r. 5 of the Matrimonial Causes Rules, 1944, which provides as follows, again omitting immaterial words :

Unless otherwise directed, where an alleged male adulterer is named in a husband's petition for divorce . . . such alleged adulterer shall, if living at the date of the filing of the petition, be made a co-respondent in the case. . .

It will be noticed that the Act is silent about naming an alleged adulterer. Rule 5 provides in terms only for the case of an adulterer who is named, and there is no provision in the rules dealing in terms with the case of an unnamed adulterer. It is well settled, however, that the expression "alleged adulterer," as used in the Act, includes not only a named adulterer but also one whose name and identity may be unknown to the husband. It has, accordingly been held in the recent case of *Eastham v. Eastham* (1) that where the name of the alleged adulterer is unknown it is still necessary for the husband to ask the court for leave to proceed without naming the adulterer. In other words, it is necessary to seek the decision of the court on both questions, namely, (a) whether the husband is to have leave to proceed without naming an adulterer, and also (b) whether an adulterer who has been named is to be made a co-respondent.

It is clear both from the terms of the Act itself and from the decisions under the corresponding section of the Matrimonial Causes Act, 1857, that the question to be decided is one for the discretion of the court. It is, therefore, impossible to lay down any rule which will be of general application, and in *Saunders v. Saunders* (2) the Court of Appeal expressly decided that any attempt to do so would be wrong. Each case must be decided on its own merits, and I wish to make it clear that nothing which I say in this judgment is intended in any way to lay down any general rule which might fetter the discretion of the court in any future cases. I think, however, that it is both permissible and useful to state what considerations I have attempted to bear in mind in arriving at my decision in the present cases, and what are the circumstances which the court may properly, in my judgment, take into consideration in exercising its discretion in similar cases.

Counsel for the husbands was careful to confine his argument to those cases in which the incontrovertible facts raise something in the nature of an irresistible inference that adultery has been committed, and in which (as in the present cases) the husband, apart from the confession of the wife, has no evidence whatever as to who the adulterer was. He contended that in such cases to insist on the alleged adulterer being named in the petition, and still more to insist on his being made a co-respondent, would have the effect of inflicting grave hardship, not only on the husband, but also on the proposed co-respondent. The husband would be put to the expense of proceeding against a man against whom he would have no chance of succeeding, with the added danger of being condemned in costs in case the alleged adulterer saw fit to defend and assert his right to be dismissed from the proceedings. As to the alleged adulterer, it was pointed out that he might well be himself a married man, and that the only effect of naming him in proceedings which were bound to be abortive as against him might be to precipitate the break-up of two homes instead of one. Counsel

conceded that, in addition to considering the parties, the court must also bear in mind the public interest in minimising the risk of any collusive design to present a false case, and contended that the duty of the court was to strike a just balance between the necessity of safeguarding the public interest, on the one hand, and the avoidance of unnecessary hardship to the parties, on the other, but he argued that in cases such as those now before the court the risk of a false case being presented was reduced almost to vanishing point, and that any public advantage to be gained from naming the alleged adulterer would be far outweighed by the hardship which might be caused to the parties. Counsel further pointed out that the court, in exercising its discretion on this matter (as on any other), should pay due regard to the contemporary conditions and to the present day needs of the community, and he appeared to suggest that the fact of the prevalence of this type of case at the present time might itself afford good reason for some relaxation of the practice of the court in favour of petitioners.

A The reports are full of cases in which applications similar to those in the present cases have been made. I need not refer to the earlier decisions, for in 1896 all the previous authorities were reviewed by GORELL BARNES, J., in *Jones v. Jones* (3), where many of the essential facts were similar to those of the present cases. In that case GORELL BARNES, J., sought to lay down a rule which he expressed in the following terms ([1896] P.170) :

C I am of opinion that, where the relief sought against the respondent is on the ground of adultery alleged to have been committed with a man, whose name and identity are known, and who is alive, the petitioner must make such person a co-respondent, and that the court ought not to excuse him from so doing, merely because he finds that he cannot obtain evidence, which will prove his case as against such co-respondent.

In the particular case GORELL BARNES, J., was not satisfied that the husband could not get evidence against the alleged adulterers, and he refused the application.

D In the following year the Court of Appeal, in *Saunders v. Saunders* (2), while not disagreeing with the actual decision in *Jones v. Jones* (3), expressed their disapproval of the rule laid down by GORELL BARNES, J., on the ground that such a rule would act as a fetter on the discretion of the court. They insisted that the court must apply its mind to each particular case and decide, on the facts of the particular case, what it was just and expedient to do, being guided by the statute, the rules of court, and what experience shows to be the dangers to be avoided. Later in the same year, in *Edwards v. Edwards* (4) another similar case came before the court, and SIR FRANCIS JEUNE, P., took the opportunity of commenting on and to some extent explaining the two previous decisions. He pointed out that there are many cases where the facts are so clear as hardly to call for the exercise of the court's discretion. Thus, where the alleged adulterer is dead, or is actually unknown, e.g., because he has escaped and cannot be found, the court can in practice do no other than grant leave to proceed without a co-respondent. On the other hand, where the alleged adulterer is a known person whom the husband believes to be guilty, the court can in practice do no other than insist upon his being made a co-respondent. The real difficulties, calling for the exercise of the court's discretion, arise in the intermediate class of case where the evidence points to a known man whom, however, the husband states he cannot prove, and does not believe, to be guilty. G SIR FRANCIS JEUNE, P., suggests that the mere belief of the husband that the alleged adulterer is not guilty cannot by itself be sufficient to excuse his being made a co-respondent ; but that if the husband can go further, and satisfy the court that no evidence can be obtained against the man accused, then there may be a case for relieving the husband from making him a co-respondent.

I doubt whether anything more is to be collected from the authorities, but H I must just mention one more case which was cited to me, if only to say that I think it must be mis-reported. This is *Gleed v. Gleed* (5), which was before LORD MERRIVALE, P., in 1927. The wife had supplied the name of the alleged adulterer, but his identity and whereabouts were unknown, and he was believed to be somewhere in Australia. According to the report, LORD MERRIVALE gave leave to proceed without making the alleged adulterer a co-respondent. The facts disclosed were so strikingly similar to those of one of the cases now before me that I thought it would be useful to examine the actual record of the case. Having studied the file I find that the alleged adulterer, was, in fact, named and

made a co-respondent, and the real question before the court, and the only question, was whether leave should be granted to dispense with service on him. I do not think, therefore, that this decision helps me very much in dealing with the present applications.

In my judgment, the wording of the Act makes it clear that it is for the husband to make out his case for relief from naming the alleged adulterer and making him a co-respondent. Unless the husband discharges the burden which is on him, by showing "special grounds," the Act requires that the alleged adulterer be made a co-respondent. The burden must be discharged on the facts of the particular case, and I do not at all assent to the proposition that the mere fact of the prevalence at any particular time of a particular class of case affords any valid reason for relaxing in favour of husbands the plain requirements of the Act. The court must be satisfied on the facts of each particular case that special grounds exist. While I agree with counsel for the husbands that the duty of the court is to strike a balance between the need for safeguarding the public interest, on the one hand, and for avoiding unnecessary hardship to the litigants, on the other, I desire to leave no doubt that, in my judgment, the public interest is the paramount consideration. In other words, I do not think that mere proof of hardship to the parties is enough by itself to constitute "special grounds," unless the husband can also satisfy the court that on the facts of the particular case the risk of presentation of a false case, or of other injury to the public interest, is so small as to be almost negligible.

In pursuance of these general observations it seems to me that the following are the sort of questions that the court may well ask itself in each particular case :—

(1) Is there any ground for suspecting that a false case is being presented ? In the ordinary type of non-access case, on proof of the essential facts, i.e., the birth of a child coupled with proof of the absence of the husband overseas at the material time, no room is left for doubt that adultery has, in fact, been committed, but the possibility remains that husband and wife may have entered into a collusive bargain to conceal the identity of the real adulterer or the wife may be deceiving her husband by accusing an innocent man so as to cloak the identity of the real adulterer. Obviously the probability of collusion between the parties diminishes the longer the absence of the husband overseas has been, but, if there remains any reasonable doubt as to the truth of the wife's accusations against the alleged adulterer, to name him and make him a co-respondent clearly provides some safeguard in the public interest.

(2) Is there any ground for suspecting that the husband has connived at the adultery of his wife ? The mere fact that he is proved to have been overseas at the time of the alleged adultery is clearly not sufficient by itself to negative the possibility that he may have connived at it, but equally it is clear that the longer the husband's absence overseas has been the less likelihood can there be of his having connived at his wife's adultery.

(3) Has the husband, in fact, taken all reasonable steps to see whether evidence against the alleged adulterer can be obtained ? Where nothing but the names of the alleged adulterer has been disclosed, and the husband has no knowledge of any such person, it may well be that no further steps are open to the husband to obtain evidence against him, but where the wife discloses both the name and address of the alleged adulterer, it seems to me that she discloses the identity of the man accused unless on further inquiry it appears that no such person exists. Where the identity of the alleged adulterer has been so disclosed, it is clear that the husband has scope for further inquiry, since evidence may be obtained as to the movements and behaviour of the alleged adulterer at the material time. Still more is this the case when the time and place of the alleged adultery has been disclosed. Unless it appears that reasonable steps to obtain evidence have, in fact, been taken, it appears to me that no case for dispensing with making the alleged adulterer a co-respondent has been made out.

(4) What is the hardship that the husband will suffer if the court insists on the alleged adulterer being made a co-respondent ? Various hardships have been suggested. (a) The husband may be put to further, and, possibly, abortive expense in endeavouring to obtain evidence against the alleged adulterer. It seems to me that the hardship of incurring this expense must be weighed against the probability or otherwise of its being fruitful. In other words, I do not think

that a husband can be required to do more than is reasonable in the circumstances of the particular case. (b) The husband may incur a liability for costs in the event of the alleged adulterer (on being made a co-respondent) appearing and asserting his right to be dismissed from the proceedings. I am not unduly impressed by this alleged hardship. It seems to me that this is one of the risks which any husband must accept when he elects to institute proceedings. (c) Since the husband must swear an affidavit verifying to the best of his belief the allegations in his petition, he may be forced by the court into a position where he must either abandon the proceedings or else swear to the truth of something which he does not genuinely believe to be true. This, I feel, is a point of some substance, but I do not see why it cannot be overcome by allowing, in a proper case, some degree of elasticity in the wording of the charge in the petition. Where the court is not satisfied that reasonable inquiries have been made by the husband for the purpose of obtaining evidence against the alleged adulterer, I do not see how the husband suffers any hardship in being forced to abandon his proceedings if he cannot conscientiously swear to his belief in the truth of the allegation in his petition. But where, after diligent inquiries, the husband is left in the position that he still has nothing whatever to go on beyond what the wife has told him, I see no reason why he should not be allowed to say so in his petition, that is to accuse the wife, for instance, of adultery "with a man whose name is stated by the respondent to be so and so but whose identity is unknown to the petitioner," or whatever form of words may be suitable to the facts of the particular case. In such a case it seems to me that the husband would have strong grounds for asking the court for leave to proceed without making the alleged adulterer a co-respondent.

(5) Lastly, the court may properly, I think, ask itself whether any unnecessary hardship will be imposed on the alleged adulterer by naming him and making him a co-respondent. Consideration can be properly given to the question whether, if he is a married man, the effect of naming him may not be merely to precipitate the break-up of another marriage. But against this it is to be remembered that if he is in fact an innocent man it is rather to his interest to be made a co-respondent, so that he may have the opportunity of coming forward to vindicate his character. Moreover, the court must never lose sight of the possibility that the man named by the wife may be merely a cloak to conceal the identity of the real adulterer, in which event the best chance of ascertaining the truth may well lie in making the alleged adulterer a co-respondent, so as to give him a chance of defending the proceedings, and exposing the falsehood of the wife's allegation.

Bearing these considerations in mind, I proceed now to consider the facts of the two cases actually before me. In the case of SAGE it is alleged that a child was born on June 6, 1945, and admissible evidence will be given to show that the husband was serving overseas from May, 1940, until May, 1945. There was thus a prolonged period of non-access before the date when the child must have been conceived. The wife has made a written confession, in the course of which she gives the name of the alleged adulterer, but states that he is a Canadian and that she does not know his address. She does not admit to any cohabitation with this man, but states that the adultery took place on one occasion in the interval of a dance which both were attending. The husband's solicitor has sworn an affidavit, in the course of which he says that he cannot think of any inquiries which might be made with a view to ascertaining the identity of the alleged adulterer. On these facts I see no hope of ascertaining the identity of the alleged adulterer or of obtaining evidence against him. With so prolonged a period of non-access I think that the possibility of collusion between the husband and the wife or of connivance on the part of the husband can be altogether disregarded. In the circumstances I give leave to proceed without making the alleged adulterer a co-respondent. Since a name has been furnished by the wife, I do not think it would be right to dispense with naming the alleged adulterer, but I think it would be quite proper for the petition to allege that the wife "committed adultery with a man whose name is stated by the respondent to be A.B., but whose identity is unknown to the petitioner."

In the case of STOCKBRIDGE it is alleged that a child was born on July 13, 1945, and admissible evidence will be given to show that the husband was overseas from March, 1943, until after the date of the birth of the child. In this

case, therefore, there was a period of about 18 months of non-access before the date when the child must have been conceived. In such circumstances I think that the probability of collusion or connivance is extremely slight, but that it cannot be completely disregarded as in the case of *SAGE*. In this case also the wife has disclosed in writing the name of the alleged adulterer, but she has also gone further and given his address, which is in Birmingham. She states that she did not actually cohabit with this man but that adultery took place at an address in Sussex on a number of occasions over a period when she was in lodgings at that address while working on the land. She is unable to furnish the name and address of any witness who can speak of the association. In these circumstances it is said that the husband cannot obtain any evidence against the alleged adulterer, but there is nothing to show that any effort to do so has, in fact, been made beyond asking the wife. In this case the husband knows, not only the name of the alleged adulterer, but also his address, *i.e.*, his identity. The person so identified is resident in this country, and must, presumably, be known to persons who may be able to speak to his movements and behaviour during the material period. Moreover, the husband knows the address where it is alleged that adultery was habitually committed. He thus has two possible lines of inquiry which have so far not been tried. I am not satisfied in the circumstances that in this case all reasonable efforts have been made to obtain evidence against the alleged adulterer. I do not think, therefore, that in this case it would be right to give leave to dispense with making the alleged adulterer a co-respondent, still less to dispense with naming him altogether. For these reasons I allow the application in *SAGE*'s case, to the extent of dispensing with making the alleged adulterer a co-respondent, but dismiss that in the case of *STOCKBRIDGE*.

Solicitors: Law Society's Services Divorce Department (for the husbands).
[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

ASSOCIATED PROVINCIAL PICTURE HOUSES, LTD. v. WEDNESBURY CORPORATION.

[KING'S BENCH DIVISION (Henn Collins, J.), February 27, 28, 1947.]

Theatres and Places of Entertainment—Cinematograph—Sunday performance—Permission—Condition—Prohibition of admission of child under 15—Sunday Entertainments Act, 1932 (c. 51), s. 1.

It is not *ultra vires* a licensing authority, when allowing, under s. 1 (1) of the Sunday Entertainments Act, 1932, cinematograph theatres in their area to be opened on Sundays, to impose a condition that children under the age of 15 years, whether accompanied by an adult or not, should be excluded. The authority, when imposing conditions, may take into consideration matters which do not directly affect the premises or the nature of the performance, but which are designed to effect a benefit to the community.

Harman v. Butt ([1944] 1 All E.R. 558) followed.

Theatre de Luxe (Halifax), Ltd. v. Gledhill ([1915] 2 K.B. 49) distinguished.

[AS TO SUNDAY OPENING OF CINEMAS, see *HALSBURY*, Hailsham Edn., Vol. 32, pp. 75-76, paras. 96, 97; and FOR CASES, see *DIGEST*, Vol. 42, pp. 920-922, Nos. 160-175.]

Cases referred to:

- (1) *Theatre de Luxe (Halifax), Ltd. v. Gledhill*, [1915] 2 K.B. 49; 112 L.T. 519; 79 J.P. 238; 31 T.L.R. 138; 24 Cox. C.C. 614; *sub nom. Halifax Theatre de Luxe, Ltd. v. Gledhill*, 84 L.J.K.B. 649; 42 Digest 920, 921, 160.
- (2) *Harman v. Butt*, [1944] 1 All E.R. 558; [1944] K.B. 491; 114 L.J.K.B. 99; 170 L.T. 355; 108 J.P. 229; 60 T.L.R. 341; Digest Supp.

ACTION by licensees of a cinematograph theatre for a declaration that a condition attached to a permission granted by the licensing authority for Sunday performances was *ultra vires*. The facts appear in the judgment.

Gallop, K.C., and *Sidney H. Lamb* for the plaintiffs.

Fitzgerald, K.C., and *Vernon Gattie* for the defendants.

HENN COLLINS, J. : This is an action in which the plaintiffs, Associated Provincial Picture Houses, Ltd., seek a declaration against the mayor, aldermen and burgesses of the borough of Wednesbury to the effect that the limitation in a licence which the defendants granted in respect of performances in cinematograph theatres on Sunday within their area was beyond the powers of a local authority to impose, namely, that a child under the age of 15 years, whether accompanied by an adult or not, was to be excluded from Sunday performances.

A The Act under which the local authority acted was the Sunday Entertainments Act, 1932, s. 1 of which provides that the authority which has power in the area to grant cinematograph licences may, notwithstanding any enactment relating to Sunday observance, allow places in their area to be opened on Sundays for the purpose of cinematograph entertainments, and these are the significant words : "subject to such conditions as the authority think fit to impose." The plaintiffs say that, in acting under that section, the local authority must act reasonably, and, subject to a proper understanding of that phrase, I think it is common ground that they must ; but what is said is that the test of reasonableness is what the court thinks reasonable rather than what the local authority think reasonable. That is a strong contention and one which would require to be supported by clear words in the section because the words in themselves are without limitation.

C The chief support in favour of the plaintiffs' argument is to be found in *Theatre de Luxe (Halifax), Ltd. v. Gledhill* (1). In that case there was a difference of opinion in a court consisting of three judges. The high-water mark on the other side is to be found in *Harman v. Butt* (2), a decision under the Act of 1932, and it is said that I have a free hand to decide as I think fit.

D Let us first see whether there really is such a conflict as has been indicated. I have come to the conclusion that there is not. *Theatre de Luxe (Halifax), Ltd. v. Gledhill* (1) was not a decision under the Act of 1932. It was a decision under the Cinematograph Act, 1909, and very different considerations, it seems to me, are to be applied to an Act which abridges personal rights from those which apply to one which tends to enlarge them. The approach is different. When an Act circumscribes private rights, this court, as has been pointed out very many times, is not astute to find that the abridgment is greater than necessity requires. Before the passing of the Cinematograph Act, 1909, anybody was free to give a cinematograph performance, all other things being equal, by whatever means he liked. The Act of 1909 was an Act to make better provision for securing safety at cinematograph and other exhibitions and introduced for that purpose a system of licensing. It was not to be supposed, *ex facie*, at any rate, that the licence which the Act contemplated was to go beyond the purposes for which the Act was expressed to have been passed, and the view of the majority in that case was that the ambit of the discretion of the licensing authority was circumscribed by the conditions visualised by the Act. The third member of the court, ATKIN, J., took the view that among the considerations which bore on that question was the question whether what was proposed was in the public interest. That alone was the line of difference between them. Whenever that case was cited in relation to the Cinematograph Act, 1909, it was, I will not say, blown on, but at any rate, strictly cribbed, cabined and confined within its particular circumstances, and it has never been taken, as I see it, for a decision on the words which appeared in s. 2 (1) of the Act : "on such terms and conditions and under such restrictions as . . . the council may by the respective licences determine," or any similar words, wherever they appear and in whatever correlation.

H In *Harman v. Butt* (2) ATKINSON, J., had to consider, not an Act abridging the rights of the subject, but one which did exactly the opposite thing. Up to the passing of that Act it was unlawful to hold a cinematograph exhibition on Sunday. The Act enabled performances to be given on Sunday, which was an enlargement of the public right, and the same considerations did not obtain in that case as obtained in the earlier case, and the difference of approach may account for the difference between the two decisions. I think that that is the explanation. ATKINSON, J., felt himself in no difficulty in deciding under the Act of 1932 that it was not *ultra vires* the authority to impose a condition that no child under the age of 16 years should be admitted, that is to say, it was not beyond their powers to take into consideration matters which did not

directly affect the premises or the nature of the performance, but which were designed to effect a benefit to a section of the community.

Which of those two authorities should I follow? It was urged on me that I was untrammelled by authority, but I do not take that view. Other things being equal, I would naturally accept as right, and binding on me in that sense, the decision under the Act of 1932 of *ATKINSON, J.*, unless there is something in the Divisional Court decision to constrict me to the other view. I have given my reasons for thinking that the earlier decision is not really *in pari materia* with that which I have to decide today, and without any hesitation, therefore, I follow the decision in *Harman v. Butt* (2), I hold that this limitation is not outside the powers of the defendant local authority, Wednesbury Corporation, and I decline to make the declaration which the plaintiffs seek. Consequently, the action is dismissed, with costs.

Judgment for defendants with costs.

Solicitors: *Norman Hart & Mitchell* (for the plaintiffs); *Sharpe, Pritchard & Co.*, agents for *G. F. Thompson, Wednesbury* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

EASTERN COUNTIES BUILDING SOCIETY v. RUSSELL.

[KING'S BENCH DIVISION (Hilbery, J.), January 31, February 25, 1947.]

Guarantee—Mortgage—Surety—Proviso that surety's liability should cease if "amount owing in respect of advance" reduced below certain sum—

Inclusion of compound interest, solicitors' charges and fines in "amount."

Building Societies—Mortgage—Interest—Compound interest—Right to charge—No agreement for compound interest in mortgage deed.

Under a building society mortgage deed the mortgagor was entitled to "an advance . . . of £775" by purchasing $7\frac{1}{4}$ £100 shares of the society at an aggregate bonus for the $7\frac{1}{4}$ shares of £38 15s. (i.e., at £5 a share), this latter sum also being lent to her. By a proviso to the surety's covenant, the liability of the surety was to cease if "the amount owing . . . in respect of the advance" was reduced below the sum of £700. There was no agreement in the deed for compound interest. In an action by the building society against the surety for payment of the amount due under the mortgage deed and unpaid by the mortgagor, the amount claimed included compound interest and solicitor's charges, but, of the actual sum of £775, less than £700 was still owing. The surety contended (i) that the society's accounts had been kept on a wrong footing and did not correctly show the true balance for which the surety could be held liable, since there was no agreement for compound interest in the deed; (ii) that his liability had already ceased before the action was brought because the words "the amount owing . . . in respect of the advance" in the proviso discharging him from liability referred solely to the £775 advance to the mortgagor and did not include compound interest and other charges.

Held: (i) the society was not entitled to charge compound interest since there was no express agreement to that effect in the mortgage deed and an agreement could not be implied because there was no evidence that the mortgagor or surety knew that it was a custom of building societies to keep their accounts in that way. The society's accounts had, therefore, been kept on a wrong footing and did not correctly show the true balance for which the surety could be made liable.

(ii) the words "the amount owing . . . in respect of the advance" in the proviso to the surety's covenant did not include the entire amount due under the deed, but only the amount still due in respect of the £775, and the surety was, therefore, discharged from liability.

[AS TO EXTENT OF SURETY'S LIABILITY, see HALSBURY, Hailsham Edn., Vol. 16, pp. 59-63, paras. 52-55, and pp. 71-73, paras. 62, 63; and FOR CASES, see DIGEST, Vol. 26, pp. 79-81, Nos. 561-572.

AS TO COMPOUND INTEREST, see HALSBURY, Vol. 23, pp. 401, 402, para. 599; and FOR CASES, see DIGEST, Vol. 35, pp. 199, 200, Nos. 261, 262, and p. 641, No. 3719.]

Cases referred to :

- (1) *Bacon v. Chesney* (1816), 1 Stark. 192 ; 26 Digest 103, 709.
- (2) *Stamford, Spalding and Boston Banking Co. v. Ball* (1862), 4 De G. F. & J. 310 ; 31 L.J.Ch. 143 ; 5 L.T. 594 ; 26 Digest 79, 566.
- (3) *Blest v. Brown* (1862), 4 De G. F. & J. 367 ; 6 L.T. 620 ; 26 Digest 108, 759.
- (4) *Wheatley v. Bastow* (1855), 7 De G. M. & G. 261 ; 3 Eq. Rep. 859 ; 24 L.J.Ch. 727 ; 25 L.T.O.S. 191 ; 26 Digest 191, 1479.
- (5) *Re Sherry, London and County Banking Co. v. Terry* (1884), 25 Ch.D. 692 ; 53 L.J.Ch. 404 ; 50 L.T. 227 ; 26 Digest 91, 633.
- (6) *Williamson v. Goolld* (1823), 1 Bing. 171 ; 7 Moore, C.P. 579 ; 1 L.T.O.S.C.P. 38 ; 26 Digest 151, 1134.

ACTION by a building society against a surety for payment of an amount due under a mortgage deed and unpaid by the mortgagor. The defence was that, by a proviso to the surety's covenant, the surety was already discharged from liability before the action was brought. The facts and the relevant clauses of the mortgage deed appear in the judgment.

Sir William McNair, K.C., and *B. H. Waddy* for the plaintiffs.
D. A. Scott Cairns for the defendant.

Cur. adv. vult.

Feb. 25. *HILBERY, J.*, read the following judgment. The plaintiffs' claim is as mortgagees against the defendant as surety for the due performance by the mortgagor of the mortgagor's covenants contained in a mortgage deed dated Jan. 6, 1937. The plaintiffs claim by the statement of claim that there is an amount due under the mortgage deed in question and unpaid by the mortgagor. The defendant denies that that is the sum due and pleads that before action brought his liability as surety under the deed had absolutely ceased and determined according to the special proviso contained in the mortgage deed.

The material recitals and covenants in the mortgage are as follows :

Whereas (a) The mortgagor is the estate owner of the property described in the schedule hereto in respect of the residue of a term of 99 years from June 24, 1879, granted therein by the lease particulars whereof are contained in the said schedule subject to the payment of the yearly rent of £8 by the said lease reserved and to the covenants on the part of the lessee and conditions therein contained. (b) The mortgagor being a shareholder in the society hath by purchasing at a bonus at the rate of £5 per share become entitled to an advance from the funds thereof of seven shares and three quarters of another share of £100 per share amounting in all to £775 on her giving the security hereinafter contained. (c) It has been agreed that the said sum of £775 and the said bonus together with interest for the same or such part thereof as shall from time to time remain unpaid shall be repaid by monthly instalments of £7 0s. 10d. each the first of such instalments to be payable on Friday Feb. 12 next and the subsequent instalments to be payable successively on the second Friday in each succeeding calendar month until the whole of the said sum of £775 and the said bonus and interest shall be repaid. (d) It has been further agreed that this deed shall contain the provisions in default of payment of any instalment interest or other moneys or any fines payable by the rules of the society now in force hereinafter contained. Now this mortgage witnesseth as follows : 1. In consideration of the sum of £775 to the mortgagor now paid out of the funds of the society (the receipt whereof is hereby acknowledged) the mortgagor as beneficial owner hereby demises unto the trustees the property described in the schedule hereto To hold the same unto the trustees for all the residue now vested in the mortgagor of the said term of 99 years granted therein by the said lease as aforesaid (except the last 10 days of the said residue) subject to the proviso for vacating this deed hereinafter contained. 2. Provided always that if the mortgagor shall pay to the trustees all the instalments fines interest and other moneys payable by virtue of the hereinbefore recited agreements or the rules of the society at the times and in the manner thereby provided and shall observe and perform all the rules of the society now in force and the covenants herein contained then the trustees shall at any time thereafter upon the request of the mortgagor indorse upon this deed a proper receipt for all moneys intended to be hereby secured and thereupon this deed shall be vacated. 3. Provided that in case the mortgagor shall neglect or refuse to pay any of the said instalments fines interest or other moneys payable by virtue of the aforesaid agreements or the rules of the society at the times and in manner aforesaid or shall fail to comply with the said rules or to observe the said covenants (of which neglect or refusal the production of the certificate of the manager for the time being of the society shall be conclusive evidence) then the entire sum of money which according to this deed and the rules of the society shall for the time being be secured by this deed shall be and become immediately payable and shall be deemed to be due within the meaning

of the Law of Property Act, 1925, and the trustees may at any time thereafter without any further notice to or consent on the part of the mortgagor exercise all the powers by the same statute conferred on mortgagees. 4. The mortgagor hereby covenants with the trustees as follows: (a) That the mortgagor will during the continuance of this security punctually pay to the trustees all the aforesaid instalments fines interest and other moneys payable by virtue of the hereinbefore recited agreements at the times and in manner aforesaid and in default of the payment of any sum or sums so to be paid as aforesaid will immediately pay the entire sum of money which according to the said rules and this deed shall for the time being be secured by this deed together with interest thereon from the time of such default until payment at the rate of £6 per centum per annum and such interest shall be a charge upon the property hereinbefore expressed to be hereby assured. (b) That the mortgagor will observe and perform all the rules of the society and will from time to time put and keep every message and building comprised herein in good and tenable repair and condition and insured against fire in the trustees' names in such office and through such agency as the trustees shall from time to time determine to the full value thereof and will deliver to the trustees the policy of such insurance and produce to the trustees on demand the receipt for the current year's premium. 5. And whereas it was a condition upon the making of the hereinbefore mentioned advance that the surety should enter into the covenant herein-after contained Now in pursuance of such condition and in consideration of the premises the surety hereby covenants with the trustees that if the mortgagor shall neglect to make any of the several payments which ought to be made pursuant to any covenant on the part of the mortgagor hereinbefore contained or shall fail to comply with any of the regulations prescribed or to be prescribed by the rules of the said society or any of them in respect of the hereinbefore mentioned advance which on the part of the mortgagor ought to be complied with then and in such case the surety his executors or administrators will from time to time and at all times when thereunto required make the several payments and comply with the several rules and regulations in respect of which the mortgagor shall have made default as aforesaid and in case the property hereby expressed to be assured shall be sold under the statutory power of sale will on demand pay any deficiency which may arise by reason of the proceeds of such sale being insufficient to liquidate the sums then due by virtue of this deed and will pay all costs occasioned by such default and that the liability of the surety his executors or administrators under this covenant shall not be affected by reason of the directors or trustees of the society giving time to the mortgagor or not proceeding to enforce the making of the payments and compliance with the rules and regulations anything herein contained to the contrary notwithstanding Provided always that if and whenever the amount owing to the society in respect of the advance hereby made shall be reduced below the sum of £700 then and in such case the liability of the surety his executors and administrators under the covenant hereinbefore contained shall absolutely cease and determine.

The issues which I have to decide are whether, on a true construction of the deed, it is established by the plaintiffs that the sum claimed is outstanding in respect of the mortgage and that the defendant, as surety, is liable to make that sum good, or whether it has been established by the surety that he is discharged because the amount outstanding in respect of the "advance" was reduced below £700 on any of the dates when it is said to have been so reduced. The plaintiffs' counsel contends: (i) that the business sense of the transaction embodied in the mortgage is that the plaintiffs only meant to discharge the surety if the total amount outstanding on the security of the mortgaged property was reduced below £700; (ii) that their account as kept between them and the mortgagor shows that the total amount outstanding and owing was never reduced below £700 and that the surety was, therefore, never discharged; (iii) that if the words "the advance" in the proviso under which the surety claims to have been discharged are to be construed as referring only to the amount advanced on the shares taken by and allotted to the mortgagor, none the less the words "amount owing in respect of the advance" are not the same as "of the advance there remains owing," and that the words "in respect of" are comprehensive enough to include interest, solicitor's charges, and fines. He further argued that, if, in the proviso to cl. 5, the word "advance" was intended to refer only to the £775, then it was necessary to include in the deed a provision for apportionment as otherwise the proviso to the surety's covenant could not be worked out, and the absence of such a provision for apportionment shows that no such thing was in the contemplation of the parties. Lastly, he stresses the fact that the accountants on both sides agreed in their evidence that building societies' accounts are not kept as the defendant here contends the

accounts in this case should have been kept; that the way in which the plaintiff society kept the account in this case is the method in general use by building societies; and the parties would have expressly provided for a different or special method if they had intended that this or any special method should have been employed.

The defendant contends: (a) that the way in which the plaintiff society has kept the account is not in accordance with the terms of the mortgage deed and does not correctly show the amounts from time to time due from the principal debtor, inasmuch as interest is periodically capitalised with the result that compound interest has been debited to the mortgagor and forms part of the total amount alleged to be due from the mortgagor, and solicitors' charges incurred since the date of the mortgage have been included; (b) that in the proviso discharging him from his suretyship if and when the amount owing in respect of the advance is reduced below the sum of £700, the word "advance" refers solely to the £775 advance to the mortgagor referred to in the deed and not to what is expressly referred to in the deed as "the entire sum of money which," according to the deed and the rules of the society, "shall for the time being be secured" by the deed; and (c) that the expression in the proviso "owing . . . in respect of the advance," read in its context, should not be construed so as to enlarge it and make it comprehend the items which the plaintiff society seeks to make it include.

After repeatedly considering the whole written instrument and all the material surrounding circumstances in which this mortgage instrument was drawn up and executed, I am of opinion that the plaintiffs' contentions are not well founded. The mortgage instrument, like any other written contract, must be taken to express what the parties intended to be the contract between them. It is not the function of the court to make a contract for the parties which would seem reasonable or which will more conveniently fit the circumstances which have supervened. The whole instrument, as it stands, must be construed so as to give effect to the intention of the parties discovered from the actual terms agreed by the parties and employed by them in the written instrument as expressing what they intend to agree. It must be borne in mind that the plaintiff society was the party putting forward the written instrument as expressing the terms on which they were willing to contract.

If, therefore, there be a doubt about how an expression in the instrument is to be interpreted, it is to be construed *contra proferentes*. Moreover, the question here does not arise between the two principals to the contract, but between the society and the surety, and the terms employed in the contract, defining the surety's undertaking and expressing the terms on which he is to be freed from his undertaking, ought to be strictly construed. Rather will the court in case of doubt lean in his favour.

Neither equity nor law will put a construction on the document which results in imposing on the surety any more than, on the strictest construction of the instrument, he must be said expressly to have undertaken, or so as to detract from the right given to the surety by the proviso defining the circumstances in which the surety is to be held discharged. If authority is needed for saying that the surety's contract has been said to be one *strictissimi juris*, I would refer to *Bacon v. Chesney* (1),

Stamford, Spalding & Boston Banking Co. v. Ball (2) and *Blest v. Brown* (3) (per LORD WESTBURY, L.C., (4 De G.F. & J. 376)). There is plenty of authority for saying that the courts treat a surety as a favoured debtor: per TURNER, L.J. (7 De G.M. & G. 279, 280), in *Wheatley v. Bastow* (4), per EARL OF SELBORNE, L.C. (25 Ch. D. 703) in *Re Sherry, London & County Banking Co. v. Terry* (5), and per DALLAS, C.J. (1 Bing. 176) in *Williamson v. Gould* (6). Such are the principles which I must apply in construing the document in question.

In the first place, however, it is convenient to decide whether the plaintiff society's method of keeping the account as between themselves and the mortgagor is correct, i.e., is in compliance with the contract and, therefore, binding on the defendant. The society has added the interest on the loan at the end of each year. The total of loan, fines (if any) and interest has been brought forward to the next year's account, and, at the end of the next year, interest on the outstanding total, including the amount so brought forward, has again been calculated and added, and so on from year to year. The

result has been that the mortgagor has been charged compound interest and compound interest has gone towards making up the alleged outstanding indebtedness of the principal debtor for which the surety is now in this action sought to be made liable. It is beyond question that there is no express agreement for compound interest to be found in the mortgage deed. It is too well established for it to be necessary to cite the authorities that a mortgagee cannot charge compound interest unless there is an agreement to that effect, and so, as there is here no express agreement for such a charge, the plaintiffs' account has been kept on a wrong footing and does not correctly show the true balance for which the surety could be held liable. An agreement for compound interest can, of course, be implied and here the plaintiff society urges the argument that building society accounts are always kept in this way, but, although that may be true and the building society may know when it enters into such a mortgage contract as this that it intends to keep the account in this way, there is no evidence before me that the mortgagor or the surety knew it. They were not like parties to a contract all of whom are in the same trade, contracting in that trade and knowing its usages. Indeed, the plaintiffs' evidence here was that the account was so kept as a matter of convenience, because the keeping of the account so as to allocate the instalment payments rateably against the sums lent by the society and the fines or other dues, and so as to make rests, would involve much more elaborate book-keeping. The argument that, because no stipulation is made in the deed for allocating, therefore, the inference should be drawn that the parties did not intend that that method should be adopted, seems to me to be of less force than to say that, since compound interest cannot be charged against a mortgagor without express agreement and there is no such agreement here, and since, by the deed in question, the surety is given an absolute discharge if the amount outstanding in respect of the advance is reduced at any time below the sum of £700, the inference is that the account must be kept so as to show the true position of the surety at all times.

While I am, therefore, of opinion that these contentions of the plaintiff society are wrong, the question still remains whether or not the surety is right in saying that under the proviso he has, in fact, been discharged because, as he contends, the words "amount owing in respect of the advance hereby made" refer only to the advance by the society of the £775. The recital (b) states that the mortgagor, by purchasing seven £100 shares and three quarters of another £100 share at a bonus of £5 per share, had "become entitled to an advance . . . of £775" on giving the security contained in the mortgage. If one turns to the rules of the society, it is possible to ascertain what this means and why it is so expressed. The mortgagor, wishing to obtain an advance from the plaintiff society to enable her to purchase the property in question, had first to become a member. This she could do by applying for and obtaining the allotment to her of a sufficient number of shares of a nominal £100 and any fraction of a £100 share, representing a total nominal value equal to the total advance required by her. If the society was willing to make the advance, then the requisite shares and fraction of a share would be allotted to the borrower at a bonus per £100 share fixed by the society. This bonus the society might, and did here, lend to the borrower. It amounted to £38 15s. The plaintiff society itself was, therefore, at all times well aware of what, by its rules or the terms of the mortgage, it was calling "advance" and the distinction between the advance and the bonus paid to obtain the advance. When one looks at the other clauses in the deed, one finds that, where it is intended that a right or obligation is either dependant on or to include, in addition to the £775, the entire amount due under the deed, that intention is expressed in terms—for example, in cl. 2, 3 and 4—but in the clauses affecting the surety, the language is altered. In cl. 5, where the intention is to make the surety liable, while he remains bound for "the several payments which ought to be made pursuant to any covenant on the part of the mortgagor" therein contained or prescribed by the rules of the society, care is taken expressly to say so. In binding the surety by that clause to make good any deficiency which may arise in the case of the enforcement of the security by a sale of the property mortgaged, it is expressly provided that the surety is to provide sufficient

“to liquidate the sums then due by virtue of” the deed. When it is borne in mind that in the same clause the recital is that “it was a condition upon the making of the hereinbefore mentioned advance that the surety should enter into the covenant” which follows, and the only specific previous mention of an “advance” is the mention in recital (b) of an advance on the 7½ shares of £775, the inference seems to me almost irresistible that the society, in drawing the mortgage deed, has taken care to distinguish throughout

A between the entire sum which, according to the deed and the rules of the society, shall for the time being be secured by the deed and the amount of the “advance” made on the shares. The proviso to the surety’s covenant, giving the surety the absolute discharge from his liability, does not adopt the language used to define the extent of his undertaking as surety which has just been used. The proviso does not say, as it so easily could have said : “Provided always that if and whenever the amount owing to the society by

B virtue of this deed,” the language theretofore used where this was intended, but takes care to use the expression : “. . . the amount owing to the society in respect of the advance.”

Applying the principles of construction which I have already stated and which I believe are applicable, I feel forced to the conclusion that the defendant’s contention is right. Even if the £38 15s. lent to the mortgagor to enable her to acquire the 7½ shares is added to the £775 by construing the reference in the proviso to the “advance” as intended to include this £38 15s., still it was conceded that, if the allocation must be made for which the defendant contended, the defendant would still be discharged.

There remain two further arguments of the plaintiff society to be dealt with. It was contended that the words “in respect of” attached to the word “advance” in the proviso are comprehensive enough to include solicitor’s

D charges, interest and fines, and ought not to be construed as the same as if they had been “of the advance there remains owing.” I see no reason to read the words in other than the way in which they would normally be used in such a context. In the ordinary use of language, a person speaking of the amount owing in respect of an advance would mean the amount of the debt remaining unpaid. It was pointed out by counsel for the defendant that there is support for this view and for the view that lawyers so use the expression, for example,

E in the Law of Property Act, 1925, s. 115 (5), sched. III, form No. 2. Lastly, since the language of the deed has a natural and ordinary meaning which does not result in anything which on the face of it is contrary to, or fails to give effect to, the apparent intention of the parties, and bearing in mind that this is a question of construction of a written contract of suretyship and the principles which should, therefore, be employed, I see no reason to give it an

F interpretation which the plaintiffs’ counsel advanced as the canon of construction which I should apply when he invited me to give it what he submitted was its business sense.

Judgment for the defendant with costs.

Solicitors : *Bell, Brodrick & Gray*, agents for *Turner, Martin & Symes*, Ipswich (for the plaintiffs); *Cooper, Bake, Fettes, Roche & Wade* (for the defendant).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

BROOKES v. LONDON PASSENGER TRANSPORT BOARD.

[KING'S BENCH DIVISION (Henn Collins, J.), February 18, 19, 1947.]

Negligence—Railway train—Underground train—Duty of company's servants to shut doors before departure of train—Contributory negligence.

The plaintiff entered the carriage of an underground train belonging to the defendant Board, and the train left the station with the door open: The plaintiff stood with his back to the doorway, holding on to a rail provided for the purpose. He had no experience of underground trains without automatic doors and had no reason to suppose the door was not shut. The train swayed on a curve, the plaintiff lost his balance, and fell out of the train and was injured.

HELD: the defendant Board were negligent in not ensuring that the train door was closed before the train started, and there was no contributory negligence on the part of the plaintiff.

[AS TO DUTY OF RAILWAY COMPANIES IN RESPECT OF CARRIAGE DOORS, see HALSBURY, Hailsham Edn., Vol. 4, p. 69, para. 103; and FOR CASES, see DIGEST, Vol. 8, pp. 78-80, Nos. 533-552.]

Cases referred to:

- (1) *Easson v. London & North Eastern Ry. Co.*, [1944] 2 All E.R. 425; [1944] 1 K.B. 421; 113 L.J.K.B. 449; 170 L.T. 234; Digest Supp.
- (2) *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 772; [1940] A.C. 152; 108 L.J.K.B. 779; 161 L.T. 374; Digest Supp.
- (3) *Gee v. Metropolitan Ry. Co.* (1873), L.R. 8 Q.B. 161; 42 L.J.Q.B. 105; 28 L.T. 282; 8 Digest 78, 533.
- (4) *Adams v. Lancashire & Yorkshire Ry. Co.* (1869), L.R. 4 C.P. 739; 38 L.J.C.P. 277; 20 L.T. 850; 8 Digest 78, 536.

ACTION for damages for personal injuries alleged to be due to the negligence of the defendant Board, their servants or agents.

On Oct. 23, 1945, the plaintiff and a friend entered a train belonging to the defendant Board at Westminster station on the District Railway. The door of the carriage was open when the plaintiff approached the carriage to enter it, and the train was started with the door open. The plaintiff and his friend stood inside the carriage, near the door, and they held the rails provided for the purpose. When the train was between Westminster and St. James's Park stations it swayed or jerked with the result that the plaintiff lost his balance, fell backwards out of the train through the open door, and was injured.

Hallis for the plaintiff.

King Anningson for the Board.

HENN COLLINS, J.: It is alleged by the plaintiff that it was negligent on the part of the defendant Board to start the train without the doors being shut. To that the answer by the Board is that they must in these days have regard to the exigencies of the traffic. To satisfy the public requirements the trains have to follow one another at intervals of two minutes or even less in the "rush" hours. They cannot be allowed to stand at stations for more than 35 seconds or less, and in those circumstances it is not reasonable to suppose that the Board's servants can shut the doors. *Prima facie*, there is no doubt in my mind that it is a negligent thing on the part of the Board to let a train go out of a station with the doors open. Their duty is to take all reasonable steps for the safety of their passengers. The question is whether, having regard to the exigencies of the traffic, it is reasonable to say that the steps that would be necessary to see that the doors are closed must be taken. I know that there is an ever-increasing tendency at the moment to say that the individual must be sacrificed to the majority. That is really the foundation of the argument which was addressed to me on this submission that the Board could not take precautions which in the past they were undoubtedly bound to take. The

whole basis on which we have hitherto proceeded may be altered, but none the less I see no good reason why the Board should start their trains when they can see that a door is open. They have to delay the start of the train by so much time as it will take to remedy that defect, and, subject to the inconvenience that that would put on the public, I think it is their duty to do it.

It is then said that the plaintiff was the architect of his own wrong in that he was negligent in not holding on tight and not shutting the door behind him. It may be that some day there will come along a passenger who is an habitual traveller on these trains and knows all about open doors and the danger of having one's back to them and not holding on, but I believe the plaintiff when he says he had no experience of underground trains that had not got automatic doors. Accepting that evidence, as I do, he had no reason to suppose the door had not shut behind him. I do not see how a passenger can be expected to guard against a danger of which he is not aware, and for that reason I do not think he was guilty of contributory negligence. I find the railway company responsible for the accident that happened.

Judgment for the plaintiff with costs.

Solicitors: *A. E. Hamlin, Brown & Co.* (for the plaintiff); *A. H. Grainger*, solicitor, London Passenger Transport Board, (for the defendants.)

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

C. BURLEY, LTD. v. STEPNEY CORPORATION.

[KING'S BENCH DIVISION (Hallett, J.), March 4, 5, 1947.]

Carriers—Carriage of goods—Implied warranty that goods not dangerous—Disposal of refuse by barge—Warranty negatived by contract—Negligence—Public Health (London) Act, 1936 (c. 50), ss. 92, 304.

Under a contract with the defendants, the plaintiffs provided barges at the defendants' wharf for the reception and removal of refuse. The tipping into the barges was screened to prevent the dispersal of smell and dust, and the plaintiffs' lighterman was unable to see what was tipped in. The defendants' foreman could see, however, and he noticed that one load of "trade refuse" included barrels containing "swarf" or metal shavings. He had no reason to think the swarf dangerous and raised no inquiry, but, in fact, it was mainly magnesium, which, when brought into contact with heat generated by other refuse, caught fire in two barges, started a series of explosions, and caused damage. By cl. 13 of the contract: "the council shall not be held responsible for any damage or mischief caused by or through the refuse after it has been shot for disposal into the contractors' barge or barges," and by cl. 16: "the contractors shall bear all risk and responsibility of whatever kind which shall attend or result from the execution of this contract."

HELD: (i) the principle of *Rylands v. Fletcher* (1868) (L.R. 3 H.L. 330) did not apply to the shooting of the swarf into the barges.

(ii) there being nothing in the appearance of the swarf to indicate to the foreman that it was dangerous, there was no negligence on the part of the defendants in allowing it to be shot into the barges.

(iii) while the balance of authority was in favour of the view that there is an implied warranty that goods delivered for carriage are safe to be

carried, irrespective of whether the person delivering the goods for carriage knows of the danger and irrespective of whether the person to whom they are delivered is under a common law or statutory duty to carry them, that doctrine could not be suitably extended to a case of this kind having regard to the terms of the contract.

(iv) even if the warranty were implied in this case, yet the liability for the breach was negatived by the express terms of the contract.

[AS TO IMPLIED WARRANTY THAT GOODS ARE SAFE TO BE CARRIED, see HALSBURY, Hailsham Edn., Vol. 30, pp. 302, 303, para. 496; Vol. 4, p. 58, para. 86; Vol. 23, p. 581, para. 833; and FOR CASES, see DIGEST, Vol. 41, pp. 314, 315, Nos. 1749-1755.]

Cases referred to:

- (1) *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J. Ex. 161; 19 L.T. 220; 33 J.P. 70; 36 Digest 187, 311.
- (2) *Brass v. Mailland* (1856), 6 E. & B. 470; 26 L.J.Q.B. 49; 27 L.T. O.S. 249; 2 Jur. (N.S.) 710; 4 W.R. 647; 41 Digest 314, 1750.
- (3) *Acatos v. Burns* (1878), L.R. 3 Ex.D. 282; 47 L.J.Q.B. 566; 26 W.R. 624, C.A.; 41 Digest 453, 2841.
- (4) *Bamfield v. Goole & Sheffield Transport Co., Ltd.*, [1910] 2 K.B. 94; 79 L.J.K.B. 1070; 103 L.T. 201, C.A.; 41 Digest 315, 1752.
- (5) *Mitchell, Cotts & Co. v. Steel Bros. & Co., Ltd.*, [1916] 2 K.B. 610; 85 L.J.K.B. 1747; 115 L.T. 606; 32 T.L.R. 533; 13 Asp. M.L.C. 497; 22 Com. Cas. 63; 41 Digest 315, 1753.
- (6) *Great Northern Railway Co. v. L.E.P. Transport & Depository, Ltd.*, [1922] 2 K.B. 742; 91 L.J.K.B. 807; 127 L.T. 664; 38 T.L.R. 711, C.A.; Digest Supp.
- (7) *Transoceanica Societa Italiana di Navigazione v. Shipton (H. S.) & Sons*, [1923] 1 K.B. 31; 92 L.J.K.B. 186; 128 L.T. 319; 38 T.L.R. 318; 16 Asp. M.L.C. 85; 28 Com. Cas. 64; 41 Digest 533, 3608.
- (8) *The Lindenhall*, [1945] P. 8; 114 L.J.P. 67; 172 L.T. 229; 61 T.L.R. 284; 78 Lloyd, L.R. 215, C.A.; Digest Supp.

ACTION for damages for breach of an implied term of a contract and for negligence. The facts appear in the judgment.

Pritchard, K.C., and *Scott Cairns* for the plaintiffs.

Mitchison, K.C., and *Geraint Rees* for the defendants.

HALLETT, J.: The plaintiffs are a company who for many years past have contracted with the defendants, the Stepney Borough Council, for the removal by barge and disposal of all classes of refuse from the council's Duke Shore Wharf, Limehouse, and Devonshire Street Wharf, Mile End. The agreement which was in force at the material time was dated Mar. 8, 1935. By that agreement the contractors had to provide barges to be moored alongside the said wharves to provide:

... an immediate and constantly open shoot for the reception of the whole or any portion of the refuse which may from time to time be brought to the said wharves from any portion of the metropolitan borough of Stepney for disposal ... there shall be one or more barges constantly in attendance at the council's wharves aforesaid for the purpose of receiving at any or all hours of the day and night any refuse which may be brought on to the said wharves for disposal.

The obligations of the council with regard to the collection of refuse can be found in the Public Health (London) Act, 1936. Section 87 of that Act deals with the removal of house refuse, and s. 92 with the removal of trade refuse. By s. 92 (1) it is provided:

If a sanitary authority are required by the owner or occupier of any premises to remove any trade refuse, the authority shall do so ...

The persons requesting the removal have to pay a reasonable sum. Accordingly in addition to removing house refuse and the products of street cleansing, the defendants were compelled by law to remove trade refuse. Trade refuse was dealt with in one of three ways. If there was only a small quantity, the dustman who was removing house refuse might take the trade refuse and make the appropriate charge; if there was a larger quantity, the council might send

A a vehicle specially for the trade refuse; and, if the person concerned desired it, he could send his own vehicle to one of the council's wharves with the refuse. In whichever way the refuse arrived, the loaded vehicle was weighed on its arrival on a weigh-bridge. In the case of a private vehicle, an attendant would ask whether the vehicle was brought there merely to be weighed or whether it was brought there to shoot something. If he was told it was brought there to shoot something, he would ask what was the nature of the load, and he would be told that it was trade refuse. Beyond that, he would not concern himself. The vehicle having passed over the weighbridge and the appropriate charge having been made to the private person or, in certain cases, the appropriate cost having been allocated, it would go on to one of the stages and would tip its contents through a hole into the barge which was moored alongside. No doubt to prevent the dispersal of smell and dust, screens are erected around the stage, and they are continued down so as to shroud the whole course of the tipping from the stage into the hold of the barge. The result, I hold, was that the lighterman in charge of the barge on behalf of the plaintiffs for the most part cannot see what is being tipped into his barge. From time to time the screens may be raised. They are raised, for instance, in the concluding stages of the loading that the trimmers employed by the defendants may level off the cargo. On the other hand, the defendants' foreman stands somewhere on the stage and has a view of what is going down through the hole into the barge.

C I am concerned here with two barges. The first of them, called the "Carnation" was loaded on Apr. 5, and the second of them, called the "Wise" started loading on Apr. 9. The "Carnation" was delayed in leaving the wharf and did not arrive at the plaintiffs' wharf at Sittingbourne until Apr. 11. The "Wise" did not finish loading until Apr. 13, and she did not get to Sittingbourne until Apr. 16. In the case of both barges much the same thing happened. When the crane man started to unload the "Carnation" by means of a grab, there was a muffled explosion between the middle hold and the fore hold, and the grab man noticed that the cargo was on fire at that part. The explosions went on during the whole of the afternoon. The fire brigade pumped water on to the cargo, and it is a matter of some significance that when the water was pumped in it made things worse. There seems to be no doubt that the source of the trouble was some large drums the contents of which have been analysed. In the case of the "Wise" very much the same thing happened. There was no sign of any trouble until the grab was dropped into the cargo for the first time, and then there was a muffled explosion, and a series of muffled explosions going on for, I think, about two hours, and then other symptoms of fire. In the result, damage was done, and special damages have been agreed, subject always to the question of liability.

F As to the cause of these explosions, up to a point, I think, there is no doubt. It turns out that on Apr. 5, and again on Apr. 11, a private lorry load arrived at the Duke Shore Wharf, and was stated to be "for disposal," which is taken as meaning that it was trade refuse delivered to the council for disposal having regard to the provisions of the Public Health (London) Act, 1936, s. 92. The foreman saw that part of the load consisted of large barrels like oil drums. He noticed that these barrels contained what can, perhaps, be described as metal shavings—I believe that the word that is sometimes used for them is "swarf"—which were curly, and looked to him like aluminium in colour. He took no steps to find out what the contents of the drums or barrels, in fact, were, but he saw the drums tipped down through the hole. In some cases the contents came out of them, some drums being split open by falling from that height. It is established with reasonable certainty that the shavings which were so tipped into the barges consisted largely of magnesium. I say "largely" because the analysis which was made showed that in addition to the large percentage of magnesium other chemicals were present in the swarf—barium peroxide, a compound of iron, and probably other substances. Mr. Henville, the public analyst and chemist of the defendants, agreed that it was dangerous to put magnesium into a cargo of this kind. He also agreed that once it was burning one would get the various phenomena which the witnesses spoke to, the explosive effect, the bright light, and so on. The position, then, is that the council allowed to be tipped into

these two barges something which was of a dangerous and explosive nature when tipped into, and ultimately buried beneath, such a cargo, because there is evidence that the other contents of these barges, in particular the vegetable matter associated with the house refuse and street cleansing, tend to generate heat and that when the loading was completed the barrels were underneath some part of such contents.

Those being the facts, I have to consider the legal position. I hope I have already made it sufficiently clear that neither the plaintiffs' servants nor the defendants' servants knew that the material which was being tipped into the barges was dangerous. In so far as it is relevant, I should express my view that neither of them could reasonably be expected to know that the material was dangerous.

Counsel for the plaintiffs, on whom the onus lies, puts his case in three ways. I hope I shall not be wanting in any due respect to his argument if I deal first, and rather summarily, with the third one. His third point was that this is a case where the doctrine of *Rylands v. Fletcher* (1) applies, because the defendants allowed this dangerous substance, magnesium, to escape from their wharf into the barges and there to cause damage, and, therefore, they are liable. I propose to say nothing more about that argument except that I am quite unable to accept the contention that the doctrine of *Rylands v. Fletcher* (1) has any relevance whatsoever in a case of this kind.

Counsel's other grounds require more consideration. In the first place, he contends that it is an implied term of the contract between the parties that the refuse to be removed thereunder should not contain matter which is dangerous, explosive or liable to spontaneous combustion. That contention has made it necessary for me to look at a considerable number of cases, because, at least since the days of *Brass v. Maitland* (2) in 1856, there has been some doubt about what is the extent of liability of a person who delivers to be carried something which turns out to be dangerous. A majority view was held by LORD CAMPBELL, C.J. and WIGHTMAN, J., in *Brass v. Maitland* (2), and a minority view was held by CROMPTON, J. There have been several cases since then where the matter has been discussed, namely, *Acatos v. Burns* (3); *Bamfield v. Goole & Sheffield Transport Co., Ltd.* (4); *Mitchell, Cotts & Co. v. Steel Brothers & Co., Ltd.* (5); *Great Northern Railway Co. v. L.E.P. Transport and Depository, Ltd.* (6), and *Transoceanica Societa Italiana di Navigazione v. H. S. Shipton & Sons* (7). The difference of opinion as to the extent of the liability is also to be found among the text-book writers. One view is expressed in SCRUTTON ON CHARTER-PARTIES, art. 31, and another view in CARVER ON CARRIAGE OF GOODS BY SEA, arts. 278 and 279, and the differences have been placed on record in SALMOND ON TORTS, 10th edn., p. 567. On the whole it seems to me that the balance of authority is in favour of the view that there is an implied warranty that goods delivered for carriage are safe to be carried, and that is so irrespective of whether the person delivering the goods to be carried knows of the danger, and irrespective of whether the person to whom they are delivered is under a common law duty or a statutory duty to carry them, but I think that that doctrine cannot be suitably extended to a case of this kind, having regard to the nature of the business arrangement between these parties and to the terms of the written contract between them.

Counsel's second ground was that there was negligence on the part of the defendants and their servants in causing or allowing the refuse to contain such dangerous matter. With regard to that, if these "things"—I am using a perfectly neutral noun—which were tipped into the barges had been obviously abnormal or dangerous (such as an unexploded Mills hand grenade), or if they had been things of a kind which would put a reasonably careful foreman on his guard, then I think, if they had been tipped in without any further enquiry or precaution, counsel might well have made good his case on negligence. But wisdom after the event does not tend in any way to show negligence before the event on the part of those who did not then possess that wisdom. We know now that this swarf was composed largely of magnesium. We know now that to put swarf largely composed of magnesium into a cargo of refuse of this description was a dangerous thing to do, but that is a long way from convincing me that the persons engaged in supervising the tipping on behalf of the defendants ought to have realised, if they had exercised reasonable care,

that these drums and the metals in them were potentially dangerous. It is not a matter which lends itself to a long discussion, and I think it sufficient to say that I am not satisfied that there was any negligence on the part of the defendants.

A I now come to the contract. I have already said that, to my mind, the absolute warranty which the cases on balance may establish to be implied, generally speaking, in the case of shipments, is inapplicable here having regard to the terms of the agreement between the parties, but counsel for the defendants goes further and says that, even if the warranty were to be implied, yet liability for the breach is negatived by the express terms of the contract. It may be that those are only two slightly different ways of putting the same thing, either saying that the warranty ought not to be implied, or that, if it is implied, the liability for its breach is negatived by the express terms of the contract, but it is put in those two ways, and I, therefore, return to the contract. The second recital to the contract is :

And whereas the contractors' representative attended before the public cleansing committee of the council at a meeting held on Feb. 19, 1935, when the contractors' said representative offered on behalf of the contractors subject to the conditions and stipulations embodied herein to remove by barge and dispose of all classes of refuse . . .

C Then it is provided that barges are to be there to provide "an immediate and constantly open shoot for the reception of the whole or any portion of the refuse which may from time to time be brought to the said wharves from any portion of the metropolitan borough of Stepney for disposal." By cl. 1 (b) a definition of "refuse" is provided :

D "Refuse" shall include house refuse, ashes, cinders, breeze, dust, road slop scrapings or sweepings, surplus soil from excavations and street works, trade refuse, gully soil, snow, ice, litter, manure, offal, garbage and rubbish of any description whatsoever.

I doubt very much whether the words "rubbish of any description whatsoever" can be limited by the application of the doctrine of *ejusdem generis*, and, indeed, I do not think counsel for the plaintiffs has so contended, but the point is not vital because there are included in the list of the kinds of refuse the two words "trade refuse."

E Under the Act of 1936 "trade refuse" is defined in s. 304 in a way which, perhaps, is not very helpful :

"Trade refuse" means the refuse of any trade, manufacture or business or of any building materials.

F There is not a particle of evidence before me tending to show that what caused the damage here was not trade refuse. On the contrary, in so far as the guilty material has been identified, it was this swarf to which I have already referred, and in so far as I am entitled to form any view about it I should form the view that that was trade refuse. I think it was delivered to the council as such, and I can see no grounds on which the council could have refused to receive it as such. The obligation, then, of the contractors was to take and remove "any refuse," including trade refuse, "which may be brought to the said wharves for disposal." It is into that obligation that the plaintiffs seek to import the limitation : "Provided always that such refuse is warranted by the council to be safe for such reception and removal." To my mind there are no sufficient grounds for implying that limitation.

G The matter, however, does not end there, because I must now refer to cl. 13 and 16 of the contract. The words of cl. 16 are very wide :

H The contractors shall bear all risk and responsibility of whatever kind which shall attend or result from the execution of this contract.

I agree that a large part of cl. 16 would appear to contemplate third party claims, but I am very doubtful indeed whether there can be found in cl. 16 any sufficient materials for limiting the operation of the clause to third party claims, as was done, for instance, in *The Lindenhall* (8). However that may be, there is also cl. 13 which provides :

That the council shall not be held responsible for any damage or mischief caused

by or through the refuse after it has been shot for disposal into the contractors' barge or barges . . .

Counsel for the plaintiffs made a twofold answer. His first answer was that this was not "refuse." He said: "It is true that the council were not to be responsible for any damage caused by or through the refuse, but that meant refuse such as was contemplated by the contract, and the refuse contemplated by the contract did not include the refuse which was the cause of the damage or mischief here." I have already examined that aspect of the matter, and I have explained, I hope sufficiently clearly, why I reject that contention. A

The second way in which counsel dealt with cl. 13, as I understood it, was this. He said: "Yes, but while the council was not to be responsible for any damage or mischief caused by or through the refuse, that was also to be subject to the council's implied warranty that the refuse which they were going to put on board our barges was not refuse which was 'dangerous, explosive or liable to spontaneous combustion'." I think I have also dealt with that contention. I think that both the grounds on which counsel seeks to limit the operation of cl. 13 are unsound, that cl. 13 must be given its full effect, and that, accordingly, the council are not responsible for the damage or mischief caused by or through the refuse with which I am now concerned, after it had been shot for disposal into the contractors' barges. B

The truth of the matter is that while it was impracticable, as I have no doubt, for the plaintiffs to scrutinise what was tipped into their barges so as to see whether it was safe or not, so also it would have been impracticable for the council to scrutinise what was tendered to them for disposal as trade refuse, except in a general sort of way. If something was tendered to them which was smouldering or hot or obviously had elements of danger in it, no doubt, the council would have rejected it, and it may be that they would have been negligent if they had not done so. Again, if there was tendered to them as trade refuse something which obviously was not trade refuse, but was a dangerous thing such as an unexploded bomb or shell, again it may be that, if they had not rejected it, they would have been negligent. But I think that to suggest that when metal shavings were tendered to them it was their business to remove part of the metal shavings and have them analysed before they allowed them to be tipped, is to suggest something which was obviously unpractical. C
However that may be, I think they have prudently protected themselves against their alleged liability by inserting the provisions which they introduced into the contract that they made with the plaintiffs. There will, therefore, be judgment for the defendants with costs. D E

Judgment accordingly.

Solicitors: J. A. & H. E. Farnfield (for the plaintiffs); Wrentmore & Son (for the defendants). F

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

TRUSTEES OF SIR HOWELL JONES WILLIAMS' TRUSTS

decided. BADDELEY v. I.R.C. [1953] 2 All E.R. 233.

AND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Viscount Simon, Lord Wright, Lord Porter, Lord Simonds and Lord Normand), January 28, 30, March 21, 1947.]

Income Tax—Exemption—Charity—Trust to maintain institute in London to give social, educational and other amenities to Welsh people or people connected with Wales—Trust property comprising houses—Direction to trustees to apply rents and profits from settled properties to carrying on institute and maintaining properties—Rents and properties so applied—Whether trust for charitable purposes—Whether moneys applied for charitable purposes only—Income Tax Act, 1918 (c. 40), s. 37 (1) (a), sched. A.

Charities—Charitable trusts—Charitable purposes—Trust to maintain institute to give social educational etc., amenities to Welsh people.

Under a trust deed dated Oct. 12, 1937, certain freehold property in London was held by the trustees to maintain an institute in London for the benefit of Welsh people resident in or near or visiting London with a view to creating a centre in London for promoting the moral, social, spiritual and educational welfare of the Welsh people and fostering the study of the Welsh language and Welsh history, literature, music and art. "Welsh people" meant and included persons of Welsh nationality by birth or descent, or born or educated or at any time domiciled in the Principality of Wales or the county of Monmouth. Without prejudice to the general purpose the deed provided that the institute might be used for particular purposes, which included the provision of a meeting place where Welsh people could obtain facilities for social intercourse, study, reading, rest, recreation and refreshment; the holding of concerts, lectures and other forms of instruction, discussion and entertainment; educational purposes connected with the Welsh language or subjects; the establishment of a library; the provision of a hostel for the accommodation of Welsh people in London; and generally for such other purposes, being charitable and for the benefit of Welsh people, as the trustees might think fit. The trust property was maintained in two blocks—the institute block which was occupied by an association incorporated in 1925 for substantially the same purposes as those recited in the deed of trust, and a second block which was let out to tenants. The trust deed directed the trustees to apply the rents and profits arising from the settled properties in carrying on the institute and towards the maintaining, equipping and using the settled properties for the purposes of the institute and generally for carrying into effect all or any of the trusts of the deed. The trustees made two donations to the association, the objects to which they were intended to be directed being certain activities of the association including public lectures and debates, a music club, literary and educational classes, the maintenance of the head-quarter premises, comprising lounge and writing rooms, library, billiard room, tea and games rooms, badminton and table tennis clubs, dances, socials, whist, and bridge drives and a central information bureau. The trustees claimed that, though the association was not established for charitable purposes, they themselves were so established, and that, in applying the rents of the second block of trust property to the purposes of the association, they had applied them to charitable purposes only, and consequently, they were entitled to exemption from income tax, sched. A, in respect of the rents of that property. The claim of the trustees that the property was vested in them for charitable purposes was based on the contentions (a) that the dominant purpose of the trust was the fostering of Welsh culture, which was a purpose beneficial to the community composed of the people of the United Kingdom, (b) that that purpose was beneficial to the community composed of the people of the Principality of Wales and the county of Monmouth which is an integral part of the United Kingdom and in itself constitutes a political body settled in a particular territorial area, and (c) because the maintenance of the institute (the expressed method of effectuating that purpose) was itself a purpose beneficial to a section of the British community which was determined by reference to impersonal qualifications (namely, persons with Welsh connections who were

resident in or near or visiting London) and was not a selection of private individuals chosen on account of personal qualifications :—

HELD : (i) in determining whether a trust was charitable, two propositions must be borne in mind, *viz.*, (a) that it was still the general law that a trust was not charitable and entitled to the privileges which charity confers unless it was within the spirit and intendment of the preamble to 43 Eliz. c. 4, which was expressly preserved by the Mortmain and Charitable Uses Act, 1888, s. 13 (2); and (b) that the classification of charity in its legal sense into four principal divisions by LORD MACNAGHTEN in *Income Tax Special Purposes Commissioners v. Pemsel* ([1891] A.C. 583), must always be read subject to the qualifications appearing in the judgment of LINDLEY, L.J., in *Re Macduff* ([1896] 2 Ch. 466), as expanded in the opinion of VISCOUNT CAVE, L.C., in *A.-G. v. National Provincial Bank* ([1924] A.C. 265), namely, that LORD MACNAGHTEN did not mean that all trusts beneficial to the community were charitable, but that there were certain beneficial trusts which fell within that category, with the result that it was not enough to say that a particular trust was for public purposes beneficial to a community or for the public welfare, but it must also be shown to be a charitable trust.

(ii) in the present case the charitable character of the trust was asserted simply because the purpose of the deed was said to be beneficial to the community or a section of the community; it was not alleged that the trust was for the benefit of the community and beneficial in a way which the law regards as charitable; and, therefore, in its mere statement, the claim was imperfect and must fail.

(iii) on a true construction of the trust deed the property was not vested in the trustees for charitable purposes only, and, on the facts, the rents applied to the purpose of the association were not applied for charitable purposes only.

Decision of the Court of Appeal ([1945] 2 All E.R. 236), *affirmed*.

[AS TO CHARITABLE PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 111-127, 136, 137, paras. 147-168, 177; and FOR CASES, see DIGEST, Vol. 8, pp. 241-265, Nos. 1-272.]

[AS TO MEANING OF CHARITY FOR INCOME TAX PURPOSES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 310-317, paras. 617-624; and FOR CASES, see DIGEST, Vol. 28, pp. 10, 11, 82-84, Nos. 51-54, 469-483.]

Cases referred to :

- (1) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 3 Tax Cas. 53; 8 Digest 241, 1.
- (2) *Re Macduff, Macduff v. Macduff*, [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 8 Digest 296, 731.
- (3) *A.-G. v. National Provincial and Union Bank of England*, [1924] A.C. 262; *sub nom. Re Tetley, A.-G. v. National Provincial and Union Bank of England*, 93 L.J.Ch. 231; 131 L.T. 34, H.L.; *affg.*, S.C., *sub nom. Re Tetley, National Provincial and Union Bank of England, Ltd. v. Tetley* [1923] 1 Ch. 258, C.A.
- (4) *Houston v. Burns*, [1918] A.C. 337; 87 L.J.P.C. 99; 118 L.T. 462; 8 Digest 297, 739.
- (5) *Dolan v. MacDermot* (1867), L.R. 5 Eq. 60; *affd.* (1868), L.R. 3 Ch. App. 676, L.C.; 8 Digest 298, 751.
- (6) *Dunne v. Byrne*, [1912] A.C. 407; 81 L.J.P.C. 202; 106 L.T. 394; 8 Digest 294, 718.
- (7) *Baker v. Sutton* (1836), 1 Keen. 224; 5 L.J.Ch. 264; 8 Digest 298, 750.
- (8) *Farley v. Westminster Bank*, [1939] 3 All E.R. 491; [1939] A.C. 430; 108 L.J.P.C. 307; 161 L.T. 103.
- (9) *Verge v. Somerville*, [1924] A.C. 496; 131 L.T. 107; *sub nom.*, *Verge v. Somerville, A.-G. for Australia v. Somerville*, 93 L.J.P.C. 173; Digest Supp.
- (10) *Keren Kayemeth Le Jisrael, Ltd. v. Inland Revenue Comrs.*, [1932] A.C. 650; 101 L.J.K.B. 459; 147 L.T. 161; 17 Tax Cas. 27; Digest Supp.
- (11) *Re Grove-Grady, Plowden v. Lawrence*, [1929] 1 Ch. 557; 98 L.J.Ch. 261; 140 L.T. 659, C.A.; *varied on appeal, sub nom. A.-G. v. Plowden*, [1931] W.N. 89; 171 L.T.Jo. 308, H.L.; Digest Supp.
- (12) *Re Smith, Public Trustee v. Smith*, [1932] 1 Ch. 153; 100 L.J.Ch. 409; 146 L.T. 145; Digest Supp.
- (13) *Goodman v. Saltash Corpn.* (1882), 7 App. Cas. 633; 52 L.J.Q.B. 193; 48 L.T. 239; 47 J.P. 276, H.L.; *revsq.*, S.C., *sub nom. Saltash Corpn. v. Goodman* (1881), 7 Q.B.D. 106, C.A.; 8 Digest 327, 1099.

(14) *Inland Revenue Comrs. v. Falkirk Temperance Cafe Trust*, 1927 S.C. 261; 11 Tax Cas. 353; Digest Supp.

APPEAL by the taxpayers from a decision of the Court of Appeal (SCOTT, LAWRENCE and MORTON, L.J.J.) dated June 13, 1945 and reported [1945] 2 All E.R. 236.

The appellants were trustees of a trust to maintain an institute in London to give social, educational and other amenities to Welsh people. The trust property comprised certain houses let to tenants and the trustees were directed by the deed to apply the rents and profits of those houses to carrying on the institute and maintaining the properties. The trustees claimed exemption from income tax under sched. A in respect of those houses on the ground that (i) the trust under which the houses fell was for charitable purposes, and (ii) that the rents and profits of the houses were applied for charitable purposes only within the meaning of the Income Tax Act, 1918, s. 37 (1) (a). The decision of the general commissioners disallowing the claim was upheld by the special commissioners, by MACNAGHTEN, J., and by the Court of Appeal. The facts appear in the opinion of LORD SIMONDS.

Cyril King, K.C., and *F. W. Bucher* for the appellants.

Sir David Maxwell Fyfe, K.C., *J. H. Stamp* and *Reginald P. Hills* for the respondents.

The House took time for consideration.

MAR. 21. VISCOUNT SIMON: My Lords, I have had the great advantage of reading in print and of studying the exhaustive opinion prepared in this case by LORD SIMONDS. I agree with it, and need say no more except that I move that the appeal be dismissed with costs.

LORD WRIGHT: My Lords, I also have had the privilege of studying the opinion about to be delivered by LORD SIMONDS. I agree with it, and have nothing to add.

LORD SIMONDS: My Lords, LORD PORTER has asked me to say that he concurs in the opinion that I am about to deliver. My Lords, the question raised in this appeal is whether under a trust deed dated Oct. 12, 1937, and made between Howell J. Williams Ltd., as trustees of the one part, and Sir Howell Jones Williams, therein called the settlor, of the other part, certain properties were vested in the trustees for charitable purposes within the meaning of s. 37 (1)(a) of the Income Tax Act, 1918, and whether the rents of those properties were in the years 1940-41 and 1941-42 applied by them to charitable purposes only.

Section 37 (1) of the Income Tax Act, 1918, is as follows:

Exemption shall be granted—(a) from tax under sched. A in respect of the rents and profits of any lands, tenements, hereditaments, or heritages belonging to any hospital, public school or almshouse, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes only . . .

I will now state the relevant provisions of the trust deed. It begins by reciting that it is supplemental to a transfer of Jan. 16, 1930, whereby certain freehold property specified in the schedule (together with other property) was transferred to the trustees. This property consisted of certain premises in the Gray's Inn Road in the parish of St. Pancras and No. 11 Mecklenburgh Square and Nos. 29, 30 and 31 Doughty Street in the same parish. It further recites that the property had been purchased by the trustees out of moneys provided by the settlor and that the Young Wales Association (London) Ltd. (thereinafter called "the Association") had been incorporated on Mar. 21, 1926, with (*inter alia*) the following objects, *viz.*: (i) to promote Welsh interests in London, and to provide means of social intercourse between persons of Welsh nationality, birth, domicile, education or sympathies; (ii) to consider and discuss all questions affecting Welsh interests; (iii) to foster the study of the Welsh language, and to procure the delivery of lectures on subjects connected with Welsh history, literature, music and art; (iv) to form and maintain a library of periodical, historical and other literature in the Welsh language or relating to Wales, and, finally, that the property had for some time past been and was then occupied used and enjoyed by the association with the consent of the settlor for the purposes of the association. I come to the operative part of the deed. Clause 1 contains an important definition. "The expression 'Welsh people' shall mean and include persons of Welsh nationality by birth or descent or born or educated or at any time domiciled in the Principality of Wales or the county

of Monmouth." Clauses 2 and 3 I can pass over. Clauses 4 and 5 cannot fairly be summarised and I state them *in extenso*.

4. The trustees shall hold the settled properties and the endowment fund for the purpose of establishing and maintaining an institute and meeting place in London to be known as "The London Welsh Association" (hereinafter called "the institute") for the benefit of Welsh people resident in or near or visiting London with a view to creating a centre in London for promoting the moral social spiritual and educational welfare of Welsh people and fostering the study of the Welsh language and of Welsh history literature music and art. 5. Without prejudice to the generality of the foregoing provisions the trustees may use or permit such part of the settled properties as is required to be used as the institute for all or any of the following purposes:—(a) For providing a meeting place for Welsh people in London and their friends where they can obtain facilities for social intercourse study reading rest recreation and refreshment. (b) For meetings concerts lectures and other forms of instruction discussion or entertainment especially in relation to subjects connected with the Welsh language and Welsh history literature music and art. (c) For any educational purposes connected with the Welsh language or Welsh subjects or likely to be of value or interest to Welsh people. (d) For establishing and maintaining a library of periodical historical and other literature in the Welsh language or relating to Wales or which is likely to be of use to Welsh people. (e) As a hostel for the accommodation of Welsh people in London. (f) For any of the purposes of the association or of any similar association which may be formed for the benefit of Welsh people in London and which purposes may be within the general scope of the trusts declared in cl. 4 hereof. (g) Generally for such other purposes being charitable and for the benefit of Welsh people as the trustees may from time to time think fit Provided always that the trustees shall not permit any alcoholic liquor to be sold or consumed on any part of the settled properties for the time being occupied or used for the purposes of the institute.

Clause 9 will be found to be important and I set out the substantive part of it:

9. The trustees shall apply the income arising from the endowment fund and any rents and profits arising from the settled properties and any other profits income or contributions which may be received by the trustees in carrying on the institute and otherwise for the maintenance repair and insurance of the settled properties and in payment of the rates and other outgoings and towards the cost of maintaining equipping and using the settled properties for the purposes of the institute and generally for carrying into effect all or any of the trusts of this deed.

Clause 10 provided that the institute should not be used for meetings of any political party or for the purposes of any such party, and that no part of the property, capital, or income for the time being subject to the trusts thereof should at any time be used or applied for any such purposes or for any other purposes not being charitable, with a proviso that that prohibition should not prevent any application of money or property for purposes necessarily incidental to carrying out the charitable trusts of the deed. Clause 13 authorised the trustees to delegate their power to carry on the institute by appointing managers and cl. 14 authorised them to exercise that power by appointing the association to act as managers of the institute. I do not think it necessary to refer to any other provisions of the deed. On the day following its execution Howell J. Williams Ltd. resigned the trusteeship of the deed and in their place seven individuals (including the settlor) were appointed trustees. The survivors of them are the present appellants.

The relevant facts as found by the Commissioners for the Special Purposes of the Income Tax Acts are these. I take them from the Case Stated, which will at the same time conveniently show the nature of the claim which is the subject of appeal to this House. Paragraph 4 of the Case states that the trust property had always been maintained as two blocks, that the first block (thereinafter referred to as "the institute block") consisted of property in Gray's Inn Road and Mecklenburgh Square which was adapted for use as an institute in accordance with the trusts of the deed, that the second block, consisting of 29, 30 and 31 Doughty Street was let out to tenants, that the first block only—and not, as incorrectly indicated in the recitals to the deed, the whole of the trust property—was until May, 1941, occupied by the Young Wales Association (London), Ltd., which later changed its name to the London Welsh Association Ltd., and was thereafter referred to as the association. In the next paragraph of the Case the claim is stated. I think it worth while to set it out.

The trustees were not in this claim contending that this association was established for charitable purposes only. The claim before us was that not the association but the

trustees were so established: that in applying the rents of 29, 30 and 31, Doughty Street to the purposes of the before-mentioned association (which they claimed was an application of income of the trust under cl. 9 of the trust deed) they had applied the same to charitable purposes only and that consequently they were entitled to exemption from income tax, sched. A, in respect of the rents of the said properties.

From para. 7 of the Case it appears that the trustees, in exercise of their powers under the deed, allowed the association to occupy the institute block and to act as managers of the institute, and that the association so acted until May, 1941,

A and that before that date they made two donations to the association for the purposes of the institute, but that after that date the association had been unable to continue in occupation of the premises, which had been let to the Welsh Services Club, and similarly after that date no further donations had been made. In para. 11 of the Case there is a summary of the evidence given before the commissioners by a Mr. V. J. Lewis, one of the trustees of the deed and at one

B time secretary of the association. Since the question raised in this appeal appears in one aspect to turn on findings of fact, I cannot omit a reference to this evidence. It appears that Mr. Lewis and two of his co-trustees met and considered what should be done with the funds which they held under the deed, and they decided to make two donations to the institute. They considered that they were carrying out the purposes of the deed, because it was necessary that the institute should be maintained. The association were running the

C headquarters premises at a loss, although making a profit on their other activities, and he and his co-trustees knew that any donation which they made would be paid into the headquarters account from which the activities of the institute were financed. This was one of two accounts, the other being the general account. On the headquarters account there was a debit balance. On the general account there was a credit balance. Into this account the sub-

D subscriptions of members of the association were paid and also donations from another distinct trust, and out of it was paid printing, postage and secretarial expenses, corporation duty, etc. The association did not keep separate accounts as to the expenditure of the donations. The objects (said Mr. Lewis) to which the donations were intended to be directed were numbers 1, 4, 5, part of 7 and 8 and 11 of the activities of the association as set out in its booklet which was annexed to the Case. These activities are there described as follows:—

E 1. Public lectures and debates, a music club, and literary and educational classes . . . 4. The maintenance of headquarters premises at 11, Mecklenburgh Square, W.C.1, comprising lounge and writing room, library (where current Welsh and English periodicals and newspapers may be found), billiard room, tea and games rooms, etc., available for the use of headquarters members of the association, and of all donors and subscribers. The headquarters premises and in particular the London Welsh Hall are increasingly becoming the meeting place of the committees and functions of the various London Welsh societies and other organisations. 5. Badminton and

F table tennis clubs are maintained in connection with the headquarters premises . . . 7. Dances, whist and bridge drives, and annually a dinner and a garden party. 8. A weekly social and dance is held for headquarters members in the London Welsh Hall, on Saturday evenings. The charge made for admission is only 6d. (ordinary members, and visitors on the introduction of a member, may obtain admission at 2s.): a dance band is provided, and the popularity of these weekly functions among the younger members of the London Welsh community is undoubted. . . . 11. The headquarters

G office of the association serves in many ways as a central information bureau for London Welsh people and visitors to the metropolis.

Mr. Lewis said that in making these donations the trustees regarded themselves as contributing to dances, whist and bridge drives held at the institute and as part of the activities taking place there and not to any such activities held elsewhere. A prominent part of the activities of the institute consisted of lectures, debates, music club and literary and educational classes. Classes

H were held in the Welsh language, history and literature. The trustees did not contribute towards the theatre guild referred to in No. 2 of the list of the activities. I must assume that the commissioners accepted as facts the statements which they set out without comment in this Case. The commissioners then state (as should always be done with clearness and particularity) the rival contentions of the trustees and the Crown. I have referred earlier in this opinion to the claim made by the trustees. Of the Crown it is only said that the contention of the trustees was resisted on its behalf. The decision of the commissioners was as follows:

Under the terms of the trust deed the purposes of the institute, to which the rents of the properties in question held by the trustees have been applied, are wide and inclusive. While certain of its features conform to the idea of a charity, we have come to the conclusion that these features are not so dominating, nor is the general character of the institute such, as effectively to distinguish it from an ordinary social club. We are unable to say that it is established for charitable purposes only; and the application accordingly fails.

I have thought it necessary to state the facts at this length because it has been a matter of some controversy what the commissioners really decided. The issues being two-fold (a) whether the trust property was vested in the trustees for charitable purposes, and (b) whether the rents were applied for charitable purposes only, it is at least arguable that the commissioners, notwithstanding that the facts stated in the Case related mainly to the second issue, yet decided only the first issue. It is not clear what view was taken on this point by MACNAGHTEN, J., before whom came the appeal from the commissioners. He found it sufficient to say that he saw no ground for questioning their conclusion, adding that, if their decision was open to criticism at all, it was that it might have been expressed in even stronger terms. When the matter came before the Court of Appeal, the confusion was made apparent and there was some difference of opinion between the members of that court, SCOTT, L.J., thinking it possible to read into the decision of the commissioners a plain finding of fact that the income in question was not applied to charitable purposes only, while MORTON, L.J. (if I read his judgment correctly) was prepared to assume that there was no finding of fact fatal to the appellants' case. In these circumstances, while I cannot entertain any doubt that on the facts stated in the Case it was not open to the commissioners to come to any other conclusion on the second issue than that the rents in question were not applied for charitable purposes only, I think it right also to examine the question whether, irrespective of the application of the rents in any year, the trust property itself is vested in the appellants for charitable purposes. That this expression means "for charitable purposes only" is conceded by the appellants.

My Lords, the claim of the appellants that the property is vested in them for charitable purposes is based on these contentions, (a) that the dominant purpose of the trust is the fostering of Welsh culture which is a purpose beneficial to the community composed of the people of the United Kingdom, (b) that the purpose aforesaid is beneficial to the community composed of the people of the Principality of Wales and the county of Monmouth which is an integral part of the United Kingdom and in itself constitutes a political body settled in a particular territorial area, and (c) because the maintenance of the institute (the expressed method of effectuating the purpose aforesaid) is itself a purpose beneficial to a section of the British community which is determined by reference to impersonal qualifications (namely, persons with Welsh connections who are resident in or near or visiting London) and is not a selection of private individuals chosen on account of personal qualifications. I have taken this statement of the appellant's contentions from the formal reasons in their written Case, because in them so clearly appears the fallacious argument on which in this and other cases, which it has been my fortune to hear, an attempt has been made to establish the charitable character of a trust.

My Lords, there are, I think, two propositions which must ever be borne in mind in any case in which the question is whether a trust is charitable. The first is that it is still the general law that a trust is not charitable and entitled to the privileges which charity confers unless it is within the spirit and intendment of the preamble to 43 Eliz. c. 4, which is expressly preserved by s. 13 (2) of the Mortmain and Charitable Uses Act, 1888. The second is that the classification of charity in its legal sense into four principal divisions by LORD MACNAGHTEN in *Pemsel's* case (1) ([1891] A.C. 583) must always be read subject to the qualification appearing in the judgment of LINDLEY, L.J. in *Re Macduff* (2) ([1896] 2 Ch. 466):

Now SIR SAMUEL ROMILLY did not mean, and I am certain that LORD MACNAGHTEN did not mean to say, that every object of public general utility must necessarily be a charity. Some may be and some may not be.

This observation has been expanded by VISCOUNT CAVE, L.C. in this House in *A.G. v. National Provincial Bank* (3) ([1924] A.C. 265) in these words:

LORD MACNAGHTEN did not mean that all trusts beneficial to the community are charitable, but that there were certain beneficial trusts which fall within that category : and accordingly to argue that because a trust is for a purpose beneficial to the community it is therefore a charitable trust is to turn round his sentence and to give it a different meaning. So here it is not enough to say that the trust in question is for public purposes beneficial to the community or is for the public welfare ; you must also show it to be a charitable trust.

A But it is just because the purpose of the trust deed in this case is said to be beneficial to the community or a section of the community and for no other reason that its charitable character is asserted. It is not alleged that the trust is (a) for the benefit of the community and (b) beneficial in a way which the law regards as charitable. Therefore, as it seems to me, in its mere statement the claim is imperfect and must fail.

B My Lords, the cases in which the question of charity has come before the courts are legion, and no one who is versed in them will pretend that all the decisions, even of the highest authority, are easy to reconcile, but I will venture to refer to one or two of them to make good the importance of my two general propositions. In *Houston v. Burns* (4), the question was as to the validity of a gift "for such public benevolent or charitable purposes in connection with the parish of Lesmahagow or the neighbourhood" as might be thought proper. This was a Scottish case, but upon the point now under C consideration there is no difference between English and Scottish law. It was argued that the limitation of the purpose to a particular locality was sufficient to validate the gift, that is to say, though purposes beneficial to the community might fail, yet purposes beneficial to a localised section of the community were charitable. That argument was rejected by this House. If the purposes are not charitable *per se*, the localisation of them will not D make them charitable. It is noticeable that LORD FINLAY L.C. ([1918] A.C. 341) expressly overrules a decision or dictum of LORD ROMILLY to the contrary effect in *Dolan v. MacDermot* (5) (L.R. 5 Eq. 62).

Next I will refer to *Dunne v. Byrne* (6), a case in the Privy Council, which is the more valuable because LORD MACNAGHTEN himself delivered the judgment of the Board. In that case the question was of the validity of a residuary gift "to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may E judge most conducive to the good of religion in the diocese." What could have been easier than to say that such a trust was beneficial to the community, and moreover to a section of the community sufficiently defined by a reference to the diocese, and was therefore charitable ? Yet the only argument was that the benefit to the community was of a character which fell within the preamble to the Statute of Elizabeth, *i.e.*, for religious purposes, and, F therefore, was charitable. And it is to be observed that this contention was rejected on the narrow ground that the terms of the bequest were not identical with religious purposes. LORD MACNAGHTEN said ([1912] A.C. 411) :

The language of the bequest (to quote LORD LANGDALE's words in *Baker v. Sutton* (7) (1 Keen, 233)) would be "open to such latitude of construction as to raise no trust which a court of equity could carry into execution."

G One more decision out of many to the same effect may be cited. In *Farley v. Westminster Bank* (8) a testatrix had bequeathed the residue of her estate in part to the respective vicars and church-wardens of two named churches "for parish work." Could it be doubted that the purpose of the gift was beneficial to the community ? It could fairly be described in the very words in which the appellants here assert the charitable nature of their trust. Yet the gift failed. It was, in the words of LORD RUSSELL OF KILLOWEN ([1939] H 3 All E.R. 494) :

... for the assistance and furtherance of those various activities connected with the parish church which are to be found ... in every parish ...

It would be unduly cynical to say that that is not a purpose beneficial to the community. Yet it failed. And it failed because it did not fall within the spirit and intendment of the preamble to the Statute of Elizabeth.

My Lords, I must mention another aspect of this case, which was discussed in the Court of Appeal and in the argument at your Lordships' bar. It is not

expressly stated in the preamble to the statute, but it was established in the Court of Chancery, and, so far as I am aware, the principle has been consistently maintained, that a trust to be charitable must be of a public character. It must not be merely for the benefit of particular private individuals. If it is, it will not be in law a charity though the benefit taken by those individuals is of the very character stated in the preamble. The rule is thus stated by LORD WRENBURY in *Verge v. Somerville* (9) ([1924] A.C. 499):

To ascertain whether a gift constitutes a valid charitable trust so as to escape being void on the ground of perpetuity, a first enquiry must be whether it is public—whether it is for the benefit of the community or of an appreciably important class of the community. The inhabitants of a parish or town, or any particular class of such inhabitants, may, for instance, be the objects of such a gift, but private individuals, or a fluctuating body of private individuals, cannot.

It is, I think, obvious that this rule, necessary as it is, must often be difficult of application and so the courts have found. Fortunately, perhaps, though LORD WRENBURY put it first, the question does not arise at all if the purpose of the gift, whether for the benefit of a class of inhabitants or of a fluctuating body of private individuals, is not itself charitable. I may, however, refer to a recent case in this House which in some aspects resembles the present case. In *Keren v. Inland Revenue Commissioners* (10) a company had been formed which had as its main object (to put it shortly) the purchase of land in Palestine, Syria or other parts of Turkey in Asia and the peninsula of Sinai for the purpose of settling Jews on such lands. In its memorandum it took numerous other powers which were to be exercised only in such a way as should, in the opinion of the company, be conducive to the attainment of the primary object. No part of the income of the company was distributable among its members. It was urged that the company was established for charitable purposes for numerous reasons, with only one of which I will trouble your Lordships, *viz.*, that it was established for the benefit of the community or of a section of the community, whether the association was for the benefit of Jews all over the world, or of the Jews repatriated in the Promised Land. LORD TOMLIN, dealing with the argument that I have just mentioned on the footing that, if benefit to “a community” could be established, the purpose might be charitable, proceeded to examine the problem in that aspect and sought to identify the community. He failed to do so, finding it neither in the community of all Jews throughout the world nor in that of the Jews in the region prescribed for settlement. It is, perhaps, unnecessary to pursue the matter. Each case must be judged on its own facts and the dividing line is not easily drawn, but the difficulty of finding the community in the present case, when the definition of “Welsh people” in the first deed is remembered, would not, I think, be less than that of finding the community of Jews in *Kerens’* case (10).

At an early stage in this opinion I said that cases on the law of charity are not easy to reconcile. I would not be taken as suggesting that there is any doubt about the present case. I agree with the judges of the Court of Appeal that, on the construction which they have adopted of the trust deed—and it is the only possible construction—the property is not vested in the appellants for charitable purposes only. It is clear, as I have already said, that they have not applied the income for charitable purposes only, and I do not doubt that they have applied them strictly in accordance with their trust. “Matters,” said RUSSELL, L.J., “have been stretched in favour of charities almost to bursting point”: see *Re Grove-Grady* (11) ([1929] 1 Ch. 582). That point would be reached if your Lordships held that this trust deed has a purpose which falls within the spirit and intendment of the preamble. It clearly does not, and, if it does not, let the community be what you will, let the purpose be as beneficial as you like, here is no charity.

My Lords, it would not be right for me in a case which raises in such a general form the broad question of charitable trusts to ignore a line of authorities relied on by the appellants. More accurately, I think, there are two lines of authorities which are apt to converge and cross each other. There is, first, the class of case of which *Re Smith* (12) is typical. In that case the testator gave his residuary estate “unto my country England for—

own use and benefit absolutely " (*sic*). This was held to be a good charitable trust. Here no particular purpose or benefit was defined. Secondly, there is the class of case, of which *Goodman v. Saltash* (13) may be regarded as the prototype. There LORD SELBORNE, L.C. used the words cited so often in the reports (7 App. Cas. 642) :

A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town or of any particular class of such inhabitants is (as I understand the law) a charitable trust.

In the one class of case there is no particularity of benefit and the widest range of beneficiary, in the other the beneficiaries are localised and the nature of the benefit defined. How are these cases to be reconciled with the decisions of this House to which I earlier referred? In TUDOR ON CHARITIES, 5th edn., at p. 45, it is said :

It is hard to avoid the conclusion that the foregoing cases, which establish that gifts for the benefit of particular districts are charitable, are anomalous. They cannot be related to the Statute of Elizabeth, and they logically involve the proposition that purposes which are not charitable in the world at large are charitable if confined to a specified locality, for, public or benevolent purposes are not charitable, while there is nothing to prevent the trustees of a fund given for the benefit of a parish from spending it upon public or benevolent purposes, and yet the gift of such a fund is charitable. Nevertheless, the gift for public purposes in a particular parish is not charitable.

Your Lordships may think that this sounds like a cry of despair, and, in truth, there is some ground for it, but I would suggest that it is possible to justify as charitable a gift to "my country England" on the ground that, where no purpose is defined, a charitable purpose is implicit in the context. It is at least not excluded by the express prescription of "public" purposes. Where the gift is localised, but the nature of the benefit is defined, no reconstruction is possible except on the assumption that the particular purpose was in each case regarded as falling within the spirit and intendment of the preamble to the Statute of Elizabeth, though I find it difficult to ascribe this quality to the benefit taken by the freemen of Saltash. If this affords no solution of the problem, I can only invite your Lordships to maintain the principles which have consistently been asserted in this House over the last 50 years in this difficult and intricate branch of the law. I would dismiss this appeal.

LORD NORMAND : I respectfully agree with my noble and learned friend, LORD SIMONDS. Discordant decisions have resulted from the occasional failure to keep in mind the two propositions which my Lord has now re-asserted and from the tacit assumption that all trusts beneficial to the public at large or to some section of it are entitled by a benevolent construction to the special privileges of charitable trusts. Yet the line between charitable and non-charitable trusts is sometimes difficult to draw, even when correct principles are applied, particularly where the claim is made that the trust is charitable because its purpose is the furtherance of the moral improvement of the community. The decision in *Inland Revenue v. Falkirk Temperance Cafe Trust* (14), a case which has some resemblance to the present, must, I think, rest on the ground that the predominant purpose of the trust was the moral improvement by means of temperance of the inhabitants of Falkirk and that the cafes and temperance hotel provided by the trust were so subordinated to the predominant purpose that it was possible to distinguish them from an ordinary commercial venture in catering and hotel-keeping. In the present case the decision of the commissioners was that, while certain features of the institute conformed to the idea of charity, they were not so dominating nor was the general character of the institute such as effectively to distinguish it from an ordinary social club. In my opinion, this conclusion is amply supported by the facts and is well founded in law.

Appeal dismissed.

Solicitors : *T. D. Jones & Co.* (for the appellants) ; *Solicitor of Inland Revenue* (for the respondents).

[*Reported by C. St.J. NICHOLSON, Barrister-at-Law.*]

Re DIPLOCK'S ESTATE, DIPLOCK AND OTHERS v. WINTLE
AND OTHERS (AND ASSOCIATED ACTIONS).

[CHANCERY DIVISION (Wynn-Parry, J.), November 26, 27, 28, 29, December
3, 4, 5, 6, 10, 11, 12, 13, 18, 19, 20, 1946, March 11, 1947.]

*Mistake—Mistake of law—Money paid under a mistake as to the construction
of a will—Residue of testator's estate paid to charitable institutions by
executors—Directions in will void for uncertainty—Right of those entitled
under an intestacy to recover from institutions sums paid—Money had and
received—Personal claim in equity.*

*Money—How far money can be followed—Money paid to charitable institutions
by executors under a mistake as to the construction of a will—Directions
in will void for uncertainty—Right of those entitled under an intestacy to
trace.*

By his will the testator directed his executors to apply the residue of
his estate "for such charitable institution or institutions or other
charitable or benevolent object or objects in England" as the executors
might "in their absolute discretion select." The testator died on
Mar. 23, 1936, and by 1938 the executors had distributed more than
£200,000 out of the testator's residuary estate to various charitable
institutions. In Sept., 1939, one of the next of kin of the testator
challenged the validity of the directions in the will, and in June, 1944,
the House of Lords held that the bequest was void for uncertainty.
In an action by those entitled under an intestacy to recover from the
institutions the sums paid to them,

HELD: (i) the rule that the mistake on which an action for money had and
received could succeed must be a mistake of fact and not a mistake of law was
of general application and in no way depended on the pre-existence of
a contract between the parties; the mistake in the present case was one
as to part of the general law of England, namely, the law defining the
requisites for the creation of a valid charitable trust, or, at least, a
mistake as to the construction of the will, either of which was a mistake
of law; and, therefore, the plaintiffs could not maintain a claim at law
for the return of the money as money had and received.

Rogers v. Ingham (1876) (3 Ch. D. 351); *Hilliard v. Fulford* (1876)
(4 Ch. D. 389); *Re Haich*, ([1919] 1 Ch. 351); and per ATKINSON, J.,
in *Anglo-Scottish Beet Sugar Corp. v. Spalding U.D.C.*, [1937] 3 All E.R.
335, referred to.

(ii) so far as a mere money demand is concerned, where, as in the present
case, an executor or administrator has paid money or transferred property,
part of the estate of the deceased, to a person not entitled thereto in
such circumstances as not to make the recipient an express trustee, the
only remedy open to the legatee or next of kin rightfully entitled against
the recipient is either to pursue a common law claim for money had and
received in the name of the executor or administrator or to pursue in
equity a claim analogous to the common law action for money had and
received in which it would be unnecessary to join the executor or
administrator as plaintiff, but in both cases it would be essential to
demonstrate that the money had been paid under a mistake of fact and
not one of law, a mistake in construing a will being regarded for that
purpose as a mistake of law, and, therefore, the plaintiffs did not have
a personal claim in equity against the defendant charities for the return
of the sums paid to them.

(iii) where a person other than the true owner thereof pays money into
an account at his bank and does not mix that money with other money,
the true owner of the money can, at common law, follow it into that
account, and, further, can follow it out of the account into any asset or
assets which can be shown to have been purchased wholly with it. The
common law right does not depend on any fiduciary relationship between
the true owner of the money and the person who deals with it. The

equitable doctrine of allowing the tracing of money where it has been mixed with other money, *e.g.*, (in a banking account) applies only where a fiduciary relationship exists between the person into whose account the money has been paid and the true owner. Therefore, where the institutions had paid the money received from the executors into a mixed account, those entitled under an intestacy could not invoke the equitable doctrine of tracing.

A *Re Hallett's Estate* (1880) (13 Ch. D. 696), applied. *Sinclair v. Brougham*, ([1914] A.C. 398), considered.

(iv) the plaintiffs were not entitled to be recouped any sum paid by the executors to one of the defendant institutions and applied by that institution in the discharge of a debt then owing by it.

B *Trevillian v. Exeter Corporation* (1854) (5 De G. M. & G. 828), and observations of LORD DUNEDIN and LORD PARKER in *Sinclair v. Brougham*, ([1914] A.C. 435, 440, 441), explained and distinguished.

C (v) where the defendant institution treated in its accounts money or securities as representing the money received by it from the executors, that did not amount to an earmarking of such moneys so as to preserve their identity and thus to allow the plaintiffs to claim the money or assets in question. The alleged right must be rested on the common law right to follow assets, and not on the equitable doctrine of tracing, for the alleged earmarking took place when the institutions concerned were not fiduciary agents, and in each case the money was first mixed in the banking account of the institution and then lost its identity.

D (vi) where the executors had imposed a condition as to how the money was to be applied by the defendant institution, the acceptance of the condition and the application by the institution of the money in accordance therewith did not of itself result in the giving of consideration by the institution so as to entitle it to be regarded as being in the position of a purchaser for value without notice. The transaction amounted to no more than a gift of money subject to a condition as to its disposal, even though the condition involved that the institution should use part of its own property in a certain way, *e.g.*, by the erection of a building on its land or by the alteration of an existing building belonging to it.

E *Dillwyn v. Llewelyn* (1862) (4 De G. F. & J. 517), and *Taylor v. Blakelock* (1886) (32 Ch. D. 560), distinguished.

F (vii) the defendant institutions were not fixed with notice to prevent them from relying on the plea of purchase for value without notice merely because they knew that they were dealing with executors who were proposing to make payments under a discretionary power in the will, and, therefore, they (the institutions) were put on inquiry as to the validity of the power given to the executors.

(viii) in so far as the plaintiffs had a right to trace, that right existed although the institution held on charitable trusts the property into which it was sought to trace and on which an equitable charge was claimed.

G [AS TO MISTAKE OF LAW, see HALSBURY, Hailsham Edn., Vol. 23, pp. 131, 132, paras. 181, 182; and FOR CASES, see DIGEST, Vol. 35, pp. 91-95, Nos. 9-44.

AS TO RIGHT TO FOLLOW ASSETS, see HALSBURY, Hailsham Edn., Vol. 13, pp. 200-202, paras. 192, 193; and FOR CASES, see DIGEST, Vol. 43, pp. 1017-1023, Nos. 4580-4624.]

Cases referred to :

- H** (1) *Kelly v. Solari* (1841), 9 M. & W. 54; 11 L.J.Ex. 10; 35 Digest 151, 487.
- (2) *Maskell v. Horner*, [1915] 3 K.B. 106; 84 L.J.K.B. 1752; 113 L.T. 126; 79 J.P. 406; 35 Digest 148, 465.
- (3) *Holt v. Markham*, [1923] 1 K.B. 504; 92 L.J.K.B. 406; 128 L.T. 719; 35 Digest 157, 533.
- (4) *Anglo-Scottish Beet Sugar Corp'n. v. Spalding Urban District Council*, [1937] 3 All E.R. 335; [1937] 2 K.B. 607; 106 L.J.K.B. 885; 157 L.T. 450; Digest Supp.
- (5) *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson*, [1944] 2 All E.R. 60; [1944] A.C. 341; 113 L.J.Ch. 225; 171 L.T. 141; Digest Supp.

- (6) *Re Macduff, Macduff v. Macduff*, [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 8 Digest 296, 731.
- (7) *Rogers v. Ingham* (1876), 3 Ch.D. 351; 35 L.T. 677; 35 Digest 93, 25.
- (8) *Re Hatch, Hatch v. Hatch*, [1919] 1 Ch. 351; 88 L.J.Ch. 147; 120 L.T. 694; 35 Digest 95, 36.
- (9) *Cooper v. Phibbs* (1867), L.R. 2 H.L. 149; 16 L.T. 678; 35 Digest 93, 27.
- (10) *Bell v. Lever Brothers, Ltd.*, [1932] A.C. 161; 101 L.J.K.B. 129; 146 L.T. 258; *revsg.*, S.C., *sub nom. Lever Bros., Ltd. v. Bell*, [1931] 1 K.B. 557; Digest Supp.
- (11) *Baylis v. Bishop of London*, [1913] 1 Ch. 127; 82 L.J.Ch. 61; 107 L.T. 730; 35 Digest 156, 526. A
- (12) *Gillespie v. Alexander* (1827), 3 Russ. 130; 23 Digest 432, 5035.
- (13) *Greig v. Somerville* (1830), 1 Russ. & M. 338; 23 Digest 432, 5036.
- (14) *David v. Froud* (1833), 1 My. & K. 200; 2 L.J.Ch. 68; 24 Digest 793, 8240.
- (15) *Sawyer v. Birchmore* (1837), 1 Keen, 825; 2 My. & Cr. 611; 6 L.J.Ch. 277; 24 Digest 794, 8241.
- (16) *Thomas v. Griffith* (1860), 2 De G.F. & J. 555; 30 L.J.Ch. 465; 3 L.T. 761; 20 Digest 268, 287. B
- (17) *Harrison v. Kirk*, [1904] A.C. 1; 73 L.J.P.C. 35; 89 L.T. 566; 24 Digest 791, 8222.
- (18) *Harris v. Harris* (No. 2) (1861), 29 Beav. 110; 32 Digest 506, 1665.
- (19) *Re Robinson, McLaren v. Public Trustee*, [1911] 1 Ch. 502; 104 L.T. 331; *sub nom. Re Robinson, McLaren v. Robinson*, 80 L.J.Ch. 381; 43 Digest 960, 4002.
- (20) *Re Mason*, [1928] 1 Ch. 385; 97 L.J.Ch. 321; 139 L.T. 477; *on appeal*, [1929] 1 Ch. 1; Digest Supp. C
- (21) *Re Rivers, Pullen v. Rivers*, [1920] 1 Ch. 320; 88 L.J.Ch. 462; 121 L.T. 57; 24 Digest 596, 6298.
- (22) *Hilliard v. Fulford* (1876), 4 Ch.D. 389; 46 L.J.Ch. 43; 35 L.T. 750; 24 Digest 853, 8880.
- (23) *Re Blake, Re Minahan's Petition of Right*, [1932] 1 Ch. 54; 100 L.J.Ch. 251; 145 L.T. 42; Digest Supp. D
- (24) *Re Hallett's Estate, Knatchbull v. Hallett* (1880), 13 Ch.D. 696; *sub nom. Re Hallett's Estate, Knatchbull v. Hallett, Cotterell v. Hallett*, 49 L.J.Ch. 415; 42 L.T. 421; 43 Digest 1021, 4614.
- (25) *Miller v. Race* (1758), 1 Burr. 452; 35 Digest 167, 5.
- (26) *Banque Belge Pour L'Etranger v. Hambrouck*, [1921] 1 K.B. 321; 90 L.J.K.B. 322; 35 Digest 168, 9.
- (27) *Sinclair v. Brougham*, [1914] A.C. 398; 83 L.J.Ch. 465; 111 L.T. 1; *varying. S.C. sub nom. Re Birkbeck Permanent Benefit Building Society*, [1912] 2 Ch. 183; 35 Digest 167, 8. E
- (28) *Taylor v. Plumer* (1815), 3 M. & S. 562; 35 Digest 167, 6.
- (29) *Frith v. Cartland* (1865), 2 Hem. & M. 417; 34 L.J.Ch. 301; 12 L.T. 175; 43 Digest 1021, 4609.
- (30) *Devaynes v. Noble, Clayton's Case* (1816), 1 Mer. 529, 572; 12 Digest 483, 3961.
- (31) *Pennell v. Deffell* (1853), 4 De G.M. & G. 372; 1 Eq. Rep. 579; 23 L.J.Ch. 115; 22 L.T.O.S. 126; 43 Digest 1021, 4612. F
- (32) *Hopper v. Conyers* (1866), L.R. 2 Eq. 549; 43 Digest 952, 3917.
- (33) *Re Oatway, Hertslet v. Oatway*, [1903] 2 Ch. 356; 72 L.J.Ch. 575; 88 L.T. 622; 43 Digest 1022, 4618.
- (34) *Roscoe (James) (Bolton), Ltd. v. Winder*, [1915] 1 Ch. 62; 84 L.J.Ch. 286; 112 L.T. 121; 43 Digest 1022, 4619.
- (35) *Buckeridge v. Glasse* (1841), Cr. & Ph. 126; 10 L.J.Ch. 134; 43 Digest 1018, 4589.
- (36) *Thompson v. Finch* (1856), 8 De G.M. & G. 560; 25 L.J.Ch. 681; 27 L.T.O.S. 330; 43 Digest 1003, 4445.
- (37) *Murray v. Scott, Agnew v. Murray, Brimelow v. Murray* (1884), 9 App. Cas. 519; 53 L.J.Ch. 745; 51 L.T. 462; *affg.*, S.C. *sub nom. Re Guardian Permanent Benefit Building Society* (1882), 23 Ch.D. 440; 7 Digest 515, 369.
- (38) *Trevillian v. Exeter Corpn.* (1854), 5 De G.M. & G. 828; 3 Eq. Rep. 896; 24 L.J.Ch. 157; 24 L.T.O.S. 149; 18 J.P. 806; 43 Digest 640, 774. H
- (39) *Brooks & Co. v. Blackburn Benefit Society* (1884), 9 App. Cas. 857; 54 L.J.Ch. 376; 52 L.T. 225; *affg. S.C. sub nom. Blackburn Building Society v. Cunliffe, Brooks & Co.* (1882), 22 Ch.D. 61; 7 Digest 489, 214.
- (40) *Wenlock (Baroness) v. River Dee Co.* (1885), 10 App. Cas. 354; 54 L.J.Q.B. 577; 53 L.T. 62; 49 J.P. 773; 13 Digest 360, 955.
- (41) *Re Wrexham, Mold & Connah's Quay Ry. Co.*, [1899] 1 Ch. 440; 68 L.J.Ch. 270; 80 L.T. 130; 13 Digest 369, 1007.

- (42) *Dillwyn v. Llewelyn* (1862), 4 De G.F. & J. 517; 31 L.J.Ch. 658; 6 L.T. 878; 25 Digest 538, 264.
 (43) *Taylor v. Blakelock* (1886), 32 Ch.D. 560; 56 L.J.Ch. 390; 55 L.T. 8; 20 Digest 258, 208.
 (44) *Collins v. Stimson* (1883), 11 Q.B.D. 142; 52 L.J.Q.B. 440; 48 L.T. 828; 47 J.P. 439; 5 Digest 732, 6347.

A ACTIONS to recover certain sums of money paid to the defendants, various charitable institutions, by the executors of a testator out of the residuary estate. By his will the testator gave the residue of his estate to his executors on trust "for such charitable institution or institutions or other charitable or benevolent object or objects" as they might "in their absolute discretion select." After the executors had distributed over £200,000, the validity of the directions in the will was challenged by the next of kin and it was held by the House of Lords that the directions in the will were void for uncertainty and that the residuary estate devolved as on an intestacy: *Chichester Diocesan Fund v. Simpson*, ([1944] 2 All E.R. 60), affirming the decision of the court of Appeal, *sub. nom. Re Diplock*, ([1941] 1 All E.R. 193). The plaintiffs in each of the present 19 actions were the persons entitled under the Administration of Estates Act, 1925, to share in such part of the estate as to which the testator died intestate. The facts and the arguments appear in the judgment.

C *S. Pascoe Hayward, K.C., C. L. Fawell and J. L. Arnold* for the next of kin (plaintiffs).

John Monckton for the judicial trustee.

H. O. Danckwerts for the Attorney-General.

Raymond Jennings, K.C., and W. S. Wigglesworth; Andrew Clark, K.C., and G. C. Dunbar; D. L. Jenkins, K.C., and J. H. Stamp; J. Pennycuik and R. W. Goff for the charitable institutions.

D *Cur. adv. vult.*

Mar. 11. WYNN-PARRY, J., read the following judgment. The plaintiffs in each of these actions are among the persons entitled under the Administration of Estates Act, 1925, to share in such part of the estate of Caleb Diplock deceased (to whom I will refer as "the testator") as to which he died intestate. These actions, nineteen in number, are brought by the plaintiffs as such next of kin to recover from such of the respective defendants as received them sums forming part of the residuary estate of the testator, paid to such defendants by the executors of the testator in circumstances which will be detailed later in this judgment. These actions are part of a larger number of actions totalling in all 120 which raise claims substantially similar to the various claims raised in these actions. These nineteen actions are regarded as typical or representative of the claims which can be put forward by or on behalf of the next of kin of the testator in the circumstances detailed later, and on the ultimate decisions in these actions will probably depend the fate of the claims in the other larger number of actions.

E In the present actions, the plaintiffs and the defendants have put forward certain points by way of claim and defence, each of which raises a question of principle. All the relevant facts have been agreed between the plaintiffs and the respective defendants, a course which has had the result of saving considerable time and expense, and the whole of the facts were opened before me. In the course of the hearing, however, it was agreed that the convenient course to follow, and the course which I propose to follow in this judgment, is as follows. I shall state only those facts which, in my view, are necessary to raise the questions of principle which have been argued. I shall then state those questions of principle and decide them. I shall then adjourn this case F to give the parties an opportunity to agree, so far as they can, the order which should be made in each action having regard to the special facts of that action, and my decision on the principle or principles applicable thereto. Finally, the case will be restored before me, when I can deal with any difficulty which may have arisen and direct what order is to be made in each case.

G H By cl. 6 of his will, dated Nov. 3, 1919, the testator gave the residue of his property to his executors on trust to sell or call in the same with power to postpone, and directed that, out of the proceeds of such sale and calling in and out of his ready money, his executors should pay his funeral and testamentary expenses and

debts and the legacies bequeathed by his will and the duty on any legacies thereinbefore given free of duty, and, subject thereto, should apply the residue for such charitable institution or institutions or other charitable or benevolent object or objects in England as his acting executors or executor might in their absolute discretion select, and to be paid to or for such institutions and objects, if more than one, in such proportions as his executors or executor might think proper. By cl. 7 of the will the testator declared that the receipts of the treasurer or other proper officer for the time being of any hospital, home or other institution should be a sufficient discharge for any legacy bequeathed given or applied thereto.

The testator died on Mar. 23, 1936, without having revoked or altered his will, which was duly proved on May 16, 1936, by three of the executors therein named, the defendants, Leslie Charles Wintle (who died on May 7, 1942), Lionel Edwin Charles Handson (who died on July 14, 1940) and Charles Thomas. During 1936, 1937 and 1938 the executors applied out of the testator's estate the sum of £203,067 10s. or thereabouts by distributing this sum among 139 institutions. Each of these institutions is a charitable institution within the meaning of the phrase "legal charity." It will be convenient to refer collectively to those of the 139 institutions which are defendants in this group of nineteen actions as "the defendant institutions." The distribution was made by cheques sent to the 139 institutions (including the defendant institutions) by the defendant, Wintle, acting as solicitor for the executors. The cheques were enclosed in letters each of which was in the following terms :

Dear Sir, *Estate of Caleb Diplock deceased. Grants to London and other charities.* The above-named deceased by his will bequeathed his residuary estate for distribution amongst such hospitals and institutions or other charitable or benevolent objects in England as his executors might in their absolute discretion select, and in such proportion as they might think proper. The executors have decided to allocate a grant of £—— to ——. We have pleasure in enclosing you herewith a cheque for this amount. We shall be obliged if you will sign and return us the inclosed form of receipt.

The circumstances in which the distribution was made, and the considerations operating in the minds of the executors, are deposed to in the affidavit of the defendant, Wintle, in proceedings to which I shall later refer. In Sept., 1939, the executors were notified that the validity of the beneficial directions in cl. 6 of the testator's will were challenged by the plaintiff, John Henry Diplock (who died on June 18, 1940), as one of the next of kin of the testator, on the ground that those directions were void for uncertainty, and that, accordingly, there was an intestacy as to his residuary estate. In October, 1939, the executors' solicitors wrote to each of the defendant institutions a letter informing it that the validity of the payment to it was challenged on the ground that the gift of the residue was void for uncertainty and calling on each of the defendant institutions not to deal in any way with any part of the sum so paid to it or with the income thereof until such institution had heard further from the executors' solicitors, and asking to be informed whether the sum so paid to it and the income thereof was still in its hands.

On June 10, 1940, an originating summons was issued by the executors as plaintiffs against the plaintiff, John Henry Diplock; the present plaintiffs; the defendants, the Chichester Diocesan Fund and Board of Finance (Incorporated); the defendant, Raymond Henry Johnson; and His Majesty's Attorney-General; as defendants, raising the question of the validity of the trust of residue contained in cl. 6 of the testator's will. This summons came before FARWELL, J., on July 18, 1940, when he upheld the validity of the trust of residue. On appeal by the plaintiffs, the Court of Appeal, on Jan. 15, 1941, reversed the decision of FARWELL, J., declaring that, on the true construction of the testator's will, the trust of residue contained in cl. 6 of the will was void for uncertainty, and that the residuary estate devolved as on an intestacy. The defendants the Chichester Diocesan Fund and Board of Finance (Incorporated) appealed to the House of Lords against the order of the Court of Appeal, and by a judgment of the House of Lords dated June 21, 1944, it was ordered and adjudged that the order of the Court of Appeal be affirmed: see [1944] 2 All E.R. 60.

These are all the facts to which it is necessary to refer for the purpose of considering and adjudicating on the questions of principle raised by the plaintiffs

and defendants respectively. The first three propositions put forward on behalf of the plaintiffs are propositions which, if well founded, are applicable in all the nineteen actions, subject to any special defences. I propose, therefore, to deal first with these three points.

The first proposition on behalf of the plaintiffs was put forward by leading counsel on their behalf in these terms. If a person is entitled in equity to property, or to a sum of money, and if that property or sum is transferred or paid to

A another person who is not a purchaser for value without notice, the person entitled in equity has a personal claim in equity against the recipient for the value of the property transferred or the amount of the sum paid. The same point was put forward by junior counsel for the plaintiffs in these terms. Where A., without giving adequate consideration in equity, receives from B. money which belongs to C., A. is under an equitable obligation to account to C. The second proposition on behalf of the plaintiffs was that each of the defendant institutions took with notice of the trust in favour of the plaintiffs. The third proposition on behalf of the plaintiffs was that they have a personal claim at law against the defendant institutions for money had and received.

B It will be convenient to deal with the second proposition first. This proposition was not argued. Counsel for the plaintiffs stated in his opening that he was constrained to admit that, in the present state of the authorities on the subject, it was not open to the plaintiffs to maintain this proposition in a court of first instance, though they desired to keep the point open in case the matter should go further. I must, therefore, proceed on the basis that the letter written to each of the defendant institutions in the terms which I have already indicated did not operate to give them notice of the trust in favour of the plaintiffs.

C I propose now to consider the plaintiffs' third proposition, because, in my view, the nature and extent of any personal claim which the plaintiffs may have in equity can only properly be appreciated after an examination of the nature and extent of the common law action for money had and received. The action for money had and received is a common law action on the case founded on an implied promise to pay which the law implies where A. has paid money to B. under a mistake of fact, the law setting up for the purpose of the claim the relationship of debtor and creditor between the parties. It is now settled beyond dispute that the action is only available where the plaintiff has paid under a mistake of fact. It is not available where he has paid under a mistake of law. Reference for this proposition can be made to a multitude of authorities, but it will be sufficient to refer to *Kelly v. Solari* (1), *Maskell v. Horner* (2), *Holt v. Markham* (3) and *Anglo-Scottish Beet Sugar Corpn. v. Spalding* (4).

D It was argued on behalf of the plaintiffs that all the cases where mistake of law has been held to preclude recovery were cases where there was a contractual nexus between the parties. It was, it was said, because of that nexus that the recipient of money was held not liable to pay. It was, however, admitted that where two parties are in legal relationship arising from contract, it is impossible to deny that the construction of any document defining their relationship must be a matter of law. It was then urged that here there was no nexus between the next of kin and the defendant institutions or between the executors and the defendant institutions.

E F G H It appears to me, however, that in view of the circumstances already referred to—that the action for money had and received is based on an implied promise to repay, and that for the purpose of the claim the relationship of debtor and creditor subsists between the parties—this argument necessarily breaks down, and that it is immaterial whether or not there was a contractual nexus in fact. The rule that the mistake on which an action for money had and received must be a mistake of fact is, in my view, of completely general application and in no way depends on the pre-existence in fact of a contract, written or oral, between the parties. The plaintiff in any action for money had and received must, as an essential condition of success, be able to show that he paid the money claimed under a mistake of fact. It was, indeed, pleaded that the mistake in this case was a mistake of fact. Para. 31 of the statement of claim reads as follows :

The several sums so paid to the defendant institutions as aforesaid were paid by the defendant executors as a result of a mistake of fact that is to say a mistake as to the class of beneficiaries interested in the testator's residuary estate.

It was argued that the mistake was a mistake as to the persons entitled in equity to the fund. It was said that all mistakes of that nature—i.e., all mistakes of title—are fundamentally mistakes of fact, though such a mistake may arise from a mistake of law, and *Anglo-Scottish Beet Sugar Corpn. v. Spalding* (4) was relied on in support of this argument.

Thus, the crucial question arises: What was the nature of the mistake in this case. In my judgment, it was a mistake as to part of the general law of England, but, if I am wrong in that view, then, in my judgment, it was a mistake as to the construction of the testator's will. It may be that in certain cases of payment of money there is involved a mistake of fact and a mistake of law, or there may be a mistake partly of fact and partly of law. The vital consideration in each case is what was the mistake which occasioned the payment: *Holt v. Markham* (3) and *Anglo-Scottish Sugar Beet Corpn. v. Spalding* (4). The mistake which was actually made here is concisely stated in para. 5 of the affidavit of the late defendant, Wintle, sworn by him in support of the originating summons taken out to test the validity of the residuary gift. Para. 5, so far as material, reads as follows:

In the belief that the trust contained in cl. 6 of the testator's will with regard to the disposition of the testator's residuary estate was a valid charitable trust my co-plaintiffs and I paid to the societies and institutions . . . the several sums [in question].

In my view, that means that the mistake on which the executors acted was the mistaken belief that a gift for charitable or benevolent purposes was a valid charitable gift in English law, whereas, in truth, it is a gift which in English law is void for uncertainty. It was a mistake as to the complicated technical requisites for the creation of a valid charitable trust. [The judge referred to the observations of LORD SIMONDS ([1944] 2 All E.R. 73) in *Chichester Diocesan Fund v. Simpson* (5) and to the judgment of STIRLING, J. ([1896] 2 Ch. 455, 456) in *Re Macduff* (6) and continued:] If, however, I am wrong in that view, then, in my judgment, the essential mistake was one of construction of the will. On no view can I see that any mistake of fact was involved at all. At the least it was a mistake as to the construction of the will as a whole, and the application to it of the decided cases. The only fact which the executors took into consideration was the actual wording of the will. As to this, there was no dispute, and, therefore, there could be no mistake of fact. It is plain that an action for money had and received cannot be founded on a mistake of law. It is equally clear that such an action cannot be founded on a mistake of construction: see *per ATKINSON, J.* ([1937] 2 K.B. 615), in *Anglo-Scottish Beet Sugar Corpn. v. Spalding* (4). See also *Rogers v. Ingham* (7), where it is assumed that the construction of a will is a question of law, and *Re Hatch* (8), where the construction of a deed is treated as a question of law. Against this weight of authority is urged the *dictum* of LORD WESTBURY (L.R. 2 H.L. 170) in *Cooper v. Phibbs* (9), but this *dictum* has given rise to much subsequent discussion and also to criticism, a recent example being the remarks of LORD ATKIN ([1932] A.C. 218) in *Bell v. Lever Brothers* (10). I think the true view is that the *dictum* must be read in its proper context, that is, in regard to an equitable claim for equitable relief, for example, setting aside a contract as part of which relief repayment of money may be directed, in which case no difficulty arises, because, in certain cases where equitable relief is sought, a mistake of law is not necessarily fatal. In the light of the modern authorities, however, it cannot be prayed in aid for the proposition that a mistake of construction is a mistake of private rights, and is, therefore, a mistake of fact which will found a claim for the repayment of money, and, in my respectful view, LORD WESTBURY never intended to say any such thing. For these reasons, therefore, the plaintiffs' claim for the return of the money paid to the defendant institutions, in so far as it is based on a claim for money had and received, fails.

I now turn to the first proposition put forward on behalf of the plaintiffs to which I have already referred. I must proceed to examine this proposition on the basis that the recipient postulated by counsel for the plaintiffs receives without such notice as would make him an express trustee. Counsel for the plaintiffs were unable to cite any reported case or to point to any accepted text book on equity in which the proposition as enunciated, or substantially as enunciated by them, was stated. In his reply, leading counsel for the plaintiffs

disclaimed that he was putting forward a wide proposition. He disclaimed any attempt to put forward a proposition based merely on what must be regarded as *ex aequo et bono*, or what has been conveniently referred to as "justice between man and man." He was constrained to accept (and, in my view, rightly) that the existence of any general head of equity based on those unsatisfactorily vague principles has been exploded. In this regard I need only refer to the judgment of HAMILTON, L.J., ([1913] 1 Ch. 140), in *Baylis v. Bishop of London* (11). His remarks, in my judgment, are applicable to equity in general, and not merely to those equitable considerations imported by the common law courts into the action for money had and received, on which it has been developed.

A For myself, I am unable to agree that the proposition put forward by the plaintiffs is a narrow, or comparatively narrow, proposition. It appears to me to be of wide import, but that, of course, is not a circumstance which of itself precludes its existence. The plaintiffs maintain that it is to be extracted from a perusal of the authorities, not from any one authority, but as the result of the cumulative effect of a number of the authorities. I proceed, therefore, to a consideration of the authorities on which the plaintiffs rely. In considering these cases it is, I think, necessary to bear in mind, for reasons which will appear later, that it is an essential part of the plaintiffs' proposition that mistake, whether of law or fact, is an irrelevant consideration. They postulated the example of a distribution by executors of a will similar in terms to the will under consideration in this case where the executors, being under no misapprehension as to the invalidity of their testator's directions, yet insisted in making the distribution among bodies similar in character to the defendant institutions. This example was characterised by counsel for the defendants as highly improbable. Be it so. Nevertheless, the plaintiffs' counsel clearly had to put their case as high as this.

D The first five cases relied on were *Gillespie v. Alexander* (12), *Greig v. Somerville* (13), *David v. Frowd* (14), *Sawyer v. Birchmore* (15) and *Thomas v. Griffith* (16). An analysis of these cases discloses two points of significance. In the first place, the distribution had in each case been made pursuant to an order of the court in an administration action, and, in the second place, the mistake, pursuant to which in each case the money had been paid, was a mistake of fact. As regards the first point, the basis on which the distribution was ordered is explained, first, by a reference to the judgment of SIR JOHN LEACH, M.R. (1 My. & K. 211), in *David v. Frowd* (14). Secondly, reference may be made to the exposition of the practice of the old Court of Chancery, and now of the Chancery Division, in administration actions to be found in the opinion of LORD DAVEY ([1904] A.C. 5), in *Harrison v. Kirk* (17). As regards the second point, namely, that the mistake in each case was a mistake of fact, that necessarily follows from an examination of the facts. It was in each case a question whether a person was a creditor, or whether a person was one of the next of kin of the deceased, in either case clearly a question of fact. In my view, therefore, these cases, properly considered, do not support the wide proposition for which the plaintiffs contend.

F The next case relied on was *Harris v. Harris* (18). Having regard, however, to the exhaustive and searching examination and criticism to which this case was subjected by WARRINGTON, J., in *Re Robinson* (19), counsel for the plaintiffs was constrained to admit that he could not place much reliance on it. The plaintiffs relied strongly on passages from the judgments of MELLISH, L.J. and BAGGALLAY, J.A. in *Rogers v. Ingham* (7). That was a case in which an executor, acting on the advice of counsel on the construction of a will, proposed to divide in certain proportions a fund between two legatees. One of the legatees, being dissatisfied, took the opinion of counsel, which agreed with the former opinion. The executor then divided and paid over the fund in accordance with the opinions. Two years afterwards the dissatisfied legatee filed a bill against the executor and the other legatee, alleging that the will had been wrongly construed, and claiming repayment from the other legatee, and it was held that the suit could not be maintained. MELLISH, L.J., having stated (3 Ch.D. 357) the established rule of law that money paid under a mutual mistake of law cannot be recovered back, said that as a general rule the court of equity did not in such a case interfere with the court of law. It was only after making this observation that he referred

to the power of the court of equity, in granting equitable relief, to order repayment of money where the mistake in question was a mistake of law. The passage in question is no authority for the proposition that there is a general rule of equity that a court of equity will entertain a mere money claim where the payment was made under a mistake of law. BAGGALLAY, J.A. made a most guarded statement (*ibid.*, 358) not referring to any specific case in which equity would relieve on a mistake of law, and couched in the subjunctive mood. The plaintiffs can gain little or no support from this passage, but their difficulty in relying on this case appears to me to be manifestly increased when reference is made to what JAMES, L.J., said (*ibid.*, 355):

I have no doubt that there are some cases which have been relied on, in which this court has not adhered strictly to the rule that a mistake in law is not always incapable of being remedied in this court; but relief has never been given in the case of a simple money demand by one person against another, there being between those two persons no fiduciary relation whatever, and no equity to supervene by reason of the conduct of the parties.

Those words seem to me to apply with full force to the claim in this case which I am now considering.

The plaintiffs then relied on *Re Robinson* (19). They admit, as they must, that it is not an express decision in their favour, but they point out that the decision turned on the application of the Statutes of Limitation, and contend that by implication the case recognises a special principle of equity relating to the recovery of a trust fund by one *cestui que trust* from another where it has been wrongly dealt with by the trustee. The headnote in this case, which, in my view, is amply borne out by the judgment, is as follows:

An action brought in the Chancery Division by one *cestui que trust* against another *cestui que trust* to recover money wrongly paid by the trustee to the latter under a common mistake of fact is in the nature of a common law action for money had and received, and the court, acting on the analogy of the Limitation Act, 1623, will hold the claim to be barred after the lapse of six years. The case would be different if the claim were made in an action in which the court was administering the trust estate. There, if there were assets to which the overpaid *cestui que trust* was entitled, the court would adjust the accounts as between the parties entitled, and lapse of time would be no bar.

So that, at first sight, the case does not appear very helpful to the plaintiffs. WARRINGTON, J., pointed out ([1911] 1 Ch. 507) that the claim was a mere money demand. Having adverted to the fact that the claim was not by the person who paid it, but by the person whose money was paid away, he treated the claim (*ibid.*, 508) as being either a strict claim in law for money had and received, or as an analogous claim in equity to which, therefore, equity by analogy would apply the Statutes of Limitation. He examined the contention of the plaintiff that in regard to a mere money demand there was a claim in equity other than a claim analogous to the common law action of money had and received, and, in my judgment, so far from having, by implication, admitted the existence of such a claim in equity, the judge, when his judgment is considered as a whole, negatived it.

The plaintiffs also relied on *Re Mason* (20). The facts in this case were that a lunatic, at the date of her death in 1798, was entitled to certain funds in court representing the residuary estate of her father. In 1794 the master had reported that the lunatic had no heir at law or next of kin. In 1798 and 1801 the Crown made *ex gratia* grants of these funds to certain persons and obtained an indemnity in respect of these grants. In 1926 a petition was presented by persons claiming to be the next of kin of the lunatic for the payment to them of the whole of her personal estate. The case was decided against the suppliants on the ground that the claim was barred by the Limitation Act, 1623. Counsel for the plaintiffs, however, contended that, by implication, the case shows that the equitable principle for which he contends exists. His argument is that, if this principle did not exist, then logically that point should have been taken, and would have been taken, as the first point on behalf of the Crown. I cannot accept this reasoning either as conclusive, or, indeed, as satisfactory. In the first place, no such proposition as that for which the plaintiffs contend was put forward by counsel for the suppliants. Their case, so far as relevant, proceeded on the basis that all parties knew the property was subject to a trust,

and that where such knowledge exists the statute can have no application. This contention was countered on behalf of the Crown by the argument that the claim was like that in *Re Robinson* (19), *i.e.*, an action for money paid under a mistake of fact, and was, therefore, barred after six years. It is plain that ROMER, J., treated the claim by the suppliants as a money demand maintainable only by an action for money had and received at common law, or by an analogous claim in equity. I cannot, therefore, regard this case as supporting the plaintiffs' first proposition.

A I now turn to *Re Rivers* (21) which was strongly relied on by the plaintiffs. They prayed this case in aid as showing, first, that the earlier five cases to which I have referred—*Gillespie v. Alexander* (12), *Greig v. Somerville* (13), *David v. Frowd* (14), *Sawyer v. Birchmore* (15), and *Thomas v. Griffith* (16)—are all still good law, a proposition which no one doubts, and, secondly, to show that *Re Rivers* (21) affords an example in modern times of the application of the principle of equity for which the plaintiffs contend and which they say is to be extracted from the cases. This case, they say, is clear authority for the proposition which they advance, that it is a case in which repayment of money was ordered although it had not been paid and received under a mistake of fact. In my judgment, *Re Rivers* (21), when examined, does not help the plaintiffs. It is, I think, a simple example of a person receiving a payment otherwise than in due course of administration and being compelled to submit to an adjustment.

C It was for that reason, I think, that counsel for the defendants in that case was constrained to admit that he could not rely on the Statutes of Limitation. So regarded, the case falls within, and is but a further illustration of the principle emerging from, the five cases to which I have referred. I would add that, in so far as it may be necessary to do so, I take the view that in this case a mistake of fact was involved.

D The defendants, for reasons which I think sufficiently appear from my analysis of the cases in question, in seeking to deny the existence of any such equity as that for which the plaintiffs contend, relied on *Rogers v. Ingham* (7), *Re Mason* (20) and *Re Robinson* (19). In addition, they relied on a number of cases to which I must refer. The first is *Hilliard v. Fulford* (22). The relevant part of the headnote in the case reads as follows :

E . . . where, after executors had made a partial distribution of the residue, an administration action was instituted by the residuary legatees who had not received their shares, and it then turned out that the executors had made two mistakes, first, in making their distribution upon an erroneous assumption that the residue was divisible among five persons instead of six ; and, secondly, in expending part of the general personal estate in repairs of property specifically devised : *Held*, that the overpaid residuary legatees could not be made to refund, that the executors must stand in the same position as if no distribution had taken place, and that the costs of the action should be paid as out of the entire residuary estate, so as to charge the executors with the share of costs attributable to each of the distributed shares ; and then that the executors should pay the balance necessary to make up to the unpaid legatees one-sixth of the residue each.

F SIR GEORGE JESSEL, M.R., said (4 Ch.D. 392) :

G The suit now comes on for hearing on further consideration ; and it seems that, after paying all the costs of the suit, the result will be that the executors will have paid probably more than their shares to the adult residuary legatees ; that is, if the estate were now to be distributed, they would not get as much as £750 each. The question is, who is to make good the difference ? That is really what it comes to.

It is important to bear that statement in mind in view of a later observation in the judgment. SIR GEORGE JESSEL, M.R., said (*ibid.*, 393, 394) :

H But where, as in this case, the accounts are substantially incorrect, and where the executors have made two most serious mistakes, one in choosing to take upon themselves the office of the court in construing an obscure will, and construing it wrongly, and secondly, making so serious an error as laying out as much as £1,095 in repairing a freehold which did not belong to their *cestuis que trust*, I think the executors cannot be allowed to say that the distribution is a proper distribution, and that it ought to avail them when the accounts come to be subsequently taken. I think they must stand in the same position as if there had been no distribution at all. Therefore, I think the right order is that the whole costs of the administration suit should be taken out of the estate as if they had never divided it, so that the plaintiff and the infant defendant will be entitled to exactly the same shares out of the residuary estate as if

no distribution had taken place and the other residuary legatees had been made defendants. Of course you cannot make those other residuary legatees pay back anything. There is no pretence for saying that they can be compelled to come in and contribute. Therefore, the difference, which I think cannot be very large, will in substance have to be made good by the executors who wrongly distributed the estate : they who have made the error will have to pay for it.

It was strongly contended on behalf of the plaintiffs that the words which I have read : "Of course you cannot make those other residuary legatees pay back anything. There is no pretence for saying that they can be compelled to come in and contribute " must be taken to relate only to a contribution to costs, and that they cannot be regarded as indicating that SIR GEORGE JESSEL, M.R., entertained the view that, had it not been merely a deficiency as regards costs, contribution could not have been claimed from the other residuary legatees. I do not share this view. It is true that, in the result, the matter was reduced to a question of contributing towards the costs, but, in my opinion, the whole of the reasoning in the judgment shows that SIR GEORGE JESSEL, M.R., considered that no repayment for costs or otherwise could be claimed from the other residuary legatees. When he said (*ibid.*, 392) : "The question is, who is to make good the difference ? That is really what it comes to," he was referring to a deficiency in shares and not to costs. Again, when he said (*ibid.*, 394) : "There is no pretence for saying that they can be compelled to come in and contribute," he did so because of what he had said in the preceding sentence : "Of course you cannot make those other residuary legatees pay back anything," a statement of general application, and certainly not limited to a contribution to costs. In my view, therefore, *Hilliard v. Fulford* (22) tends strongly to negative the existence of the equitable principle for which the plaintiffs contend, and it is of considerable importance in this matter because, as I interpret it, it is authority for the proposition that a mistake of construction in regard to a will is a mistake of law, and that a payment by executors to a legatee under such a mistake of law will be a bar to a personal claim by other persons entitled under the will, who have either been under-paid or not been paid, to recover from the recipients.

In *Re Hatch* (8) the court had to consider a deed made in 1885 under which a husband covenanted to pay to his wife £200 per annum during her life. The husband died in 1907 having by his will bequeathed his residuary estate to his executors and trustees upon certain trusts in favour of his four sons, one of whom subsequently died, having bequeathed his one-fourth share to the wife absolutely. The husband during his life-time, and his executors and trustees after his death, had paid the wife's annuity in full without deducting income tax. It was held by SARGANT, J., that, on the true construction of the deed, the wife's annuity was payable subject to, and not free from, income tax, and that past over-payments in respect of income tax having been made under a mistake of law were not recoverable as a debt from the wife, and could not be deducted either from future payments of the annuity or from the wife's share in the residuary estate of the husband. The basis of the decision of SARGANT, J. ([1919] 1 Ch. 356) was that, in the case of payment of money under a mistake of fact, recoupment could have been ordered, because in that case the estate would have been a creditor of the annuitant, but that, the mistake being one of construction, and, therefore, one of law, the relationship of debtor and creditor between the annuitant and the estate could not be implied, and, therefore, no debt could be implied in respect of which recoupment could be ordered. The claim was treated as one which, if it were to achieve success, must fulfil the conditions required for the successful prosecution of a claim for money had and received at common law, or the analogous claim entertained in equity, an essential condition of which was, of course, that the money in respect of which recoupment was sought should have been paid under a mistake of fact. SARGANT, J., rejected the contention that there was an equity, arising out of the circumstances existing at the date of the testator's death, entitling the trustees to recoup to the estate the amount of the overpayments—though made under a mistake of law and not constituting a legal debt—out of the share to which the annuitant became beneficially entitled. *Re Hatch* (8), therefore, strongly militates against the existence of the principle for which the plaintiffs contend, unless there be any foundation for their submission that, as regards the quality of the mistake, cases of misconstruction of deeds and contracts are to be distin-

guished from cases of misconstruction of wills in the consideration of claims based on more money demands. I am unable to see any distinction in principle, and, in my view, the weight of authority is directly against the existence of any such distinction. I need only refer again to *Hilliard v. Fulford* (22) and *Rogers v. Ingham* (7).

In *Re Blake* (23) the facts, as they appear from the headnote, were as follows :

- A The suppliant on a petition of right claimed to be entitled to the estate of an intestate who died on September 23, 1876. The petition stated that the suppliant was the legal personal representative of the grandchild of a paternal aunt of the intestate who died in 1886; that by an order dated June 23, 1883, it was declared that Queen Victoria was in right of her Royal Prerogative entitled to the intestate's personal estate, that it was ordered that the residue be paid by the Treasury Solicitor to such persons as Her Majesty or the Lords Commissioners of the Treasury should direct; that, pursuant to that order, the residue was transferred to the Paymaster-General; and that, at the date of the petition, the money, stocks and funds in question formed part of the Consolidated Fund and were held in trust for the intestate's next of kin. The petition submitted that an inquiry ought to be directed to ascertain who were the persons entitled to the estate and to what extent, and that the amount should be paid over to them. The Crown by demurrer pleaded that the claim was barred by the Limitation Act, 1623, and that the petition was bad in substance and in law on the ground that, on the facts therein alleged, no part of the money, stocks and funds constituting or representing the personal estate of the intestate, or forming part of the Consolidated Fund, was held in trust for the next of kin. *Held*, that the Crown succeeded on the point taken by the demurrer and that the petition must be dismissed.

- D The suppliant's case was rested on a right to follow the residue into the Consolidated Fund (and for the purpose of considering the extent of the doctrine of following assets I shall have occasion to return to this case later) which, if established, would, according to the contention on behalf of the suppliant, have avoided the application of the Statutes of Limitation. MAUGHAM, J., having discussed the nature of the Consolidated Fund ([1932] 1 Ch. 61), disposed of the suppliant's claim to follow the residue into that fund. On the previous page (*ibid.*, 60), after a reference by MAUGHAM, J., to the Intestates Estates Act, 1884, there is a passage which throws much light on the question which I am considering. It is quite true, as was emphasised by counsel for the plaintiffs, that the only question decided was that the suppliant's claim was barred by lapse of time, but I am entitled, and, indeed, bound, to have regard to the reasoning by which that result was arrived at. It is worthy of remark that the principle for which the plaintiffs contend, not depending on the existence of any mistake, was not adumbrated by any of the counsel engaged in the case, for the purpose of either asserting or demolishing the principle. Nor is the existence of the principle referred to by the judge. As I read his judgment, MAUGHAM, J., was postulating that, apart from any right to follow assets, if capable of being traced, the only other remedy open to a next of kin of a deceased person making a money demand in respect of money or property paid or transferred to the wrong person is by a claim for money had and received at common law or by an analogous claim in equity.

- G On this review of the authorities, I have come to the conclusion that the principle for which the plaintiffs contend is unsupported by the authorities, is against the weight of the authorities, and, as a head of equity, does not exist. In my judgment, the authorities establish that, so far as a mere money demand is concerned (and I am, as regards this part of the matter, dealing only with a money demand), where the executor or administrator has paid money or transferred property, part of the estate of the deceased, to a person not entitled thereto in such circumstances as not to make the recipient an express trustee, the only remedy open to the legatee or next of kin rightfully entitled against the recipient is either to pursue a common law claim for money had and received in the name of the executor or administrator or to pursue in equity a claim analogous to the common law action for money had and received in which it would be unnecessary to join the executor or administrator as plaintiff. In either case, however, as I have shown, it would be essential to demonstrate that the money was paid under a mistake of fact and not a mistake of law, a mistake in construing a will being regarded for this purpose as a mistake of law. There are, of course, cases in which equity, in the exercise of its remedial

jurisdiction, will intervene to grant relief such as rescission, which may involve the repayment of money, and for the purpose of granting such relief will not treat as fatal a mistake of law. I am not concerned to state the ambit of this jurisdiction. It is sufficient to say that this case, being a claim based on a mere money demand, is outside that class of case. In my judgment, the words of JAMES, L.J. (3 Ch. D. 355), in *Rogers v. Ingham* (7), are as true today as they were when spoken in 1876, and the subsequent authorities only serve to emphasise their correctness.

The next point advanced on behalf of the plaintiffs was that on the undisputed facts, to which I have already referred, they were entitled to follow the moneys paid by the executors to the respective defendant institutions into the hands of those institutions, and that, as in each case the money received had been paid into a banking account kept by the recipient with its bankers, the plaintiffs, on the principles laid down in *Re Hallett's Estate* (24), were entitled to trace the money into the banking account, and also out of the account, and further, that where, on such tracing out of the account, assets could be discovered in the hands of the recipient, representing wholly or in part the application of the money so received, the plaintiffs were entitled to an equitable charge on such assets to secure the amount of the money so traced into the assets.

For the purposes of the argument on this part of the case, the plaintiffs' counsel admitted that, on the receipt by the defendant institutions respectively of the payments made to them by the executors, the defendant institutions became neither trustees nor clothed with any fiduciary character, and that this position obtained until the receipt in October or November, 1939, by the respective defendant institutions of the warning letters from Mr. Wintle, to which I have referred earlier in this judgment. The plaintiffs' counsel were clearly constrained to make this admission in view of their admission on their second point, namely, that they could not maintain in this court that any of the defendant institutions took with notice of the trust in favour of the plaintiffs. In view of this admission, it becomes desirable to advert shortly to the right of following an asset at common law, and to the equitable doctrine of tracing (which is more extensive in its scope than the common law right), and to the principles on which the respective rights are based.

At common law there is a right in the owner of an asset who is deprived of the possession thereof to follow that asset into whosoever hands it may come, and notwithstanding that it may change its form, so long as he retains the property in the asset in its original or converted form: *Miller v. Race* (25) and *Banque Belge v. Hambrouck* (26) ([1921] 1 K.B. 329); and so long as the means of identifying the asset (in its original or converted form) continue to exist. The right is essentially a right *in rem*, and the difficulty which is usually encountered is the difficulty of continued identification where the asset sought to be followed is money or has at some stage of the chain of events been converted into money: see *per* LORD HALDANE in *Sinclair v. Brougham* (27) ([1914] A.C. 418, 419) where, commenting on a passage from the judgment of LORD ELLENBOROUGH, C.J. (3 M. & S. 575) in *Taylor v. Plumer* (28), LORD HALDANE said:

But LORD ELLENBOROUGH laid down . . . that if the money had become incapable of being traced, as, for instance, when it had been paid into the broker's general account with his banker, the principal had no remedy excepting to prove as a creditor for money had and received. The explanation was, of course, that a relation of debtor and creditor had arisen between the banker and his client . . . which precluded the notion of following the money.

The last sentence which I have read, if taken literally, would appear to support the conclusion that the payment of money by a holder thereof into his banking account in any circumstances would destroy the right of the true owner to follow the money at common law. I do not, with respect, think that LORD HALDANE intended his words to have such a far-reaching effect, and I do not think that he intended them to have the effect of denying to the true owner the right to follow his money when it has been paid by the person against whom it is sought to follow it into a separate account at his bankers into which no other moneys are paid. It is true that the result of such payment in is, as regards that money, to create the relationship of debtor and creditor and to substitute for the money a chose in action, but there has been no "mixing and confounding" of the

money in a "general mass of the same description," to use the words of LORD ELLENBOROUGH in *Taylor v. Plumer* (28).

A That that is the true view is, I think, borne out by the language of LORD ELLENBOROUGH (3 M. & S. 575) in *Taylor v. Plumer* (28), and from the judgments of the Court of Appeal in *Banque Belge v. Hambrouck* (26), particularly that of BANKES, L.J. ([1921] 1 K.B. 328), and that of ATKIN, L.J. (*ibid.*, 335). I, therefore, hold that where a person other than the true owner thereof pays money into an account at his bank, and does not mix with that money any other money, either his own, or that of any other person, the true owner of the money can, at common law, follow it into that account, and, further, can follow it out of the account into any asset or assets which can be shown to have been purchased wholly with it.

B The common law right of following property depends in no degree on the existence of any fiduciary relationship. This is conclusively demonstrated by LORD HALDANE ([1914] A.C. 420) in *Sinclair v. Brougham* (27). The common law right of following thus had the advantage that the person seeking to exercise it need not assert and prove any fiduciary relationship, but at the same time it had the disadvantage that, whenever the identity of the *res* ceased in fact, the remedy was gone. In the case of money, as I have already shown, whenever money, the *res*, is mixed with other money, the identity of the *res* is gone and the right to follow is at an end, a result which led LORD HALDANE to say (*ibid.*, 418): "In most cases money cannot be followed." It will thus be seen that as regards money the common law right of following property is distinctly limited in scope. It was because of this limitation of the scope of the common law right that equity—which, as pointed out by LORD HALDANE, had so far exercised a concurrent remedy based on trust—gave a further remedy, namely, what is conveniently called a right to trace. For the purposes of this case D it is essential, for reasons which will appear later in this judgment, to have clearly in mind not only what is the nature and extent of the right of tracing in equity, but also, and, indeed, primarily, what are the principles on which that right is rested.

E The leading case on this matter is *Re Hallett's Estate* (24) to which I must refer in some little detail. The principles enunciated in this case are frequently referred to as the rule in *Hallett's* case, but it is important to observe at the outset that two distinct points emerge from the case: (i) that in certain circumstances, which I shall deal with, money which has been paid into a banking account and there mixed with other money, can be followed into that account notwithstanding that mixing; and (ii) after the entry into the account has been made, how the account is to be unravelled for the purpose of tracing the money through and out of the account.

F The first of these two points is dealt with under the heading of "Claim of Mrs. Cotterill" (13 Ch.D. 707). Mr. Hallett, a solicitor, held certain bonds on behalf of Mrs. Cotterill, a client of his, and, therefore, stood in a fiduciary position towards her. He improperly sold these bonds and put the money, the proceeds of such sale, to his general account at his bankers. The money remained at his bankers mixed with his own money at the time of his death, *i.e.*, he had not drawn out that money from his bankers. In that position of matters, Mrs. G Cotterill claimed to be entitled to receive the proceeds, or the amount of the proceeds, of the bonds out of the money in the hands of Mr. Hallett's bankers at the time of his death, and the claim was allowed. The basis on which the claim was allowed, involving, as it did, entering the mixed account, was that Mr. Hallett stood in a fiduciary position towards Mrs. Cotterill: see *per* SIR GEORGE JESSEL, M.R. (*ibid.*, 708, 709). SIR GEORGE JESSEL, M.R., dealt with the suggestion that there was a distinction in this regard between "an express H trustee, or an agent, or a bailee, or a collector of rents, or anybody else in a fiduciary position," and stated in emphatic terms that there was no such distinction. He concluded (*ibid.*, 710):

Therefore, the moment you establish the fiduciary relation, the modern rules of equity, as regards following trust money, apply.

Later in his judgment (*ibid.*, 719) SIR GEORGE JESSEL, M.R., quoted from the judgment of WOOD, V.-C. (2 H. & M. 420), in *Frith v. Cartland* (29). Both BAGGALLAY and THESIGER, L.JJ., in agreeing with the conclusion of SIR GEORGE

JESSEL, M.R., based their judgments on the existence of the fiduciary duty owed by Mr. Hallett to Mrs. Cotterill.

Pausing here, it appears to me to follow from a perusal of the judgments in *Re Hallett's Estate* (24) on the claim of Mrs. Cotterill that, so far as the authority of that case goes, the equitable doctrine of allowing tracing into a mixed mass, particularly into a banking account where the tracer's money has been mixed with other money, is rested on the existence of a fiduciary relationship between the person into whose banking account the money has been paid and the true owner; that the existence of that fiduciary relationship is a condition precedent to entering the banking account where the moneys have been mixed; and, therefore, that where that fiduciary relationship does not exist, there is no right in equity to trace into the mixed account. In other words, it is the existence of the fiduciary relationship which enables equity to give that further remedy to which LORD HALDANE ([1914] A.C. 420) referred in *Sinclair v. Brougham* (27).

The second point which was decided in *Re Hallett's Estate* (24) arose in this way. Mr. Hallett, being the trustee of some bonds, improperly sold them, and by his direction the proceeds were paid to his credit at his bankers and there mixed with moneys belonging to himself in the same banking account, and he also drew by ordinary cheques moneys from the banking account which he used for his own purposes. At his death in 1878 there was more money to the credit of the account than the sum of trust moneys paid into it, but if, applying the rule in *Clayton's case* (30), every payment made after the payment in of the trust moneys was applied to the first items on the credit side in order of date, a large portion of the trust moneys would have been paid out. The question was whether or not, in these circumstances, the moneys drawn out by Mr. Hallett after the payment in of the trust moneys were to be treated as the repayment of his own moneys, or whether they were to be treated as appropriated so as to diminish the amount applicable to the trust funds. SIR GEORGE JESSEL, M.R., first considered the matter on principle and observed (13 Ch.D. 727):

Now, first upon principle, nothing can be better settled, either in our own law, or, I suppose, the law of all civilised countries, than this, that where a man does an act which may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongly.

Having then given a series of examples, he observed:

That is the universal law. When we come to apply that principle to the case of a trustee who has blended trust moneys with his own, it seems to me perfectly plain that he cannot be heard to say that he took away the trust money when he had a right to take away his own money.

Having dealt with what he describes as the simplest case of the mingling of trust moneys in a bag with the trustee's own, he said (*ibid.*, 727, 728):

What difference does it make if, instead of being in a bag, he deposits it with his banker, and then pays in other money of his own, and draws out some money for his own purposes? Could he say that he had actually drawn out anything but his own money? His money was there, and he had a right to draw it out, and why should the natural act of simply drawing out the money be attributed to anything except to his ownership of money which was at his bankers.

SIR GEORGE JESSEL, M.R., then proceeded (*ibid.*, 728) to demonstrate that, wherever the fiduciary position exists, then, in unravelling the banking account where the trust and other moneys have been mixed, the rule in *Clayton's case* (30), which is a rule of convenience based on a presumed intention, must give way to the application of the principle in respect of which I have quoted him. Having dealt with a difficulty with which FRY, J., supposed himself to be faced by the decision of the Court of Appeal in *Pennell v. Deffell* (31), he said (13 Ch.D. 730):

No human being ever gave credit, even beyond that theory, that he should not only misappropriate trust moneys to increase his assets, but that he should pay the trust moneys so misappropriated to his own banking account with his own moneys, and draw out after that a larger sum than the first sums paid in for the trust moneys.

BAGGALLAY, L.J., based his judgment on the same considerations (*ibid.*, 743), but THESIGER, L.J., dissented from the majority, taking the view (*ibid.*, 752) that the Court of Appeal was bound by the previous decision of that court in *Pennell v. Deffell* (31).

The effect of this second part of the judgment in *Re Hallett's Estate* (24) is that, once the banking account into which the money sought to be traced has been paid has been entered, the application of the rule in *Clayton's case* (30) is displaced for the same reason as that by reason of the existence of which equity allows the account to be entered, namely, the fiduciary relationship between the person who has paid in the money sought to be traced and the true owner. The fiduciary position is treated as a circumstance which displaces
A the presumed intention on which the application of the rule in *Clayton's case* (30) depends, because as between the trustee or the person owing a fiduciary duty, on the one hand, and the beneficiary or person owed the fiduciary duty, on the other hand, it must be presumed that the trustee or fiduciary agent intended to act honestly, and effect can only be given to that intention by treating drawings out of the account as drawings by the trustee or fiduciary agent of his own moneys. It may well be, as is suggested by BAGGALLAY, L.J., that the
B rule in *Clayton's case* (30) will obtain as between respective beneficiaries whose moneys have been mixed by their trustee in one banking account.

Now, it is to be observed that the doctrine is artificial in that it is based on a presumed intention, namely, that the trustee or fiduciary agent intended to act honestly, when in most cases, of which *Re Hallett's Estate* (24) itself forms an example, the contrary is the fact. In the usual case there is a deficiency. The competition
C is between the beneficiary and the creditors of the trustee or fiduciary agent, and the position has been brought about by the improper and generally dishonest motive of the trustee or fiduciary agent. This improper or dishonest motive neither he nor those who claim under him are allowed to set up, and it is presumed (usually quite contrary to the fact) that all along he was filled with a proper and honest intent. Here I may observe in passing that I place
D no weight on the circumstance on which the plaintiffs' counsel relied strongly, namely, that all the reported cases relating to tracing deal with a deficiency, because, as was pointed out by KINDERSLEY, V.-C., (L.R. 2 Eq. 552) in *Hopper v. Conyers* (32) the test must always be as between the trustee or fiduciary agent and the person seeking to follow or trace. The creditors of the trustee or fiduciary agent cannot stand in a better position than he could. I have been at pains to emphasise the artificial element in the equitable doctrine of tracing
E because, in my view, it serves to underline the truth that, in the evolution of this doctrine, equity did no more, and at the same time did no less, than have recourse to its age-old expedient of fastening on the conscience of the person against whom it intended to extend the remedy. The decision in *Re Hallett's Estate* (24), if I may so put it, reeks of trust and fiduciary relationship, and the two points, which emerge from the judgments and with which I have dealt above, are, as I have shown, based by the express language of the court upon the existence of trust or fiduciary relationship.

On the doctrine of tracing in equity as enunciated in *Re Hallett's Estate* (24) certain refinements have been engrafted, which, however, in no way affect the principles on which the decision is rested, but which, indeed, are wholly consistent with the logical working out of those principles. In *Re Oatway* (33) it was held that where a trustee pays trust money into his banking account whereby it becomes mixed with his own money and out of moneys drawn from the account
G purchases an investment in his own name, but subsequently applies the balance to his own purposes, his representatives cannot successfully maintain that the investment is purchased out of the trustee's own money, and that what has been spent, and can no longer be traced and recovered, is the money belonging to the trust. In *Roscoe v. Winder* (34) it was held that payment into a general account cannot, without proof of express intention, be appropriated to the replacement of trust money which has been improperly mixed with that account
H and drawn out: see *per* SARGANT, J., ([1915] 1 Ch. 69). It is significant to observe that the decision in this case was given after the decision of the House of Lords in *Sinclair v. Brougham* (27), and that SARGANT, J., neither showed any inclination to extend the doctrine of tracing as laid down in *Re Hallett's Estate* (24), nor regarded that doctrine as having been affected by the decision in *Sinclair v. Brougham* (27).

Many cases involving the equitable doctrine of tracing have come before the courts of equity since the decisions in *Re Hallett's Estate* (24) in 1879 and 1880, but (apart from *Sinclair v. Brougham* (27)) I do not consider it necessary to

refer to more than the authorities to which I have already referred. The difficulties which have occurred have arisen, not on any doubt as to the principles underlying the decision in *Re Hallett's Estate* (24), but in the application of those principles to the facts of particular cases. One conclusion appears to me to be clear, namely, that, putting aside for the moment *Sinclair v. Brougham* (27), there is no case in the books (and in this regard I do not omit from account *Buckeridge v. Glasse* (35) and *Thompson v. Finch* (36)) from which it could be asserted that the equitable right of tracing is available against a person who, at the time of receiving the money sought to be traced and which he has mixed with his own in his banking account, owed no fiduciary duty to the true owner, while, on the other hand, the whole weight of the authority of *Re Hallett's Estate* (24) and the cases which have followed it is without exception to the contrary. It is no part of the defendants' case to dispute that, if a volunteer receives trust money or property without knowledge that it is subject to a trust, but subsequently receives such notice and is still in possession of the trust money or property, he, being a volunteer, cannot maintain his title against those entitled under the trust. On the other hand, it is no part of the plaintiffs' case that the notice given to the defendant institutions by the respective warning letters could in any sense be related back to the respective dates of receipt by them of the moneys paid to them by the executors or that the defendant institutions could be clothed with any fiduciary character prior to the receipt of the warning letters. I have, however, considered it necessary to examine at some length the decision in *Re Hallett's Estate* (24) because of the way in which the plaintiffs' case has been put.

If I have rightly understood the arguments of the plaintiffs' counsel, they involve that the question of the defendants' conscience is not material at the start of the tracing as a condition precedent to equity allowing the tracing to be undertaken, but, at the most, at the end of the inquiry, if, as a result thereof, a superfluity should be found in the defendants' hands. They maintain that the right to the machinery of tracing for which they contend is supported by authority, or, if not, is justified on principle, and in so far as acceding to their contention would represent an extension of the equitable doctrine of tracing, that extension should be made.

I must, therefore, proceed to consider, first, whether the plaintiffs' counsel are right in their contention that the proposition for which they contend is supported by authority. Virtually speaking, the only authority on which they rely is confined to one case, but one of the greatest importance, namely, the decision of the House of Lords in *Sinclair v. Brougham* (27). The plaintiffs contend that, on a true view, this case is authority for the proposition that the machinery of a tracing order can be applied to a case where the person against whom the tracing order is sought did not stand in a fiduciary relationship to the person seeking the order at the time of receipt of the property or money sought to be traced. The defendants, on the other hand, contend that, properly understood, *Sinclair v. Brougham* (27) is no more than an application of the first point decided in *Re Hallett's Estate* (24), i.e., that it predicated, for the purpose of getting into the mixed mass of money dealt with in that case, that there was a fiduciary relationship, and that in so far as there could be said to have been any departure from the strict application of the second part of the decision in *Re Hallett's Estate* (24), that departure lay in the decision to divide the mixed mass between the two competing sets of claimants in proportion to their respective contributions to what the mass represented, because the machinery for unravelling the mass laid down in the second part of the decision in *Re Hallett's Estate* (24) could not, in the circumstances, be applied. The immediate question, therefore, is: Which of these views is correct?

For this purpose I must embark on a detailed consideration of the facts in *Sinclair v. Brougham* (27), and of what was decided in that case. The relevant facts were that a building society, formed in 1851 and empowered by its rules to borrow to an unlimited extent, started and developed a banking business. In 1911 the society was ordered to be wound up and questions of priority arose between the outside creditors, the unadvanced shareholders and the bank customers on current and deposit account (to whom I will refer as "the depositors.") The assets were insufficient for payment of all the

claimants in full, but were more than sufficient for the payment of the outside creditors (who were subsequently paid by arrangement) and the shareholders. It was held that the power to borrow must be limited to the proper objects of the society and that the carrying on of the banking business was *ultra vires*. Secondly, it was held that the depositors were not entitled to recover moneys paid by them on an *ultra vires* contract of loan on the footing of money had and received by the society to their use. It was, however, held thirdly (as stated in the headnote) :

A Applying the principle of *Re Hallett's Estate* (24) that the assets remaining after payment of the outside creditors must be taken to represent in part moneys which the depositors could follow, as having been invalidly borrowed, and in part moneys which the society could follow, as having been wrongfully employed by its agents in the banking business, and (subject to any application by any individual depositor or shareholder with a view to tracing his own money into any particular asset, and to the costs of the liquidation) ought to be distributed *pari passu* between the depositors and the unadvanced shareholders according to the amounts respectively credited to them in the books of the society at the commencement of the winding-up.

B Now, as I shall show, at the root of the decision lie the circumstances that, as the carrying on of the banking business was *ultra vires* the society, the directors of the society, and not the society itself, must be deemed to have carried on that business, and the moneys constituting the mass in the hands of the liquidators must be deemed to represent moneys received from the society and the depositors by the directors; that the directors so receiving such moneys stood in a fiduciary relationship to the society and the depositors; that in expending the moneys so received the directors had acted wrongfully and in breach of trust; that they had done so to the knowledge of both the society and the depositors; and that as between the society and the depositors the equities were equal.

D If this be a correct view of the matter, then it appears to me that, so far as the first part of *Re Hallett's Estate* (24) is concerned, this case represents a strict application of the principle there enunciated for the purpose of effecting entry into the mass in the hands of the liquidator, and that the only departure (if it be one) from *Re Hallett's Estate* (24) occurs as regards the second point, in the division of the mass between the two competing classes, because of the practical impossibilities of tracing. The departure would appear to be more apparent than real, because, if (as, in my view, was the position) it was a case of a fund held on behalf of two sets of beneficiaries, the machinery of tracing dealt with in the second part of *Re Hallett's Estate* (24) would not have been applicable even if it could have applied. It appears to me, therefore, that the only relevance of *Re Hallett's Estate* (24) in *Sinclair v. Brougham* (27) was to effect entry into the mass. LORD HALDANE, having dealt with the claim for money had and received, said ([1914] A.C. 420, 421) :

E But while the common law gave the remedy I have stated, it gave no remedy when the money had been paid by the wrong-doer into his account with his banker, who simply owed him a debt, so that no money was or could be, in the contemplation of a court of law, earmarked. Here equity, which had so far exercised a concurrent jurisdiction based upon trust, gave a further remedy. The Court of Chancery could and would declare, even as against the general creditors of the wrong-doer, that there was what it called a charge on the banker's debt to the person whose money had been paid into the latter's bank account in favour of the person whose money it really was. And, as JESSEL, M.R., pointed out in *Hallett's case* (24), this equity was not confined to cases of trust in the strict sense, but applied at all events to every case where there was a fiduciary relationship. It was, as I think, merely an additional right, which could be enforced by the Court of Chancery in the exercise of its auxiliary jurisdiction, wherever money was held to belong in equity to the plaintiff. If so, subject to certain qualifications which I shall presently make, I see no reason why the remedy explained by JESSEL, M.R., in *Hallett's case* (24), of declaring a charge on the investment in a debt due from bankers on balance, or on any mass of money or securities with which the plaintiff's money had been mixed, should not apply in the case of a transaction that is *ultra vires*. The property was never converted into a debt, in equity at all events, and there has been throughout a resulting trust, not of an active character, but sufficient, in my opinion, to bring the transaction within the general principle.

H The object of that passage was to lead to the conclusion that there was no reason why the remedy explained by JESSEL, M.R., in *Re Hallett's Estate* (24)

of declaring a charge should not apply in an *ultra vires* transaction. LORD HALDANE was only seeking to apply a known principle of equity and not to extend such principle or to make a new head of equity. In referring to the principle, he refers to the condition on which its applicability depends, namely, the existence of a fiduciary relationship, and underlines this aspect of the matter in the last sentence of the paragraph. He says "there has been throughout a resulting trust." The word "throughout" is vital. There could not be a resulting trust, however dormant, over a period during which the recipient of the money sought to be traced was not in any sense a fiduciary agent. LORD HALDANE said (*ibid.*, 422, 423):

For the purpose of the question before us the really relevant part of the judgment in *Hallett's* case (24) is that which shows how the difficulty of following money into a debtor and creditor account like a banker's is got over in equity. The loan to the banker was regarded as an investment *pro tanto* of the principal's money, and the latter was treated as entitled to waive the breach of duty by his agent, and to claim the investment to the extent of the amount due to him as made on his behalf. The agent could not set up that any part of the money in the bank was his until he had made good his breach of duty, and in that sense there was a charge.

In the present case the investment was not made in breach of a fiduciary duty on the part of the society, and it was actually made with the authority of the depositors. What was a material point in *Hallett's* case (24), therefore, does not occur here. No doubt it was *ultra vires* of the society to undertake to repay the money. But it was none the less intended that in consideration of giving such an undertaking the society should be entitled to deal with it freely as its own. The consideration failed and the depositors had the right to follow the money so far as invalidly borrowed into the assets in which it had been invested, whether these assets were mere debts due to the society or ordinary securities, but that was their only right.

It was sought to be argued that that passage was authority for the proposition that, for the purpose of effecting entry into a banking account, the person seeking to trace need not show that the recipient of the money into whose account it was paid stood in any fiduciary relationship at the time of receipt or payment in. For myself, I do not consider that any such far reaching proposition can be deduced from this or any other passage of LORD HALDANE's speech. In the first of the two paragraphs which I have just read LORD HALDANE demonstrates conclusively that, in order to pray in aid the first rule in *Re Hallett's Estate* (24) for the purpose of following money into a banking account, it is necessary to show that the person into whose account the money was paid was a fiduciary agent. In the second paragraph what LORD HALDANE is explaining is that both the society and the depositors were tracers. The society did not owe the depositors any fiduciary duty and in that sense the case was different from *Re Hallett's Estate* (24). None the less, it is not right to say that *Sinclair v. Brougham* (27) is not a case in which any question of fiduciary relationship was involved. As is pointed out by LORD HALDANE in the passage on which I have commented and again (*ibid.*, 425) and even more clearly and expressly by LORD PARKER, as the business was *ultra vires* the society, it had to be regarded as carried on improperly by the directors, the agents of the society and necessarily fiduciary agents. I am, therefore, unable to regard LORD HALDANE's speech in *Sinclair v. Brougham* (27) as authority supporting the plaintiffs' proposition to which I have already referred.

LORD DUNEDIN said (*ibid.*, 431):

Now I think it is clear that all ideas of natural justice are against allowing A. to keep the property of B., which has somehow got into A.'s possession without any intention on the part of B. to make a gift.

The plaintiff's counsel relied very strongly on this passage, and sought to put it forward as authority for their proposition that the receipt of the property of B. by A., without any intention on the part of B. to make a gift, constituted an equity in B. entitling him to enter and investigate the banking account of A. to discover whether A. still retained the money or held an asset wholly or in part representing that money. In my judgment, to take this view would be to extract from the passage in question more than it contains. It is, in my view, essential to bear in mind the concrete problem to which LORD DUNEDIN was addressing himself, and which he states (*ibid.*, 438) in these words:

What has happened is truly this. The directors of the society have taken the moneys of the shareholders which they had a right to receive, and the moneys of the depositors which they had not, and mixed them so that they cannot be discriminated from each other, and have put them, so to speak, in the society's strong-box, where the mixed mass is found by the liquidator.

It is clear from this passage that what LORD DUNEDIN was dealing with throughout his speech was a real superfluity existing *in specie* and not a mere superfluity in account. In the case before him the facts established that the mass in the hands of the liquidator represented in fact the moneys of the depositors and the society. No question, therefore, such as that before me, arose for consideration in *Sinclair v. Brougham* (27), but it is to be observed that, on the footing of the statement of the facts by LORD DUNEDIN, the fiduciary element was present, namely, the fiduciary duty owed by the directors to the society and the depositors, which would entitle either set of tracers to enter the mixed mass on the authority of the first part of the rule in *Re Hallett's Estate* (24). I can find no suggestion in the language used by LORD DUNEDIN to effect any extension of the equitable doctrine of tracing or to enunciate any new head of equity, or, indeed, to do anything more than to apply existing and well-known principles to the particular facts before him. It is true that LORD DUNEDIN said (*ibid.*, 435, 436):

I have made these citations to show that other great systems of law have not been unable to solve the problem arising where the equity of restitution comes in contact with the doctrine of nullity of contract. Is English equity to retire defeated from the task which other systems of equity have conquered? Let us for a moment examine what the argument on the other side is. There being no contract, it is impossible, it is said, to have any obligation on the part of the society to restore what it has taken from the depositors. The only right of the depositors is a right to vindicate property; or, in other words, when you have a *jus in re* you can enforce it; but if the thing has so disappeared that a *jus in re* is no longer to be found (and this must practically always be so in the case of money), then your remedy is gone. The sole relief which equity can give is that if you can show that your money has paid a just debt, in that case you shall have action. This comes to this, that having got hold of property which does not belong to you, if only you are wise or lucky enough to change its form you may enjoy the proceeds unmolested. Such a plea on the face of it seems only worthy of the Pharisee who shook himself free of his natural obligations by saying Corban. In the words of technical equity it is unconscionable.

The words "In the words of technical equity" appear to me to supply the key to the whole passage. In the eye of equity (technical equity) it could only be unconscionable to retain the property if, after the application of the relevant rules of equity, the retention could still be said to be unconscionable. If it be still true, as I think it is, that the application of the two rules in *Re Hallett's Estate* (24) depend on the existence of a fiduciary relationship, it cannot be unconscionable in the eye of equity to retain money in circumstances where the identity of the money has, in fact, been lost, and where the rules of equity cannot be prayed in aid to preserve that identity.

I think that counsel for the defendants was right in his submission that LORD DUNEDIN was presupposing on the part of the recipient knowledge that the money belonged to some one else in equity, in other words, that there existed that fiduciary relationship which would admit the application of the rules in *Re Hallett's Estate* (24). LORD DUNEDIN nowhere sought to quarrel with, or to cast doubt on, those rules. He recognised the correctness of the first rule by his silence, and only referred to the case at all to point out that on the facts before him the second part of *Re Hallett's Estate* (24) had no application. I am, therefore, of opinion that the plaintiffs do not find support for their proposition in the speech of LORD DUNEDIN.

I now turn to the speech of LORD PARKER OF WADDINGTON. In the first place, I desire to refer to certain passages which, in my judgment, establish beyond doubt that LORD PARKER's reasoning proceeded on the basis that on the facts of the case before him the *ultra vires* business must be deemed to have been carried on by the directors who thus stood in a fiduciary relationship both to the depositors and to the society. LORD PARKER said ([1914] A.C. 441, 442):

Secondly, it appears to be also well settled that the lender in an *ultra vires* loan transaction has a right to what is known as a tracing order. A company or other

statutory association cannot by itself or through an agent be party to an *ultra vires* act. If its directors or agents affecting to act on its behalf borrow money which it has no power to borrow, the money borrowed is in their hands the property of the lender. At law, therefore, the lender can recover the money, so long as he can identify it, and even if it has been employed in purchasing property, there may be cases in which, by ratifying the action of those who have so employed it, he may recover the property purchased. Equity, however, treated the matter from a different standpoint. It considered that the relationship between the directors or agents and the lender was a fiduciary relationship, and that the money in their hands was for all practical purposes trust money. Starting from a personal equity, based on the consideration that it would be unconscionable for any one who could not plead purchase for value without notice to retain an advantage derived from the misapplication of trust money, it ended, as was so often the case, in creating what were in effect rights of property, though not recognised as such by the common law.

That means that the basis of the right of tracing in such a case is the wrongdoing of the fiduciary agents, which makes applicable the first part of the rule in *Re Hallett's Estate* (24). After referring to *Re Guardian Permanent Benefit Building Society (Crace-Calvert's Case)* (37) LORD PARKER said (*ibid.*, 443, 444):

No doubt at first sight it is difficult to be certain as to the principles of equity to which SIR GEORGE JESSEL referred. But I think the difficulty may be solved by disentangling the equity itself from the directions by means of which the court endeavoured to give effect to it. The equity lay in this, that it would be unconscionable for the society to retain the amount by which its assets had been increased by, and in fact still represented, the borrowed money. It would be inequitable for the society to take advantage of the misapplication by its agents of money belonging to others and held by them in a fiduciary capacity. In other words, it was the same equity as that on which a tracing order is based.

LORD PARKER stated the particular case before him in these words (*ibid.* 448, 449):

The case, therefore, presents itself in this way. Here is a mass of assets arising in the course of an *ultra vires* business carried on by the directors and agents of the society. There are, on the other hand, liabilities, how or for what purpose incurred is not in evidence. No one claims any interest in the assets except the *ultra vires* lenders, the members of the society and the creditors, in respect of the liabilities to which I have referred. The *ultra vires* lenders and the members are willing that these liabilities and the costs of the liquidation, which are in effect costs of administering the fund, shall be first paid. If this is done, what is left may be taken to represent in part the moneys of the *ultra vires* lenders and in part the moneys of the society wrongfully employed in the business. The equities of the *ultra vires* lenders and of the society are equal, and it follows that the remainder of the assets ought to be divided between the *ultra vires* lenders and the society rateably, according to the capital amount contributed by such lenders and the society respectively. This mode of distribution gives effect to all the equities of the parties, and there is in it nothing necessarily inconsistent with the decision in the *Crace-Calvert* case (37), for there the business actually carried on was *intra vires*, and thus belonged to the society, except in so far as the *ultra vires* lenders could establish any equitable claim. It depends solely on the fact that the assets for distribution being assets not of a legitimate but an *ultra vires* business are not the assets of the society, except in so far as they can substantiate some equity to them, and that such equity as they have can arise only from an application of the same principles to which the *ultra vires* lenders are themselves entitled to have recourse.

These passages also appear to me to establish that LORD PARKER treated the matter as one in which, because of the fiduciary position of the directors who carried on the *ultra vires* business, it was open both to the depositors and to the society to make entry into the mass of assets in the hands of the liquidator by invoking the first part of the rule in *Re Hallett's Estate* (24).

The following passage from the speech of LORD PARKER (*ibid.*, 442), particularly the latter part, was strongly relied on both by the plaintiffs and the defendants:

The principle on which, and the extent to which, trust money can be followed in equity is discussed at length in *Re Hallett's Estate* (24) by SIR GEORGE JESSEL. He gives two instances. First, he supposes the case of property being purchased by means of the trust money alone. In such a case the beneficiary may either take the property itself or claim a lien on it for the amount of the money expended in the purchase. Secondly, he supposes the case of the purchase having been made partly with the

trust money and partly with money of the trustee. In such a case the beneficiary can only claim a charge on the property for the amount of the trust money expended in the purchase. The trustee is precluded by his own misconduct from asserting any interest in the property until such amount has been refunded. By the actual decision in the case, this principle was held applicable when the trust money had been paid into the trustee's banking account. I will add two further illustrations which have some bearing on the present case. Suppose the property is acquired by means of money, part of which belongs to one owner and part to another, the purchaser being

A in a fiduciary relationship to both. Clearly each owner has an equal equity. Each is entitled to a charge on the property for his own money, and neither can claim priority over the other. It follows that their charges must rank *pari passu* according to their respective amounts. Further, I think that as against the fiduciary agent they could by agreement claim to take the property itself, in which case they would become tenants in common in shares proportioned to amounts for which either could claim a charge.

B Suppose, again, that the fiduciary agent parts with the money to a third party who cannot plead purchase for value without notice, and that the third party invests it with money of his own in the purchase of property. If the third party had notice that the money was held in a fiduciary capacity, he would be in exactly the same position as the fiduciary agent, and could not, therefore, assert any interest in the property until the money misapplied had been refunded. But if he had no such notice this would not be the case. There would on his part be no misconduct at all. On the other hand, I cannot at present see why he should have any priority as against the property over the owner of the money which had, in fact, been misapplied.

C

In my judgment, this paragraph, when carefully analysed and considered in its context, admits of no ambiguity. In the first place, it is clear that LORD PARKER was not seeking in this passage to make any exhaustive statement of the principle on which, and the extent to which, trust money can be followed in equity. In the immediately preceding paragraph he is confining himself to the impact of equity on an *ultra vires* transaction of lending, leading

D up to the conclusion that equity considered that the relationship between the directors or agents and the lender was a fiduciary relationship, and that the money in their hands was for all practical purposes trust moneys. He then contents himself with observing that the principle on which, and the extent to which, trust money can be followed in equity is discussed at length in *Re Hallett's Estate* (24) by SIR GEORGE JESSEL. Then he refers to two instances given by SIR GEORGE JESSEL. In both of those instances the existence of the fiduciary relationship at the time of dealing with the trust money is postulated. LORD PARKER then adds two illustrations of his own. The first, in effect, was the case before him. In that case also the existence of the fiduciary relationship would enable either party to invoke the first rule in *Re Hallett's Estate* (24) and enter the mass, whether it consisted of specific property or a chose in action owed by his bankers to the person under the

E fiduciary duty, though, when entry into the mass had been made, then, as between the two owners of the money, the equities would be equal. His second illustration is introduced in these words :

F

Suppose, again, that the fiduciary agent parts with the money to a third party who cannot plead purchase for value without notice, and the third party invests it with money of his own in the purchase of property.

G It is, I think, important to consider the scope of that illustration. In the discussion of the elements of a principle or the extent of its application, a hypothetical example is frequently of the greatest help, but only if its scope is clearly understood. In the illustration which he gives, is LORD PARKER postulating the mixing by the third party in his banking account of the money paid to him by the fiduciary agent with his own money before the investment is effected, or not ? Both views were urged before me. In favour of the view

H that LORD PARKER did postulate such mixing is the undoubted circumstance that in practice the normal course which would be followed by the recipient, particularly if he took without notice of the trust, would be to pay the money into his banking account. Against this consideration, however, must be set these considerations : (i) that LORD PARKER's statement of his illustration does not in terms involve any such mixing ; (ii) that it was unnecessary for the purposes of the case before him to consider the effect of such mixing ; (iii) that the second variation of this second illustration militates strongly, and, as I think, conclusively, against any such postulation.

Having stated the illustration, LORD PARKER gives two variations of it. In the first place, he postulates that the third party receiving the money has notice that it was held in a fiduciary capacity. In such an event it would clearly be immaterial whether or not the money was mixed by the third party with money of his own, because in the language of LORD PARKER, "he would be in exactly the same position as the fiduciary agent and could not, therefore, assert any interest in the property until the money misapplied had been refunded," *i.e.*, that both parts of the rule in *Re Hallett's Estate* (24) would be applied against him. In the second place, LORD PARKER says: "But if he had no such notice this would not be the case. There would on his part be no misconduct at all." That is, in such circumstances he could not be deprived of the right to assert an interest in the property except on the terms of first refunding the money received from the fiduciary agent. As between the third party and the true owner of the money paid by the fiduciary agent the equities would be equal, and for that reason LORD PARKER concluded his observations on this part of the matter with this sentence:

On the other hand, I cannot at present see why he should have any priority as against the property over the owner of the money which had, in fact, been misapplied.

If LORD PARKER, as I think was the case, did not have in mind any mixing of the two sets of moneys in the banking account of the third party prior to the investment, then the whole matter is plain, and the illustration amounts to this, that, as regards the first variation, it is a simple case of the application of both parts of the rule in *Re Hallett's Estate* (24), while, as regards the second illustration, it shows that, on the third party in fact receiving notice that the money paid to him was held in a fiduciary capacity and on proof that he still possesses an asset in part representing that money, the true owner can effect entry into the asset, so to speak, but not on the terms of having any priority over the third party. If, on the other hand, it were to be predicated that the money received from the fiduciary agent was first mixed by the third party with his own before the investment was made, he not then knowing that it was held in a fiduciary capacity, it appears to me that the second illustration put forward by LORD PARKER should be regarded, not as a true illustration of the application of the rule in *Re Hallett's Estate* (24), but as being a statement of the law either in extension of or in addition to that rule. I am clear that in neither of the paragraphs which I have been considering, nor in any other part of his speech, did LORD PARKER intend to do anything except apply the existing rules of equity, and certainly did not intend by means of a hypothetical example to cast any doubt on the rule of equity that the identity of trust money paid by a recipient thereof into his banking account and there mixed with his own moneys can be preserved (and, as I think, can only be preserved), if it be shown that at the time of payment in that recipient was clothed with a fiduciary character. I think that the correctness of this conclusion is illustrated by reference to a subsequent passage in LORD PARKER's speech, namely, his statement ([1914] A.C. 444) of the equity involved in the *Crace-Calvert Case* (37).

I can find nothing in the speech of LORD SUMNER which would support the plaintiffs' contention. The effect of the last paragraph of his speech ([1914] A.C. 459, 460), as I understand it, is that on the facts of the case LORD SUMNER was of opinion that the first part of the rule in *Re Hallett's Estate* (24) applied so as to allow entry into the mass, namely, because of the existence of the fiduciary relationship in which the directors of the society stood, but that in the special circumstances of the case the second part of the rule did not apply. This is entirely consistent with his previous observation (*ibid.*, 458):

In my opinion, if precedent fails, the most just distribution of the whole must be directed, so only that no recognised rule of law or equity be disregarded.

LORD SUMNER was not concerned, and it is, I think, plain that he was not dealing with, the effect on the continued identity of trust moneys of an innocent recipient paying them into his banking account and there mixing them with his own. In my judgment, therefore, *Sinclair v. Brougham* (27) cannot be regarded as an authority which casts any doubt on the rule of equity that, where trust moneys are paid by a recipient thereof into his banking account

and there mixed with his own moneys (in which event the identity of the trust moneys is lost in fact), their identity will be preserved in the eye of equity, if, at the time of payment in, the recipient can be said to be a fiduciary agent. It was urged on me by counsel for the plaintiffs that, if I should come to the conclusion to which I have come, that the authorities do not support their claim to trace the trust moneys into the banking accounts of the defendant institutions in cases where the trust moneys have been mixed in such accounts

A with the moneys of the respective defendant institutions, yet on principle I should allow their claim to trace. I cannot see how I can accede to that submission. I regard the decision in *Re Hallett's Estate* (24) as extended and refined by the decided cases to which I have referred, as laying down the extent to which equity will allow the tracing of trust money into a banking account where it is mixed with other moneys, and as requiring, as an essential condition precedent to allowing entry into the banking account, that it be shown that the person into whose account the trust moneys have been paid was, at the date of payment in, a fiduciary agent. If that be correct, then it follows that to allow tracing into that account when it cannot be shown that at the date of payment in the payer was a fiduciary agent, would involve disregarding altogether an essential element on which the reasoning of the judgments in *Re Hallett's Estate* (24) proceeded. But the decision in that case is a decision of the Court of Appeal and is binding on me.

C I have not failed to have regard to the well known passage from the judgment of SIR GEORGE JESSEL, M.R., (13 Ch. D. 710), in *Re Hallett's Estate* (24), where he refers to the modern rules of equity. The authorities following on *Re Hallett's Estate* (24) were exhaustively canvassed before me, and I have referred to them, so far as I have considered necessary, earlier in this judgment. They appear to me to bear out this, that it is still as necessary to-day as it was in 1879 to establish the fiduciary relation before the modern rules of equity, as regards following trust money, apply. From this it appears to me to follow that if, before the time the fiduciary relation is established, the trust money has been mixed in a banking account with other moneys, it would be wholly at variance with the reasoning of the judgments in *Re Hallett's Estate* (24) to hold that anything remained which could be the subject of tracing.

D Taking that view of the matter, I cannot discover any principle helpful to the plaintiffs which I could apply which would represent a legitimate extension of, as opposed to a departure from, the basic principle on which the decision in *Re Hallett's Estate* (24) is founded. The principle for which the plaintiffs' counsel contend is a perfectly simple and intelligible one, but in the view which I take of the authorities it is one which, if it is to be established, must (if I may say so with respect) be established by a higher court. I, therefore, hold that the plaintiffs are not entitled to trace into any banking account of any of the defendant institutions into which the moneys paid to such defendant institution by the executors were paid and there mixed with moneys of that defendant institution. In coming to this conclusion, I am fortified by the observations of MAUGHAM, J. ([1932] 1 Ch. 63, 64), in his considered judgment in *Re Blake* (23).

E The question was canvassed before me how the banking accounts should be unravelled, and how the moneys paid by the executors should be traced through and out of the accounts. In view, however, of the conclusion to which I have arrived, that the plaintiffs are not entitled to enter the accounts, this further question does not arise. I would only observe that, even if the plaintiffs had succeeded in establishing a right to trace into the accounts, I cannot see on what principle they would have been entitled to invoke the second part of the rule in *Re Hallett's Estate* (24), which, equally with the first part of the rule, depends on the existence of a fiduciary relationship at the time of payment in of the moneys sought to be traced—for without the existence of that fiduciary relationship there would be no ground on which there could be imputed to the person effecting the payment in that intention at the time of payment in and thereafter on which the machinery of tracing established by the second part of the rule essentially depends. Further, it appears to me, as at present advised, that to apply the second part of the rule in *Re Hallett's Estate* (24) against a person, who, when he received the money sought to be traced, was not a fiduciary agent, would be to go against

the whole weight of the reasoning in the speeches in *Sinclair v. Brougham* (27), and to give the tracer that priority which, as I understand his language ([1914] A.C. 442, 443), LORD PARKER would have denied him. How far the view expressed by BAGGALLAY, L.J. (13 Ch. D. 743) in *Re Hallett's Estate* (24) can be reconciled with the reasoning of the House of Lords in *Sinclair v. Brougham* (27), is a question which may one day have to be decided. It may be that the answer is that, in a case involving a banking account in which more than one trust fund has been mixed, and where the facts make it practicable to do so, the rule in *Clayton's Case* (30) would be applied, while, on the other hand, in a case of which *Sinclair v. Brougham* (27) is an example, where it is not on the facts practicable to apply the rule in *Clayton's Case* (30), the principle of division on which the House of Lords proceeded in *Sinclair v. Brougham* (27) would be applied instead. On this aspect of the matter, however, I do not desire to express any concluded view.

There are two further points advanced on behalf of the plaintiffs to which I should refer. It was contended on their behalf that, wherever it could be shown that the money paid by the executors to the respective defendant institutions had been applied in the discharge of a just debt then owing by such institution, the plaintiffs were entitled to be recouped the amount so applied. This proposition was sought to be rested on the authority of *Trevillian v. Exeter Corp.* (38), the headnote of which is as follows :

A corporation raised money under an Act of Parliament on mortgages of the tolls and additional works of a canal, and, acting on what the Court of Appeal (differing from the court below) decided to be an erroneous construction of the Act, applied part of the money so raised in paying off old mortgages affecting other property of the corporation. On the tolls and additional works proving an insufficient security : *Held*, that the new mortgagees were entitled to follow their money so far as it had been erroneously applied, and to stand in the place of the old paid-off mortgagees as against the other property of the corporation.

His Lordship referred to the judgment of TURNER, L.J. (5 De G.M. & G. 834). This case appears to me to be no more than a simple instance of the application of the equitable doctrine of tracing and to establish that, where a trustee in breach of trust applies trust moneys in paying off a mortgage on his own property, equity will not allow him to assert any interest in the property so freed from the mortgage until the trust moneys have been recouped, and for that purpose will regard the property as charged in favour of the person entitled to the trust moneys to the extent thereof in place of the mortgagee. It does not appear to me to be an authority for the proposition that where an unsecured debt is discharged out of trust moneys, equity, as part of the doctrine of tracing, will order recoupment. The fact is that the debt is extinguished and the trust fund to that extent dissipated, and to order recoupment by the trustee would involve the imposition of a personal liability, and not the enforcement of a right *in rem*. The right *in rem* can only exist where property continues to exist into which the trust moneys can be shown to have gone, as in *Trevillian v. Exeter Corp.* (38). Again, the decision was one involving an express trustee, and is no authority against a person who is in no sense a fiduciary agent at the time of expenditure of the trust moneys. His liability must be confined to what can be followed into and shown to remain in his hands at the time he first becomes clothed with a fiduciary character. But apart from the above objections there is a fatal difficulty which prevents the plaintiffs from relying on *Trevillian v. Exeter Corp.* (38), if the conclusions to which I have arrived on the question of tracing are correct. *Trevillian v. Exeter Corp.* (38), is, as I have pointed out, a case of tracing. Even if the view of the case put forward by the plaintiffs were right, they could only pray it in aid if they first established not only the right to trace into, but through and out of, the various banking accounts. This right they have not, in my judgment, succeeded in establishing, and, therefore, *Trevillian v. Exeter Corp.* (38) can have no application.

In their argument on this part of the case counsel for the plaintiffs sought to rely on three passages in *Sinclair v. Brougham* (27). The first passage is from the speech of LORD DUNEDIN ([1914] A.C. 435) :

... but if the thing has so disappeared that a *ius in re* is no longer to be found (and this must practically always be so in the case of money) then your remedy is gone.

The sole relief which equity can give is that if you can show that your money has paid a just debt, in that case you shall have action.

The second passage is from the same speech (*ibid.*, 436) :

Equity—I am now speaking of technical equity—has already found itself able, in the exercise of its auxiliary jurisdiction, as the respondents admit, to deal with the situation when the money has gone to pay a just debt. Is its action limited to that situation ? I think not. I think it can always, in the exercise of the same jurisdiction, help the common law by tracing . . .

The third passage is from the speech of LORD PARKER (*ibid.*, 440, 441) :

Accepting the principle that no action or suit lies at law or in equity to recover money lent to a company or association which has no power to borrow, the question remains whether the lender has any other remedies. On this point the result of the authorities may be stated as follows : First, it appears to be well settled that if the borrowed money be applied in paying off legitimate indebtedness of the company or association (whether the indebtedness be incurred before or after the money was borrowed), the lenders are entitled to rank as creditors of the company or association to the extent to which the money has been so applied. There appears to be some doubt as to whether this result is arrived at by treating the contract of loan as validated to the extent to which the borrowed money is so applied, on the ground that to this extent there is no increase in the indebtedness of the company or association, in which case, if the contract of loan involves a security for the money borrowed, the security would be validated to a like extent ; or whether the better view is that the lenders are subrogated to the rights of the legitimate creditors who have been paid off. See the case of *Blackburn and District Benefit Building Society v. Cunliffe Brooks & Co.* (39), the case of *Wenlock v. River Dee Co.* (40), and the case of *Re Wrexham, Mold and Connah's Quay Ry. Co.* (41). It is still open to your Lordship's House to adopt either view, should the question actually come up for determination. Secondly, it appears to be also well settled that the lender in an *ultra vires* loan transaction has a right to what is known as a tracing order.

In my view, these passages make it clear, first, that LORD DUNEDIN and LORD PARKER were treating the right which they were discussing as something, which was alternative to and not part of the remedy of a tracing order, and, secondly, that they were considering this right solely in relation to a transaction of *ultra vires* borrowing. These passages, therefore, do not appear to me to assist the plaintiff's case. Further it is to be observed that although, as LORD PARKER points out, it is still open to the House of Lords to adopt the view that the right is based on subrogation, the weight of present authority is the other way and binds me. In addition to the cases cited by LORD PARKER reference may be made to WHITE & TUDOR'S LEADING CASES IN EQUITY, 9th ed., vol. 1, pp. 148, 149.

The second matter to which I must refer is the argument advanced by the plaintiffs that where, as happened in more than one of the cases before me, the recipient defendant institution treated in its accounts money or securities as representing the moneys received by it from the executors, that circumstance amounted to an earmarking of such moneys so as to preserve their identity and thus to allow the plaintiffs to claim the money or assets so said to be earmarked. The alleged right was and must be rested on the common law right of following assets and not on the equitable doctrine of tracing, for the alleged earmarking took place at a time when the defendant institutions concerned were not fiduciary agents. In each of the cases involved, however, the money received from the executors was first mixed in the banking account of the defendant institution before the alleged earmarking took place, and this circumstance appears to me to preclude the plaintiffs from asserting that what the defendant institution treated in its books as representing the money received from the executors was, in fact, such money or was, in fact, an asset into which that money had been converted. In fact, the money received from the executors lost its identity for ever on being mixed in the banking account with other moneys of the defendant institution. There was no duty on the defendant institution to preserve the identity ; there could be no obligation on it to revive the identity, because that would be impossible ; and, finally, no question of estoppel is involved. All that happened was that for its own internal purposes the defendant institution treated as representing the moneys received from the executors an *aliquot* part of its financial resources with which those moneys had already been mixed.

It may be convenient if at this point I pause to sum up the position in law as regards the claims to follow and to trace. (i) In every case where a defendant institution paid the money received by it from the executors into an account at its bankers where it was mixed with other moneys of that defendant institution, the right to follow the money at law ceased, because the means of identification failed. (ii) In no such case can the plaintiffs invoke the equitable doctrine of tracing and enter the account, because at the time of payment in there was not that fiduciary relationship in existence which would otherwise have given the plaintiffs the right, first, to maintain that the defendant institution could not claim any interest in the mixed moneys standing to the account after payment in of the moneys received from the executors until those latter moneys had been recouped to the estate of the testator, and, therefore, secondly, to claim a charge on the whole of the mixed moneys to secure such recoupment. (iii) For the same reason, namely, the absence of any fiduciary relationship prior to the receipt of the warning letters, the plaintiffs are not entitled to trace through the account, because there cannot be imputed to the defendant institution that intent by means only of which the identification of the moneys received from the executors could be artificially preserved in equity. (iv) For the same reason the plaintiffs cannot trace the moneys received from the executors out of the account with a view to showing that an asset still held by the defendant institution was acquired in whole or in part out of the moneys received from the executors. (v) Where a defendant institution paid the money into a separate account and that money was never mixed with any moneys of the defendant institution, the plaintiffs can follow into that account. Where there are still moneys standing to the credit of the account, they can claim to have such moneys paid over to them, and where assets can be shown to have been purchased wholly with moneys from that account, they can claim the transfer to them of those assets. But where identification in fact is impossible, as where, for example, the asset into which the money sought to be followed was purchased partly with the moneys in the separate account and partly with other moneys of the defendant institution, or as where, for example, the money has been expended in erecting buildings on land owned by the defendant institution or altering an existing building, the right to follow is lost. (vi) Where a defendant institution paid money into a separate account and that money was never mixed with any money of the defendant institution, then, as from the date of the warning letter in question, the defendant institution became a trustee of any money then standing to the credit of that special account, and as an alternative to the common law right of following into the account, the plaintiffs, as from the date of the warning letter, can claim to trace into and through and out of the account in accordance with the principles to which I have already referred. In such a case, therefore, they can claim a charge on any moneys still standing to the credit of the separate account and on any assets still held by the defendant institution into which moneys paid out of the separate account since the date of the warning letter can be shown to have gone in accordance with the principles to which I have already referred. On the other hand, however, where, after the date of the warning letter, moneys have been paid out of the separate account in discharging unsecured debts of the defendant institution, the trust moneys must be considered to that extent to have been dissipated, except that where a defendant institution agreed with the executors to expend money for a particular purpose—for example, for altering an existing building or erecting a new one—all moneys expended after the date of the warning letter in discharging liabilities incurred in connection with such alteration or erection, whether such liabilities were incurred before or after that date, must be considered as represented in and traceable into the building, and the plaintiffs are entitled to a charge thereon to the amount of such moneys.

A special defence to which I must refer is that which is put forward on behalf of a number of the defendant institutions, who claim that, on the particular facts of their respective cases, they are entitled to be regarded not as volunteers, but as being in the position of purchasers for value without notice. The cases concerned are those in which Leaf Homoeopathic Hospital, Queen Alexandra's Cottage Homes and Guys Hospital are involved. The defendants relied on a number of authorities to two of which I propose to refer. In *Dilwyn v.*

Llewelyn (42) the facts were that a father placed one of his sons in possession of land belonging to the father, and at the same time signed a memorandum that he had presented the land to the son for the purpose of furnishing him with a dwelling-house. The son, with the assent and approbation of the father, built at his own expense a house on the land and resided there. It was held that this was not a mere incomplete gift, but that the son was entitled to call for a legal conveyance, and not merely of a life-estate, but of the whole fee-

A simple. In *Taylor v. Blakelock* (43) the facts were that C., the trustee with the plaintiff of a will and also trustee with the defendant of a settlement, having misappropriated a portion of the settlement fund, applied an equal portion of the will fund in the purchase of stock which he transferred into the names of himself and the defendant. The plaintiff and the defendant were both innocent of C.'s fraud, and the defendant and the *cestuis que trust* under the settlement had no notice that the stock was purchased with part of the will fund. C. died insolvent. In an action by the plaintiff to compel the defendant to transfer the stock to him, it was held by the Court of Appeal (affirming the judgment of BACON, V.-C.) that the defendant, having, by accepting the transfer of the stock, given up his right to sue C. for his debt to the trust, was entitled to be treated as a purchaser for value without notice, and consequently to retain the stock as part of the settlement fund.

C [His Lordship referred to the judgments of COTTON, L.J. (32 Ch. D. 568) and BOWEN, L.J. (*ibid.*, 569), in which FRY, L.J., concurred.] Those two authorities appear to me to establish that to enable a defendant to set up the plea of purchaser for value, it is unnecessary for him to assert and prove that the transaction in regard to which he desires to set up the plea was a contract of sale and purchase in the strict sense. It is, in my judgment, sufficient if he can show that the transaction consisted in the transfer or handing over to him of property by the plaintiff or some person through whom the plaintiff claims, and that there should move from the defendant (not necessarily to the plaintiff) some consideration valuable in the eye of the law, for example, the suffering by the defendant of some detriment. In neither of the cases referred to was there involved a sale and purchase within the strict meaning of the term. Further, it does not appear to me to matter, for the purposes of the plea, what is the nature of that which is transferred to the defendant.

D In *Dillwyn v. Llewelyn* (42) that which was transferred was land; in *Taylor v. Blakelock* (43), it was debenture stock. I can see no reason in principle, however, why that which is transferred to the person seeking to set up the plea should not be money, as in the present case.

The crux of the matter in each case is the question: Did valuable consideration move from the defendant institution concerned? In each of the cases with which I am concerned the executors imposed a condition as to how the money was to be applied by the defendant institution. The acceptance of this condition and the act of the defendant institution in applying the money in accordance with the condition does not of itself appear to me to result in the giving of consideration by the defendant institution. In the case of Leaf Homoeopathic Hospital, the condition was that the money should be applied in paying off a building debt and for general purposes. The money was received and applied for these two purposes. This involved no dealing by Leaf Homoeopathic Hospital with its own moneys or other property and the suffering of no detriment. The transaction appears to me to have amounted to no more than a gift of money subject to a condition as to the disposal of the money, and in that case I am of opinion that the plea of purchaser for value is not established. The other two cases stand on a different footing in one respect. In the case of Queen Alexandra Cottage Homes, it was the intention of all parties that the new homes should be erected on land already belonging to the charity and this was done. Thus, as was urged on behalf of this defendant, it was an essential part of the transaction that the defendant institution in question should use in a particular way not only the money to be received from the executors but its own property. Again, in the case of Guys Hospital, it was urged that it was an essential part of the transaction under which the money was received from the executors that Guys Hospital should devote part of its property to the accomplishment of the object, the attainment of which was made by the executors a condition of the payment

of the money in question. That is true, but in each case that which was to be done to or in regard to the property of those respective defendants was to be done wholly with the money to be paid by the executors, and must result wholly to the advantage of those respective defendants. In those circumstances the acts of those defendants, in subjecting their properties, in the one case, to the erection of a building and, in the other case, to the alteration of a building, do not appear to me to involve in either case the suffering of a detriment. In my judgment, therefore, neither of those defendants is in the position of a purchaser for value. A

On this view it becomes unnecessary for me to consider the question of notice. Nevertheless, I think that I ought shortly to advert to the argument put forward on behalf of the plaintiffs on this point. It was submitted by the plaintiffs that, notwithstanding their admission that for the purposes of the application of the doctrine of tracing they could not assert that the defendant institutions became trustees or in any degree fiduciary agents prior to the receipt of the warning letters, nevertheless they were sufficiently fixed with notice to prevent them from relying on the plea of purchase for value without notice. This was said to be the case because the defendant institutions, knowing that they were dealing with executors who were proposing to make payments under a discretionary power in their testator's will, the substance and effect of which was communicated to them, were put on inquiry as to the validity of the power given to the executors by the will. I am unable to follow this reasoning. In the first place, it is necessary to remember that that which the executors handed over was money, and, as LORD HALDANE ([1914] A.C. 418) said in *Sinclair v. Brougham* (27): B

When sovereigns or bank notes are paid over as currency, so far as the payer is concerned, they cease *ipso facto* to be the subjects of specific title as chattels. If a sovereign or bank note be offered in payment it is, under ordinary circumstances, no part of the duty of the person receiving it to inquire into title. The reason of this is that chattels of such a kind form part of what the law recognizes as currency, and treats as passing from hand to hand in point, not merely of possession, but of property. D

In the second place, it must be remembered that the plea of purchase for value without notice is one which, if established, is effective to halt the operation of the equitable doctrine of tracing: see *Collins v. Stimson* (44). It follows that if, at the time of the transaction in regard to which the plea is raised, the defendant can show that he had not such notice as would make him a trustee or a fiduciary agent for the purpose of the doctrine of tracing in equity, it necessarily follows that he was also sufficiently without notice to allow him to rely on the plea of purchase for value without notice. Apart from this consideration, which appears to me to conclude the matter, I cannot see that anything other than confusion would result, if there were as regards notice two different tests, one which would decide whether a man was a trustee or fiduciary agent for the purposes of the equitable doctrine of tracing, and another for the purposes of the plea of purchase for value without notice. E

A further defence raised by certain of the defendant institutions, of which the case of *Guys Hospital* forms an example, was that where a defendant institution held the property into which it was sought to trace and on which an equitable charge was claimed on charitable trusts, there was nothing held by such defendant institution which could be the subject of such a charge. I do not accept the proposition. In so far as under this judgment the plaintiffs have a right of tracing, that right exists because the body in which the property is vested, or by whom the property is held into which it is sought to trace, is to be treated as standing in a fiduciary relationship to the plaintiffs and cannot assert any interest in the property until the burden cast on it by reason of such fiduciary relationship has been discharged. No one claiming through the body in question can be in a better position in this regard than the body itself, and, therefore, no one can assert an equity competing with the plaintiffs' equity. F

The last matter to which I must refer is the plea raised by a number of the defendants of the statutes of limitation. When this question came to be argued, it was made plain on behalf of all the defendants concerned that they only desired to rely on this plea so far as concerned the plaintiffs' claims *in personam*, and that, in so far as it should be held that any claim against them *in rem*—that is, to follow at common law or to trace in equity—succeeded, G H

they did not desire to rely on any statute of limitation. I have already earlier in this judgment expressed the conclusion that the plaintiffs are not entitled to succeed on either of their claims *in personam*. In these circumstances it becomes unnecessary for me to express any view on the applicability of the statutes of limitation in the present proceedings, and I refrain from doing so.

Adjourned to agree orders.

Solicitors : *White and Leonard* (for next of kin and judicial trustee) ; *Treasury Solicitor* (for the Attorney-General) ; *Thomas Eggar & Son, Trollope & Winkworth, Freshfields, Eland, Nettleship & Butt, and Peake & Co.* (for charitable institutions).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

B *Reversed. H.L. [1948] 2 All E.R. 252.*

WILDS v. AMALGAMATED ANTHRACITE COLLIERIES, LTD. SAME v. SAME.

[COURT OF APPEAL (Scott, Morton and Somervell, L.JJ.), February 3, 4, 27, 1947.]

C *Workmen's Compensation—Industrial disease—"Notional accident"—Total incapacity—Further "notional accident" during incapacity caused by first "accident"—Partial capacity recovered—Right to compensation in respect of second "notional accident"—Workmen's Compensation Act, 1925 (c. 84), ss. 1, 9, 43, 47—Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, (S.R. & O. 885 of 1943), para. 9 (3).*

D On June 14, 1944, a workman, who had been working underground for the employers as a miner, was certified as suffering from miners' nystagmus, in respect of which the employers paid compensation on the basis of total incapacity at the rate of £1 10s. 0d. per week until Nov. 11, 1945, when they reduced the payment to £1 5s. 6d. per week. On Dec. 18, 1944, the workman was certified as suffering from pneumoconiosis, and in respect of this disease the employers paid no compensation. On Jan. 10, 1945, the workman was examined and it was found that he had sufficiently recovered from the nystagmus to undertake light work. The workman's average weekly earnings before the first accident were £7 10s. 0d. per week, and from Jan. 11, 1945, he was able to earn £4 3s. 0d. per week notwithstanding his partial incapacity from nystagmus and his partial incapacity from pneumoconiosis. On Apr. 30, 1946, the workman lodged two requests for arbitration, claiming in respect of the nystagmus £1 10s. 0d. per week beginning on Nov. 11, 1945, and to continue, and in respect of the pneumoconiosis £1 10s. 0d. per week from Jan. 11, 1945.

E HELD : (i) from Jan. 11, 1945, the workman was partially incapacitated by both diseases, and compensation must be calculated according to the Workmen's Compensation Act, 1925, s. 43 (1) (d), in respect of the nystagmus, and according to s. 47 of that Act and the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, para. 9 (3), in respect of the pneumoconiosis.

F (ii) "the earnings of the workman under the employers from whom the compensation [was] recoverable" were in each case those immediately preceding the first notional accident, and the court had no alternative but to adopt that criterion for the purpose of assessing the compensation in respect of the second notional accident as well as the first, and, accordingly, both claims should be allowed.

H *Evans v. Oakdale Navigation Collieries, Ltd. (No. 2), ([1940] 1 K.B. 702), discussed and followed.*

[AS TO COMPENSATION IN CASES OF MORE THAN ONE ACCIDENT, see HALSBURY, *Hailsham Edn.*, Vol. 34, p. 912, para. 1255, note (e) ; and FOR CASES, see DIGEST, *Supp.*, Master and Servant, Nos. 3362 a, b. See also WILLIS'S WORKMEN'S COMPENSATION, 37th Edn., pp. 288-290.]

Cases referred to :

- (1) *Lysons v. Knowles (Andrew) & Sons, Ltd., Stuart v. Nixon & Bruce*, [1901] A.C. 79; 70 L.J.K.B. 170; 84 L.T. 65; 65 J.P. 388; 34 Digest 423, 3433.
- (2) *McCann v. Scottish Co-operative Laundry Assn., Ltd.*, [1936] 1 All E.R. 475; 105 L.J.P.C. 58; 154 L.T. 503; Digest Supp.
- (3) *Ball v. Hunt (William) & Sons, Ltd.*, [1912] A.C. 496; 81 L.J.K.B. 782; 106 L.T. 911; 34 Digest 395, 3228.
- (4) *Allen v. Tinsley Park Collieries, Ltd.* (1944) 37 B.W.C.C. 28; Digest Supp.
- (5) *Doudie v. Kinneil Cannell & Coking Coal Co., Ltd.*, [1947] 1 All E.R. 6; 176 L.T. 125. A
- (6) *Bacon v. Wills (A. W.) & Sons, Ltd.*, [1933] 2 K.B. 493; 26 B.W.C.C. 374; 102 L.J.K.B. 611; 149 L.T. 385; Digest Supp.
- (7) *Cole v. Amalgamated Anthracite Collieries, Ltd.* (1933), 26 B.W.C.C. 560; Digest Supp.
- (8) *Thompson v. London and North Eastern Ry. Co., Ltd.*, [1935] 2 K.B. 90; 104 L.J.K.B. 515; 152 L.T. 571; 28 B.W.C.C. 95, C.A.; Digest Supp. B
- (9) *Evans v. Oakdale Navigation Collieries, Ltd. (No. 1)*, [1939] 2 All E.R. 358; 32 B.W.C.C. 51.
- (10) *Evans v. Oakdale Navigation Collieries, Ltd. (No. 2)*, [1940] 2 All E.R. 201; [1940] 1 K.B. 702; 109 L.J.K.B. 493; 164 L.T. 17; 33 B.W.C.C. 122, C.A.; Digest Supp.
- (11) *Wheatley v. Lambton, Hetton and Joicey Collieries, Ltd.*, [1937] 2 All E.R. 756; [1937] 2 K.B. 426; 106 L.J.K.B. 667; 156 L.T. 490; 30 B.W.C.C. 171, C.A.; Digest Supp. C
- (12) *Jones v. Amalgamated Anthracite Collieries, Ltd.*, [1944] 1 All E.R. 1; [1944] A.C. 14; 113 L.J.K.B. 49; 170 L.T. 78; 36 B.W.C.C. 195, H.L.; Digest Supp.
- (13) *Harwood v. Wyken Colliery Co.*, [1913] 2 K.B. 158; 82 L.J.K.B. 414; 108 L.T. 283; 6 B.W.C.C. 225, C.A.; 34 Digest 348, 2803.

APPEAL by the employers from an award of His Honour Judge MORRIS, K.C., Llanelly County Court, dated Sept. 4, 1946. The county court judge held that the workman was entitled to £1 10s. 0d. a week compensation from the dates named, both in respect of the miner's nystagmus and also in respect of the pneumoconiosis. The facts appear in the judgment of SCOTT, L.J. and are summarised in the headnote. D

H. Edmund Davies, K.C., and *G. Owen George* for the employers.
Paull, K.C., and *T. Jenkin Jones* for the workman. E

Feb. 27. The following judgments were read.

Cur. adv. vult.

SCOTT, L.J.: Each of these appeals raises the same type of problem depending for its elucidation on the right interpretation of the statutory provisions about industrial diseases contained in the Workmen's Compensation Act, 1925, s. 43, or the schemes made under s. 47 by the Secretary of State. The workman suffered from and claimed in respect of two such diseases. He suffered from no injury by physical accident. In the first arbitration the workman, a coal miner, claims from Nov. 11, 1945, 30s. a week compensation plus supplementary allowances, which I shall for brevity call "30s. plus," in respect of partial incapacity resulting from miners' nystagmus. In his other arbitration, the same workman claims from Jan. 11, 1945, the same amount but in respect of partial incapacity by pneumoconiosis. Both claims were made on Apr. 30, 1946, on the usual form of request for arbitration. In neither request does the applicant make any reference to his other request or to the other disease. F

The relevant facts can be stated shortly. On June 14, 1944, the workman was duly certified as suffering from miners' nystagmus and disabled thereby from earning full wages at his old work as from the previous day. He was paid compensation up to the maximum limit of 30s. plus on the basis of total incapacity till Nov. 10, 1945. In the meantime, on Jan. 10, 1945, he had been examined by his own doctor and found partially recovered and fit for light work on the surface as from Jan. 11, 1945. On Nov. 11, 1945, his compensation was reduced from 30s. plus to 25s. 6d. plus, presumably because of increased earning power. It may have been by agreement. The gaps in this rather incomplete story are to some extent filled by the events relating to his other disease, pneumoconiosis. On Dec. 18, 1944, the Pneumoconiosis Medical Board, acting pursuant to the provisions of the Pneumoconiosis Scheme, made by the Secretary of State under s. 47 of the Act (see WILLIS, 37th edn., pp. 1064, G

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et. seq.) had suspended him from his work as a miner as from Dec. 8, while certifying him as fit for light work, but he made no claim for payment of compensation in respect of pneumoconiosis until Apr. 30, 1946, when he launched both his claims for arbitration. His average weekly earnings in the "process" of employment, in which he had contracted both diseases, namely, mining underground, were agreed at £7 10s. 0d. At the time of the arbitrations he was earning nothing, but it was argued that his miners'

A nystagmus left him capable by light work on the surface of earning £4 3s. 0d. and (whether agreed or not) the judge held that, taking into account the disablement due to both diseases, he was still capable of earning £4 3s. 0d. by such work. If the measure of s. 9 (3) of the Act is applicable to those figures, half of the difference—£3 7s. 0d.—would exceed the 30s. limit imposed by the section, so that that figure would correctly represent the workman's claim for partial incapacity in either arbitration.

B The judge held that the workman was entitled to 30s. plus in each arbitration from the dates claimed, namely, from Nov. 11, 1945, for miners' nystagmus, but from Jan. 11 of that year for pneumoconiosis. The possible questions for us would seem to be :—(1) Whether the workman is entitled to an award for each disease ? (2) If for only one, for which ? (3) Whether in one award or both should there be any and what alteration in respect of

C (a) the starting date, (b) the money figure of 30s. plus ? (4) Can this court dispose of question 3 or must we (in default of agreement between counsel) send those issues back for re-hearing ? It was suggested in argument that there is or may be a fundamental difference in the rights conferred on the workman by the legislation between the case of injury by accident resulting in disablement and incapacity and similar disablement and incapacity resulting from disease, or, shortly, "between physical and notional accidents." The

D answer to that enquiry depends on a close consideration of the language of the Act, but the shorter form of the question diverts attention from the true character of the problem which is solely one of interpretation.

Before considering the numerous decisions cited to us in argument I think it will be useful to make some preliminary analysis of the legislative structure. If we can see clearly what its fundamental basis was for accidents in 1897 and for industrial diseases in 1906, a basis which thereafter remained until

E the legislation was replaced for the future by the new Act of 1946, the problems of these appeals will, I believe, almost solve themselves. At any rate, we shall see more clearly to what extent they are governed by authority, When Parliament passed the Act of 1897, the scope of the new system of compensation for the loss by a workman of his earning power was limited to incapacity resulting from injury by accident. By s. 8 of the Act of 1906 that

F scope was extended to include the results of certain industrial diseases, and that extension necessarily involved the creation of a second new "right of action." But, although it was a new right, Parliament was moved by the same economic motive as for the 1897 right of action, namely, loss of earning power, now resulting from disease as previously from accident, and, in order the more conveniently to assimilate the administration of the new right to that of the old, and to graft it on to the existing system of procedure,

G Parliament treated the event of disablement by or suspension because of the disease notionally as the happening of an "accident in the course and out of the employment." It being impossible also to predicate in the case of disease the particular moment of time when the loss of earning-power happens, that difficulty also had to be dealt with. Parliament did so by instituting two practical tests for the new cause of action : (1) prior medical certification as conclusive proof of the disease and its effect on earning power ; and (2) the

H date of the disablement or suspension, so certified, as the happening of the incapacity resulting from the disease. Broadly speaking, subject to the above differences, the fundamental nature of the cause of action for disease—*i.e.*, of the legal right of the workman to recover compensation from the employer—was the same for disease as for accident.

The very kernel of the legislation is that the evil for the suffering of which the workman was given his "compensation" (whether it resulted from accident or from disease) was loss of earning power caused by disablement or incapacity for work. It is in that kernel that we shall find the key to these

appeals. It is not without interest to note that those terms "disablement" and "incapacity" were used—it would seem unconsciously—by Parliament as interchangeable synonyms. "Disability" appears (in the form of the verb "disable") in proviso (a) to s. 1 (2) of the Act of 1897, from which, in an identical sentence, it was repeated by Parliament in 1906 and 1925; and in sched. I to the Act of 1897, dealing with the "amount and conditions of compensation," para. 1 (b) begins: "Where total or partial incapacity for work results from the injury" as if that very phraseology had already appeared in s. 1 of the Act. In 1906 the allocation to s. 1 and schedule of their subject-matters was identical with 1897. In 1925 there was a distinction without a difference. The "amount of compensation for total or partial incapacity" was promoted from the schedule into s. 9 of the Act itself, but the relevant point of the present appeals is that loss of earning power through disability or incapacity, whichever one calls it, is the basis on which, and on which alone, rests the right to compensation, and, as the presence of that factor gives rise to the right, so also its cessation brings the right to an end. The incapacity is necessarily a condition of its continuance. *Cessante ratione cessat et ipsa lex*. The inescapable corollary is that without incapacity the right to compensation is non-existent, and it is worth noting that that fundamental condition of the right found in the Act of 1897 its natural recognition in the schedule which was appropriately entitled "Scale and conditions of compensation." "A weekly payment during the incapacity" is the language used in 1906.

From the start of the legislation, provisions for the measurement and conditions of compensation were, and still are, kept separate from those which create the right. In the 1897 and 1906 Acts the former were relegated to a schedule. In *Lysons v. Knowles* (1), the House of Lords drew attention to the contrast. As LORD HALSBURY said in effect, ([1901] A.C. 85) and LORD DAVEY (at pp. 94-96), you must not resort to the schedule that is the measurement of the compensation for the purpose of cutting down the right to compensation. The Act of 1925 put the measurement and conditions of compensation into the body of the Act (s. 9), but that change did not alter the character of the contents. *McCann v. Scottish Co-operative Laundry Association, Ltd.* (2) in the House of Lords, was a case in which a workman had suffered injury to a hand, and received compensation for total incapacity for a time. Then she recovered sufficiently to do light work and did it for her old employers who paid her for it at her full pre-accident rate of earning. Then she again became incapacitated, but by illness which had nothing to do with her injury. The light work at the same pay remained open to her throughout her illness, but the employers paid her no compensation. The arbitrator awarded it. The Court of Session set the award aside and gave her nothing. The House of Lords restored the award. The essence of that case was that the right of compensation had already vested in the workman, and, as nothing had happened to divest it, the award was right. LORD THANKERTON said ([1936] 1 All E.R. 478):

My Lords, it seems to me that the learned judges who formed the majority in the Court of Session have fallen into an error similar to that of the Court of Appeal in the well-known case of *Ball v. William Hunt & Sons* (3), and I may be pardoned in recalling the observations of LORD MACNAGHTEN in that case (p. 500) where he said: "Now 'incapacity for work' as the phrase is used in the schedule seems to me to be a compendious expression meaning inability to earn wages or full wages as the case may be at the work in which the injured workman was employed at the time of the accident. But whether that be so or not, it is laid down most distinctly in this House (*Lysons v. Andrew Knowles & Sons, Ltd.* (1)), that you must not resort to the schedule for the purpose of cutting down the right to compensation. The right to compensation is given by the Act. The Act is the workman's charter. The schedule prescribes the scale of compensation and the mode and conditions of its enjoyment. That is the office of the schedule. The key to the meaning of the legislature is not to be looked for there." The transference of the provisions of the first schedule of the Act of 1906, to which LORD MACNAGHTEN referred, into the body of the Act of 1923, and of the Act of 1925, where they are found in ss. 8 and 9, does not alter the validity of these observations.

But, just as s. 9 of the Act of 1925, cannot, any more than the schedule to the Acts of 1897 and 1906, be construed as cutting down the right conferred by s. 1, so also it must not be construed as enlarging that right or creating

- a new right outside the limits of s. 1. If, for instance, s. 1 imposes a limit on the right or a condition of its exercise, s. 9 should not be construed as intended to remove that limit or modify that condition, unless the language is unequivocally clear to that effect, which no one can contend. I concede that the general words of s. 1 (1) "subject as hereinafter mentioned" potentially extend to all and any of the provisions which follow, including both the group of sections entitled "Amount of Compensation," and that entitled
- A "Conditions of Compensation," as well as the remaining groups—"Procedure for determining Compensation and settling Questions," "Alternative Remedies," and so on. If the wording of s. 1 (1) were ambiguous, reference to the other groups would be theoretically legitimate for the purpose of resolving the ambiguity, but not either to cut down or to extend the basic right already created by s. 1. Anyhow, that reflection is, in my view, academic as I see nothing in the other groups germane to the question of fundamental right.
- B My interpretation of the Act, so far as relevant to these appeals may be put into nine propositions. (1) It creates a right of action for compensation at the instance and for the benefit of the workman. That right vests in him automatically on the happening of the events which give rise to it. (2) The Act contemplates agreement between workman and employer as the primary method for compliance with the law imposed by the Act (s. 31 (1), and
- C cf. s. 12). (3) The procedural rights conferred on both parties are (a) to register in the county court a memorandum of their agreement with a view to its judicial enforcement, if necessary, and (b) in default of agreement, arbitration and award, which in practice has always meant decision by the county court. (4) That the right of action for compensation, once vested in the workman, cannot, without his consent, be divested, follows by necessary implication from s. 1, but that inherent right of property is also expressly recognised by
- D the Act itself: see s. 40 (veto on alienation), s. 11 (review of weekly payments when pursuant to an award or a registered recorded agreement), s. 12 (weekly payments unprotected by an award or registered agreement), and ss. 13, 24 and 25 which require the approval of the court to validate lump sum settlements and protect the workman's vested right to a weekly payment. (5) The nature of the right vested in the workman is by legal process to compel weekly payments by the employer of money to the statutory amount
- E in order to that extent to compensate the workman for the loss of earning power during his incapacity, but only in proportion to the continuing degree of that incapacity and no longer and no further. (6) The Act keeps in existence the vested right for the protection of the workman, unless and until the workman agrees to reduce or end it, or the employer takes procedural action in the county court under ss. 11, 12, or 13 to obtain legal sanction, which to the extent granted will divest the right of compensation. By the
- F words "during the incapacity" in sched. I to the Acts of 1897 and 1906 and s. 9 of the 1925 Act, the continuance of the vested right is recognised, and all questions of "duration" were expressly left to the arbitrator: s. 1 (3) of 1897 and 1906 and s. 21 of 1925. (7) As loss by the workman of his earning power is both the cause of his right to compensation and the condition of its "continuance," so if at any time the workman has no earning power, that is,
- G is in a state of total incapacity, no new accident or disease then affecting him physically can give rise to any right of compensation, for neither accident nor disease occurring to him can take away an earning capacity which is not there. (8) On the other hand, if the workman at that moment still possesses partial capacity for work, whatever be the cause which reduced him from full to partial capacity, and whether it be a cause within the Act or wholly independent of it, it follows inevitably that (to use a phrase of LORD GREENE's)
- H "there is some capacity upon which the Act can 'operate'": *Allen v. Tinsley Park Collieries Ltd.* (4). (9) It is at this point in the analysis of the legislative system, (including the delegated legislation made pursuant to powers conferred on the Secretary of State by the Act of 1925), that there may be a material difference between its operation on "partial incapacity" in a case of accident under s. 9 (3) of the Act, on the one hand, and its operation on "partial disability" in a case of disease, whether under s. 43 "modification" (d), or under s. 47 (2) ("any other case" than death or total disablement) and the Coal Mining Industry (Pneumoconiosis) Compensation

Scheme, 1943, para. 9 (3). My proposition (9), in effect, poses the only question of law which, I think, we have to determine in these appeals, although in regard to the problems of interpretation thus raised there are some decisions which we must consider, and, so far as these judgments are based on particular solutions of those problems, they may be binding on us.

The Act and its predecessors have not in express terms dealt with the problem of partial disability or incapacity from any other angle than the quantitative assessment of the weekly compensation, although the main purpose of the legislation has always been to make the right to compensation roughly equivalent to half the loss of normal earning power whether the incapacity results from accident or disease. The difference in result between the method of measuring that power for accidents and for disease is obviously caused by the contrast between the suddenness of the former and the gradualness of the latter in its effect on the workman. I can see no provision in the legislation to make this difference in measuring the *quantum* of compensation affect the workman's right to receive compensation when a disease supervenes and destroys or reduces such capacity as he still has, any more than, in the case of his having no earning capacity, the court can create it in order to give him compensation.

For disability by accident the starting point for ascertaining the pre-accident earnings was, in 1897 and always has been since, the date of the accident. Consequently, the problem we have to face in these appeals did not, and could not, arise so long as the legislation was limited to accidents. The theory was simple. Whatever capacity the workman had at the moment of the accident, that was the arithmetical starting point. If before the accident he had full capacity for his work, he was obviously entitled to the benefit of that fact in calculating compensation for total incapacity. That was equally the first line of the subtraction sum for partial incapacity. If, on the other hand, the workman was already from any cause whatsoever partially disabled or "incapacitated" (the two words in the legislation are, at least in this context, absolutely synonymous), the top line of the sum would obviously show a lower earnings figure and the half-difference predicated by s. 9 (3) would *ipso facto* be proportionately lower. Thus, no unfair or disproportionate burden would be thrown on the employer. But when disablement by industrial disease was introduced by s. 8 of the Act of 1906 and continued by s. 43 of the Act of 1925, Parliament, perhaps, did not realise, (and I am not sure that the courts have fully realised) that, by adopting in s. 8 (1) (d) of 1906 and s. 43 (1) (d) of 1925 as the criterion for "pre-accident" earnings the workman's period of employment with the last employer for whom he was working in the disease-causing industry, they were interposing what would sometimes be a substantial lapse of time, and often quite a long one, between the date when the workman left that employment and the date of his disablement or suspension pursuant to medical certificate. For the mere purpose of assessing the *quantum* of weekly compensation for that incapacity the lapse of time would make little difficulty. The compensation would for total incapacity be half the average weekly earnings of the earlier period, and half the difference between the average weekly earnings in the same period and the workman's actual or potential average weekly earnings after the disablement for partial incapacity. If, however, the workman, while only partially incapacitated by the disease, was earning money in work of a kind not prevented by his disease, and when doing that new work was (a) disabled by a statutory accident, or (b) certified for disablement or suspension by another statutory disease causing some further incapacity short of total, the difference in the measure of resultant compensation between the two new causes (a) and (b) at once becomes apparent, and is startling. Under (a) (accident) the upper line of the subtraction sum is the average weekly earnings of the partially incapacitated man at the time of the accident—say 40s. a week. If total incapacity has resulted from the new accident he gets 20s. weekly compensation under s. 9 (2). If only aggravated partial incapacity has resulted he gets half of 40s. minus 20s., that is 10s. On the other hand, under (b) (disease) the upper line of the subtraction sum may be a very much higher figure, say £7, because that is what he had been earning from his last employer in the industry which gave rise to the disease. The

effect of the legislation is, then, that for total incapacity the measure is half of £7 = £3 10s. 0d., limited to 30s. under s. 9 (1) (c), while for partial incapacity the lower line remains the same as under (a) namely, 20s., difference £6, half of that is £3, or 30s. permitted maximum as against 10s.

Exactly the same reasoning applies to s. 47 of the Act of 1925 which was first introduced in July, 1918, by the Workmen's Compensation (Silicosis) Act, 1918, s. 1. An exactly similar position to the above was at once created by the schemes then introduced, with which the schemes under the Act of 1925 are for present purposes identical. Under both Acts these schemes have full statutory force. The practical result under ss. 43 and 47 is, of course, in many cases that the test for the top line of the subtraction sum is an earning period when the workman was still getting his full scale wages for full time work. The corollary is likely in some cases, at least, to be that, some time having elapsed since the workman ceased work for that employer, he may, in fact, have become partially or even almost totally disabled by the disease, and if at that moment he suffers an accident within the Act or is certified for another disease within the Act he still has "some capacity upon which the Act can operate," and, however small his earning power then is, no regard can be paid to it for "top-line" purposes in assessing his compensation for his new disability, and he gets a large award out of all proportion to his earning power at the time of certification or award. That is what the Act says, and there is nothing in the Act to allow us to take any other view of it. It follows that, as the workman had some capacity when he got his second disease, we cannot interfere with either award, unless there is authority binding us to decide otherwise.

It has been unequivocally decided that the existence of partial incapacity at the time of an accident is no reason for refusing an award for total incapacity induced by that accident. If the workman had any capacity left which could be taken away or reduced by the accident, it is irrelevant to enquire how he lost what capacity he had lost: *Doubie v. Kinneil* (5) and *McCann v. Scottish Co-operative Laundry Association, Ltd.* (2), both in the House of Lords. That the workman had ceased to work in the industry that caused the disease long before he was certified and still longer before he asked for arbitration was held irrelevant by this court in *Bacon v. Wills (A. W.) & Sons, Ltd.* (6) and *Cole v. Amalgamated Anthracite Collieries* (7), and in the latter case it was held that earnings subsequent to the workman's leaving the disease-causing employment must also be disregarded as a criterion of his pre-accident earnings. In *Thompson v. London and North Eastern Railway* (8), it was held by this court that an award for total incapacity did not divest or reduce the workman's already vested right to compensation for an earlier injury by accident causing partial incapacity for work. Similarly, in *Evans v. Oakdale* (No. 1) (9), it was held that a workman did not lose his right under an award for partial incapacity by an accident to continue in receipt of that compensation by reason of the fact that total incapacity supervened as a result of silicosis for which the workman was in receipt of the maximum compensation of 30s. plus. In *Evans v. Oakdale* (No. 2) (10), the same workman, while in receipt of compensation for his partial incapacity caused by the accident and in consequence of that accident having a reduced earning capacity, was none the less entitled to the maximum compensation of 30s. plus for a new partial incapacity caused by a supervening disease, because in the relevant period when he was still working in the disease-causing industry his average weekly earnings had been high enough to make the half difference exceed the maximum of s. 9 (1) (c).

I can see nothing in the above cases inconsistent with the conclusion to which my analysis of the legislation has led me, and the last case seems to me to be direct authority, binding this court, for that conclusion. The two appeals should, in my opinion, be dismissed with costs.

MORTON, L.J.: These appeals were heard together and raise the same important question of principle. It will be convenient if I refer to an accident which comes within the Workmen's Compensation Act, 1925, s. 1, as "a physical accident" and to a disease which comes within sched. III to the same Act, or is the subject of a scheme under s. 47 of the Act, as "a

notional accident.” [HIS LORDSHIP stated the facts leading up to the arbitrations, and continued]: These two arbitrations were taken together by consent, and the arbitrator records an agreement between the parties as follows: “Agreed pre-accident earnings £7 10s. 0d. as regards each notional accident. Agreed light work figure £4 3s. 0d. as regards each notional accident.”

There is no dispute before us that the position is as follows. The workman's average weekly earnings before the first of the two notional accidents must be taken as being £7 10s. 0d. From June 14, 1944, to Jan. 10, 1945, the workman was totally incapacitated. From Jan. 11, 1945, onwards the average weekly amount which the workman was able to earn was £4 3s. 0d. notwithstanding that he was partially incapacitated by nystagmus and also partially incapacitated by pneumoconiosis. By his award in the arbitration relating to partial incapacity from nystagmus the arbitrator awarded £1 10s. 0d. per week (plus supplementary allowances) as from Nov. 11, 1945. In the arbitration relating to partial incapacity from pneumoconiosis he awarded the weekly sum of £1 10s. 0d. (plus supplementary allowances) as from Jan. 11, 1945. Each of these figures represents half the difference between £7 10s. 0d. and £4 3s. 0d.: (see the Workmen's Compensation Act, 1925, s. 9 (3)), reduced to 30s. by reason of the limit imposed by s. 9 (1) (c) of the same Act. Both awards would have begun from Jan. 11, 1945, but for the fact that the employers had already paid compensation at the full rate in respect of the nystagmus up to Nov. 10, 1945. It is obvious that these awards have a curious result. From Dec. 8, 1944, to Jan. 10, 1945, the workman was totally incapacitated by reason of nystagmus and was also suffering from pneumoconiosis. During that period he was clearly only entitled to one weekly payment of £1 10s. 0d. (plus supplementary allowances). The development of pneumoconiosis did not entitle him to any further compensation. This notional accident did not and could not result in any loss of earning capacity since earning capacity was *nil* when it occurred. It was common ground that this is the effect of the decision in *Wheatley v. Lambton, Hetton & Joicey Collieries, Ltd.* (11). From Jan. 11, 1945, onwards he was only partially incapacitated by the nystagmus and he still continued to be partially incapacitated by pneumoconiosis, but he was able to earn £4 3s. 0d. per week in suitable light employment. Yet, as a result of the two awards, he was entitled, as from Jan. 11, 1945, to two separate sums of £1 10s. 0d. (plus supplementary allowances). Although this result seems surprising, it may be the effect of the language used in the relevant statutory enactments. It is convenient now to refer to the relevant portions of the 1925 Act, which are ss. 9 (1) (c), (2) (i) and (3) (i); s. 43 (1) (i) (a) (c) (omitting the provisos) and (d); ss. 47 (1), (2) and (3) (f); also the scheme, set out on p. 1,065 of WILLIS, paras. 4 (omitting the provisos), 6 and 9, sub-cl. (2) (a) and 9, sub-cl. (3). The employers admit that as from Jan. 11, 1945, the workman was entitled to one sum of £1 10s. 0d. per week (plus supplementary allowances), but they say that he was entitled to no more. They point out that on Jan. 10, 1945, when the total incapacity from nystagmus ceased, the workman was still suffering from a partial incapacity from nystagmus which reduced the amount which he was able to earn from £7 10s. 0d. to £4 3s. 0d. There was no further reduction of earning capacity by reason of the pneumoconiosis, and, therefore, they say that no additional compensation was payable in respect of the pneumoconiosis.

The following proposition seems to be well settled by authority. Where a physical accident causing partial incapacity is followed by another physical accident causing either partial incapacity which further reduces the workman's earning capacity or total incapacity, then (a) two sums are payable by way of compensation even though the limit of 30s. laid down by s. (9) (1) (c) is exceeded; (b) the compensation payable in respect of the second physical accident is to be based on the difference between the reduced weekly sum which the workman was earning after the first accident and the weekly sum which he is earning or is able to earn after the second accident: see *Thompson v. London & North Eastern Railway* (8), approved by the House of Lords in *Doudie v. Kinneil Cannell & Coking Coal Co., Ltd.* (5). There are four cases in which the problems dealt with in *Thompson's* case (8) may arise: Case “A”: where a physical accident is followed by another physical accident;

Case "B": where a physical accident is followed by a notional accident;
 Case "C": where a notional accident is followed by another notional accident;
 Case "D": where a notional accident is followed by a physical accident.
 Case "A" is *Thompson's* case (8). The present case is Case "C." I can see no logical reason why the principles applied by this court in *Thompson's* case (8) and approved by the House of Lords in *Doudie's* case (5) should not also apply to Cases "B," "C" and "D." It is clear that in each of the four cases

- A the compensation payable in respect of the first accident, be that accident physical or notional, must be based on the difference between the pre-accident earnings and the post-accident earnings. It would seem equally clear, logically, that in each of the four cases the compensation payable in respect of the second accident, be that accident physical or notional, should be based on the difference between the post-first-accident earnings and the post-second-accident earnings. The intention of the Acts is to compensate a workman in
- B respect of loss of earning capacity, and, if the first accident has already reduced the workman's earning capacity, the relevant question is surely: "How much further has his earning capacity been reduced by the second accident?" That is the measure of the earning capacity lost as a result of the second accident. To take an example, assume pre-first-accident earnings of £10 a week. After the first accident (physical or notional) the earnings are £8 a week. Compensation is £1 a week, being half the difference, under the Act of 1925, s. 9 (3).
- C A second accident (physical or notional) occurs. After it the earnings are £6 a week. Compensation for the second accident should logically again be £1 a week. Thus, the workman gets a total of £2 a week compensation, in accordance with the principles laid down in *Thompson's* case (8). Assume, however, that he is still earning, or able to earn, £8 a week after the second accident. In that event he has suffered no loss of earning capacity as the result of the second accident. Why, then, should he have any further compensation?
- D The same principle could be applied in the case of a third and fourth accident. In each case the compensation should logically be based on the difference between the sum which the workman was earning, or was able to earn, before that particular accident and the sum which he is earning, or is able to earn, after it. The principle set out above seems to me to be in accordance not only with *Thompson's* case (8), but with *Wheatley's* case (11) already cited, and with the observations of LORD THANKERTON in *Jones v. Amalgamated Anthracite Collieries, Ltd.* (12), where he says ([1944] A.C. 23):
- E

I am unable to distinguish this case from, for instance, the case of the workman sustaining injury from two successive accidents, the first of which leaves him subject to partial incapacity for work, and the second of which increases the partial incapacity. The wage which he may be, in fact, earning after the second accident would be accepted as the amount of his earnings, but there would necessarily remain an inquiry with a view to allocating the parts of the total reduction which resulted respectively from the injury caused in each accident, so as to ascertain the compensation due by the particular employer against whom the claim was made.

- F
- G It is only fair to add, however, that I doubt if LORD THANKERTON had "notional" accidents in his mind when he made these observations. I have not overlooked the fact that, when the accident is a notional one, "the amount of the compensation shall be calculated with reference to the earnings of the workman under the employer from whom the compensation is recoverable": see, as to miners' nystagmus, s. 43 (1) (d) of the Act of 1925, and as to pneumoconiosis, s. 47 of the same Act, and para. 9 (3) of the Pneumoconiosis Compensation Scheme, 1943. Apart from authority, however, I should not have thought that the words "with reference to," etc., prevented the employers from succeeding on the present appeal. Bearing in mind the
- H fact that the Acts are intended to compensate the workman for loss of earning capacity, I should not have thought that those words prohibited the arbitrator from taking into account the facts (a) that by his first award compensation was payable in respect of a drop in earning capacity from £7 10s. 0d. to £4 3s. 0d., and (b) that the workman was unable to show any further drop in his earning capacity. Applying the principle already stated to the present case, and disregarding, for brevity, the supplementary allowances, I get the following result: Earnings before June 14, 1944, £7 10s. 0d. On June 14, 1944, the first notional accident (nystagmus) happens. Earnings are

reduced to *nil*, owing to total incapacity. Compensation is £1 10s. 0d., that being the maximum sum. On Dec. 8, 1944, the second notional accident (pneumoconiosis) happens. No additional compensation is payable at that time, because no earning capacity existed at the time of the second accident, and, therefore, no capacity has been taken away by the second accident. On Jan. 11, 1945, the workman partially recovers from nystagmus, and, so far as that disease is concerned, he is able to earn £4 3s. 0d. a week. Compensation is still £1 10s. 0d. by reason of s. 9 (3) and the limiting proviso (c) to s. 9 (1) of the 1925 Act. If the effect of the pneumoconiosis had been that he was only able to earn, say, £3 a week, he would have been entitled to further compensation at the rate of 11s. 6d. (half the difference between £4 3s. 0d. and £3) as from Jan. 11, 1945, but as he was still able to earn £4 3s. 0d. a week, in spite of the pneumoconiosis, he is entitled to no further compensation. But for *Evans'* case (No. 2) (10), already mentioned, I should have dismissed the employers' appeal which relates to the award of £1 10s. 0d. in respect of nystagmus, and should have allowed the appeal which relates to the award of £1 10s. 0d. in respect of pneumoconiosis for the reasons stated. It is necessary, however, to consider *Evans'* case (9) and (10) with some care. The first decision given in that case is reported in 32 B.W.C.C., p. 51, and I take the facts from that report. The workman, Evans, was a collier earning an average weekly wage of £3 11s. 0d. On Aug. 12, 1935, he sustained an accident and several ribs were fractured. The employers admitted liability and paid compensation at the rate of £1 10s. 0d. a week. He was examined by the employers' doctor on Dec. 7, 1936. On Dec. 19, 1936, the compensation was reduced to 16s. 9d. a week after service of a notice under s. 12. The employers assessed his earning capacity at £1 17s. 6d. a week. On Feb. 22, 1937, Evans was given a certificate by the Silicosis Medical Board that he was totally disabled by silicosis, the date of disablement being certified as Nov. 18, 1936. On receipt of this certificate the employers restored the compensation to £1 10s. 0d. a week, but attributed 16s. 9d. of that sum to the injury and 13s. 3d. to the silicosis. The workman did not protest against the allocation and in fact signed two receipts each week. On July 15, 1937, the employers served a notice under s. 12 of their intention to terminate the weekly payment of 16s. 9d. No counter-notice was served and the workman still continued to receive £1 10s. 0d. a week thereafter, only signing one receipt each week. On Aug. 22, 1938, the workman filed an application for arbitration, claiming the restoration of the payment of 16s. 9d. and ignoring the £1 10s. 0d. paid for silicosis. In their answer the employers pleaded that they were already paying £1 10s. 0d. a week and submitted to a declaration of liability in respect of the rib injury. The county court judge, as arbitrator, found that the workman was still partially incapacitated by the rib injury and awarded 16s. 9d. a week to the workman, to date from July 15, 1937, ignoring the payment of £1 10s. 0d. made by the employers since that date in respect of the silicosis. The employers appealed to the Court of Appeal. This court held that there was evidence to support the arbitrator's finding of fact and no misdirection. The fact that the employers had for a time been paying compensation at the full rate for the supervening total disablement by silicosis was irrelevant and could not affect the workman's right to compensation at the appropriate rate in respect of his partial incapacity from the rib injury. It is clear from the judgment of SIR WILFRID GREENE, M.R., that he thought the employers might be found to have been overpaying the workman in respect of the silicosis, but he naturally refused to express an opinion on the point, saying (32 B.W.C.C. 57):

The only question before us is: What is the workman's right in view of the finding of fact of the learned county court judge in respect of the man's compensation for the first accident, as from the time in July, 1937, when the employers ceased to pay him compensation for that accident? To that question it seems to me that there is one answer and one answer only—to pay compensation for that accident on the basis of the partial incapacity existing during that period. The actual figure of 16s. 9d. a week is not contested.

This decision gives rise to no difficulty in the present case, but in July, 1939, the workman instituted arbitration proceedings, claiming compensation for his total incapacity from silicosis at the rate of £1 10s. 0d. a week from

Dec., 1936. He based that claim on the contention that his compensation should be based on his average weekly earnings of £3 10s. 0d. when he was employed in the process of working underground in the coal mine and had not yet sustained the accident to his rib on Aug. 12, 1935. The county court judge upheld the workman's claim and the employers appealed. The appeal came before a Court of Appeal which did not include any member of the court which decided *Evans' case* (No. 1) (9). This court upheld the decision of the county court judge, distinguishing *Thompson's case* (8) and relying on *Cole v. Amalgamated Anthracite Collieries, Ltd.* (7) and *Bacon v. Wills & Sons, Ltd.* (6). In the course of his judgment in *Evans' case* (No. 2) (10), SLESSER, L.J., said ([1940] 1 K.B. 709):

Thus the workman in the present case notionally met with his silicosis accident on Nov. 18, 1936, and during the year of his notional injury preceding the accident—the disease—he is to be deemed to be physically capable of earning £3 11s. 0d., his full wage. The case is taken out of the category of a second physical accident acting on an already limited capacity, as in *Harwood's case* (13) and *Thompson's case* (8), and must be deemed to be one where, notwithstanding the actual partial incapacity due to the rib accident, the Silicosis Scheme requires the workman in the circumstances to be assumed to be of full capacity and capable of earning £3 11s. 0d. a week at the date when he was certified in Nov., 1936, to be totally incapacitated by silicosis.

LUXMOORE, L.J., said (713-714):

... there is a material difference between the case where a workman is, in the first instance, partially incapacitated by an injury by accident as distinct from a notional accident by disease and is then rendered totally incapable by reason of a second accident which is also not a notional one, and the case where the original partial incapacity is followed by total incapacity arising from a notional accident caused by industrial disease. In the former case the compensation in respect of the second accident, which resulted in the partial incapacity from the first accident becoming total incapacity, must on the true construction of the Act, be calculated with reference to the average weekly earnings immediately preceding the second accident.

He then cited *Harwood v. Wyken Colliery Co., Ltd.* (13), and *Thompson's case* (8). The case of *Evans* (No. 2) (10) was Case "B," mentioned above, while the present case is Case "C," but I can see no good ground for distinguishing that case from the present case. It is, I think, a decision that whenever the second accident is a notional accident the compensation must be calculated with reference to the average weekly earnings immediately preceding the first accident, and not with reference to the reduced earnings immediately preceding the second accident. There are the following possible grounds of distinction between the present case and *Evans' case* (No. 2) (10): (1): In the present case both accidents are notional, while in *Evans' case* a physical accident was followed by a notional accident. In my view, this is a distinction without a difference. No difficulty arises in regard to the first accident and *Evans' case* decides the point which arises in the present case in regard to the second accident. (2): In the present case the workman was totally incapacitated by nystagmus at the date—Dec. 8, 1944—when the suspension from silicosis began. In my view, this, again, is a distinction without a difference, as there was a subsequent period, from Jan. 11, 1945, onwards, when the workman was partially incapacitated as a result of the first accident and was also partially incapacitated as a result of the second accident. I do not think he could be permanently excluded from all compensation in respect of the second accident because he happened to be totally incapacitated by the first accident for a few weeks from Dec. 8, 1944. (3): In the present case the second (notional) accident only partially incapacitated the workman, while in *Evans' case* (No. 2), the second (notional) accident totally incapacitated the workman. The result is that in the one case the weekly payment is to be calculated having regard to the provisions of s. 9 (3) of the Act of 1925, while in the other case it is to be calculated having regard to s. 9 (2) of that Act. It was not, however, contended before us that this fact constituted a material distinction between *Evans' case* (No. 2) and the present case.

I think, therefore, that *Evans' case* (No. 2) concludes the present appeal against the employers. It is worthy of note that in that case counsel for the employers put forward the same argument, in substance, as that put forward now on behalf of the employers, which I have already stated, and it was

rejected by the court. I ought, however, to mention another argument which was put forward by counsel for the employers. He relied on the passage which I have already quoted from the judgment of SLESSER, L.J., and, in particular, on the observations :

... the Silicosis Scheme requires the workman in the circumstances to be assumed to be of full capacity and capable of earning £3 11s. 0d. a week at the date when he was certified, in Nov., 1936, to be totally incapacitated by silicosis.

Relying on these observations, counsel for the employers suggests that the earning capacity of the workman in the present case must be regarded as notionally unimpaired by reason of the nystagmus and that he is entitled to no compensation in respect of the nystagmus. With all respect, I have difficulty in following the reasoning of SLESSER, L.J. on this point, but, whether that reasoning can be wholly supported or not, I think that counsel's contention is contrary to the actual decision in *Evans'* case (No. 1) (9), and cannot succeed.

For the reasons already stated I think that both awards must stand. I am conscious that these reasons differ somewhat from the reasons just given by SCOTT, L.J., although we arrive at the same conclusion. I have arrived at this conclusion with some misgiving, because, as I have already pointed out, it leads to a curious result in the present case. Counsel for the employers submitted formally that *Cole v. Amalgamated Anthracite Collieries, Ltd.* (7), *Bacon v. Wills & Sons, Ltd.* (6), and *Evans'* case (No. 2) (10), were all wrongly decided, in order to keep this point open in the House of Lords, but that argument is not, of course, open to him in this court. The result is that, in my opinion, the appeals should be dismissed, with costs.

SOMERVELL, L.J. : I agree that these appeals should be dismissed. I agree with MORTON, L.J. that *Evans v. Oakdale* (No. 2) (10), which is binding on us, covers this case. I am not satisfied that, apart from that decision, I should have come to the same conclusion on the construction of the relevant words of the statute and Scheme, which have already been cited, for reasons which I can state shortly. Neither the Act nor the Scheme deal expressly with successive accidents. In principle, it is clear that where a workman has two successive accidents each causing partial incapacity there ought, as LORD THANKERTON said in *Jones v. Amalgamated Anthracite Collieries, Ltd.* (12), to be ([1944] A.C. 23) :

... an inquiry with a view to allocating the parts of the total reduction [in earning capacity] which resulted respectively from the injury caused in each accident, so as to ascertain the compensation due by the particular employer against whom the claim was made.

Where the claims are against the same employer it seems to me to follow in principle that in assessing compensation for the second accident compensation should be based on the further loss of earning capacity caused by that accident. There is no dispute that that is the result under the Act in cases where the two accidents are actual accidents. It is also clear that it would, at any rate ordinarily, be attained if the first accident is a notional accident and the second an actual accident. In that case the partial incapacity caused by the notional accident will be reflected in the pre-actual accident earnings. It is when the second accident is notional that the difficulty arises, though in this case the result may be attained. If, for example, a miner has an actual accident, but, being partially incapacitated, is able to return to work as a miner though earning less. Later, he develops an industrial disease due to his employment as a miner. As I read the Act and Schemes as construed by the authorities, including *Evans'* case (No. 2) (10), his compensation for the industrial disease, the notional accident, would be based on his earnings as reduced by the first accident. The present problem arises when as the result of the first accident, whether actual or notional, he ceases to be employed in the employment to the nature of which the disease is due. In such a case in assessing the compensation you must go back to his earnings when he was employed by the employer in the process which gave rise to the disease. If he has left that employment, earnings *ex hypothesi* reduced by the first accident do not come in as pre-accident earnings under s. 9 (3).

The question, however, which seems to me to remain and is raised by these appeals can be, I think, shortly stated. When an arbitrator has to make an award in respect of a second accident which is notional, can he have regard to the fact that the workman has already been awarded compensation in respect of a former accident reducing his earning capacity below the *prima facie* datum line as laid down in the Act or the relevant Scheme? In the present case under the first award the workman had been awarded compensation on the basis that his earning capacity was reduced by miners' nystagmus from £7 10s. 0d. to £4 3s. 0d. When he came to the second award, was the arbitrator entitled to deal with the claim on the basis that the workman was able to show no further reduction of earning capacity owing to pneumoconiosis. I am myself doubtful, and here I think I differ from SCOTT, L.J., whether the words of the Scheme preclude his doing this which would seem to me to be in accordance with principle and common sense. *Evans' case* (No. 2) (10), for reasons which have been stated by MORTON, L.J., decided that he cannot, and on that authority I think the decisions appealed from were right.

Appeals dismissed with costs.

Solicitors: *Botterell & Roche*, agents for *Llewellyn & Hann*, Cardiff (for the employers); *J. T. Lewis & Woods*, agents for *Randell, Saunders & Randell*, Llanelli (for the workman).

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

WEATHERLEY v. WEATHERLEY

[HOUSE OF LORDS (Lord Jowitt, L.C., Lord Wright, Lord Simonds, Lord Uthwatt and Lord Normand), March 14, 31, 1947.]

D *Divorce—Desertion—Wilful and unjustifiable refusal to continue sexual relations—Parties continuing to reside in matrimonial home—Matrimonial Causes Act, 1937 (c. 57), s. 2.*

The parties were married on May 17, 1941, the husband being then a sergeant in the Royal Air Force, aged 22, and the wife a spinster of 30. After the marriage sexual intercourse took place every week-end in May and June of that year and during the husband's periods of six days' leave in each of the months of July, August and October. When the husband came on leave in November, 1941, the wife informed him that she had prepared another bed for him, that she could not sleep if they shared the same bed, and that she had finished with sexual intercourse and did not want any more of it. The parties continued, however, to share the flat which constituted the matrimonial home, the wife prepared the husband's meals for him when he was home on leave, and they had their meals together and visited their social clubs together. They continued on these terms during the husband's various periods of leave until June 1, 1943, when the husband asked the wife to resume normal married relations. The wife refused and the husband had nothing more to do with her. At the hearing of a petition, dated Feb. 22, 1945, alleging desertion from Nov. 24, 1941, the husband stated that when the wife refused intercourse in that month she said she thought it was very hard on him and if he wanted that sort of thing he could have it with some other woman. He also stated that he kept going back to the flat after Nov., 1941, when on leave, in the hope that he might be able to get the wife to alter her opinion:—

Held: so long as cohabitation was continued a mere refusal of sexual intercourse by one of the spouses could not constitute desertion without cause within the meaning of the Matrimonial Causes Act, 1937, s. 2.

Jackson v. Jackson (1) ([1924] P. 19) approved.

Decision of Court of Appeal, [1946] 2 All E.R. 1, affirmed.

[FOR THE MATRIMONIAL CAUSES ACT, 1937, s. 2, see HALSBURY'S STATUTES, Vol. 30, p. 336.]

Cases referred to:

- (1) *Jackson v. Jackson*, [1924] P. 19; 27 Digest 308, 2852.
- (2) *Synge v. Synge*, [1901] P. 317; 70 L.J.P. 97; 85 L.T. 83; 27 Digest 375, 3631.
- (3) *Bell v. Bell*, 1941, S.C. (H.L.) 5; Digest Supp.
- (4) *Wilkinson v. Wilkinson*, 1942 S.C. 472; 1943 S.C. (H.L.) 61; Digest Supp.

APPEAL by the husband from a decision of the Court of Appeal (TUCKER, L.J., and EVERSHED, J. (SCOTT, L.J., *dissenting*)), dated Apr. 16, 1946, and reported [1946] 2 All E.R. 1, dismissing an appeal from the refusal of BUCKNILL, J., on Oct. 12, 1945, to grant a decree *nisi* on the ground of the wife's desertion. The facts appear in the opinion of LORD JOWITT, L.C.

G. H. Crispin for the appellant (the husband).

E. Holroyd Pearce, K.C., and *William Latey* for the King's Proctor.

The respondent (the wife) was not represented.

The House took time for consideration.

Mar. 31. LORD JOWITT, L.C. : My Lords, this was a husband's petition for divorce based on the ground of desertion by the wife. The petition was dated Feb. 22, 1945, and it was, therefore, necessary to show that the desertion had lasted for at least three years, from Feb. 22, 1942. The trial judge, BUCKNILL, J., heard the case in October, 1945, and dismissed the petition. The Court of Appeal (SCOTT and TUCKER, L.J.J., and EVERSHED, J.), dismissed the appeal, SCOTT, L.J., *dissenting*. From this decision an appeal has been brought to your Lordships' House.

The relevant facts can be shortly stated. The parties were married at the registry office in Bromley, Kent, on May 17, 1941, the husband being then aged 22, a sergeant in the Royal Air Force, and the wife being a spinster of 30 years of age. They lived in a two-roomed flat of which the wife was the tenant. In the early days of the marriage, the husband was in the habit of spending with his wife the time when he was on leave, and her flat became the marital home. In the early days of the marriage normal sexual intercourse took place, and this continued up till October, 1941, whenever the husband got leave. When the husband went home on leave in November, 1941, the wife said that she had prepared another bed for him. She said she did not want any further resumption of marital relations. She said that she knew that she was being awfully selfish, but (I quote from the evidence) "she thought this sex business was horrid and beastly and she did not want any more of it." She added that she realised it was awfully hard on her husband, but, if he wanted that sort of thing, he could have it with some other woman. As a result, the husband had to sleep in another bed and at some later date, which was not specified in the evidence, in another room. In all other respects they continued living together in the flat as a normal married couple. They had their meals, which were prepared by the wife, together, and they went out together to clubs and entertainments. Although from time to time thereafter the husband asked the wife to change her mind and to allow him sexual intercourse, she never consented to do so. They continued, however, to live together at the marital home.

The sole question in this case is whether that state of affairs, which continued, at any rate, for part of the three years preceding the presentation of the petition constitutes desertion.

Under the Matrimonial Causes Act, 1857, adultery, coupled with desertion without reasonable excuse for two years or upwards had been a ground on which a wife could obtain a decree of divorce, and desertion without cause was of itself a ground on which a sentence of judicial separation could be obtained. The Matrimonial Causes Act, 1937, for the first time, made desertion without cause a ground of divorce if it had continued for three years immediately preceding the presentation of the petition. It is noticeable that in neither of these two Acts was desertion defined. In these circumstances I think we should first consider what was the state of the law as laid down in the decided cases dealing with the subject of desertion up to the date of the passing of the Act of 1937. In the absence of any statutory definition of desertion I should think it right to presume that the legislature, in using that word, used it in the understood and accepted sense.

My Lords, I find it unnecessary, for the reasons I will give presently, to bring the many decided cases into detailed review. In all of them the judges have declined, and, in my view, wisely declined, to attempt any definition of "desertion." In this respect I propose to follow their example. On some future occasion it may be necessary that this House should consider some of these decisions, and, in particular, should consider whether there is sufficient warrant

for the doctrine of "constructive desertion" which from time to time seems to have found favour. In the view which I take no such consideration is necessary for the determination of the present appeal, for it is the fact that in none of those cases before *Jackson v. Jackson* (1) is there anything to suggest that, so long as cohabitation is continued, a mere refusal of sexual intercourse by one of the spouses can constitute desertion.

- A (1). This point actually arose for decision for the first time in *Jackson v. Jackson*. The actual refusal in that case was a refusal by the husband to sleep with his wife because she insisted on having her little girl with her. The case was argued on the footing that there had been an unqualified refusal of sexual intercourse and the judgment proceeds on this basis. SIR HENRY DUKE, P., in the course of his judgment, states the principle as follows ([1924] P. 23):

- B How does it stand in point of principle? Wanton refusal of one or other of the parties to a marriage to have sexual intercourse is no doubt a wrong thing. It is the intentional breach of one of the ties of marriage, but it does not produce either separation or living apart. It may be a ground upon which the party against whom the refusal is made may decide to go away; and in the case of *Synge v. Synge* (2) in the Court of Appeal, which has been so much pressed upon us. COLLINS, L.J., said that where, upon a refusal of sexual intercourse by one of the spouses, the other had decided to go away, they were living apart by mutual consent. But reflection upon the manifold duties of the married state must, I think, convince any reasonable mind that this refusal of itself
- C by one of the parties, while the parties remain living together and discharging the other duties of the married state, cannot be said to amount to desertion. It is not abandonment; it is not living apart. If it is a refusal of a duty it does not purport to conclude the matrimonial relationship.

- D That case had been acted on many times between 1924 and the passing of the Matrimonial Causes Act of 1937. I agree with that decision, but, even if I had thought it incorrect, I should still have been of the opinion that, when the legislature in the Act of 1937 for the first time made desertion by itself a ground of divorce, it cannot have intended the word "desertion" to bear a meaning which it does not naturally bear and which judicial authority had so recently denied to it.

- E SCOTT, L.J., in his dissenting judgment, ([1946] 2 All E.R. 4) states that marriage, whether it be in an established church or in a registry office, is to be regarded as a Christian marriage. He, therefore, proceeds to consider the doctrine of marriage as set forth in the Book of Common Prayer. He finds there stated that one of the causes for which matrimony was ordained was the procreation of children, and so reaches the conclusion that where the wife has, after a time, refused further sexual intercourse with the husband, she has "deserted" the husband, because he regards the mutual rights of sexual intercourse for the purpose of the procreation of children as fundamental to the marriage state. I
- F think this a dangerous and fallacious line of argument. It proceeds on the basis that any fundamental breach of the obligations contracted in holy matrimony, as laid down in the Book of Common Prayer, constitutes desertion within the meaning of the Act of 1937. It could not be contended that a marriage which had been duly consummated could be dissolved because one of the spouses was unable, by reason of some physical infirmity, to procreate children.
- G Yet the consideration which prevailed with the learned Lord Justice would appear in such a case to be equally valid. The marriage which is contemplated in the Book of Common Prayer is a lifelong union which imposes an obligation on the one spouse towards the other "to love and to cherish till death us do part." The fact is that the law of the land cannot be co-extensive with the law of morals, nor can the civil consequences of marriage be identical with its religious consequences. What marriage means to different persons will depend on their upbringing, their
- H outlook and their religious belief. We must remember, as SCOTT, L.J., rightly says (*ibid*), that marriage, whether solemnised in a church or a registry office, whether contracted between Christians or between those who have different or no religious beliefs, must in each case have the same legal consequences, and, remembering those things, we shall, I think, find the solution to the question which arises for determination in this case and in similar cases, not on a consideration of the Christian doctrine of marriage as laid down in the Book of Common Prayer, but on the true construction of the relevant Acts of Parliament.

This further consideration cannot be disregarded. It is, my Lords, most undesirable, save where we are clearly enjoined by statute so to do, to seek to discover or reveal the secret intimacies of the marriage bed. If a question arises whether the marriage has been consummated, no doubt this may be necessary. It is not, I think, right that we should do so in cases such as the present. I find it significant in this connection that the Act of 1937, which provided that a decree of nullity could be pronounced on the ground that the marriage had not been consummated owing to the wilful refusal of the respondent, did not go on to say that a marriage could be dissolved if, when once it had been consummated, further sexual intercourse was withdrawn. If any such doctrine were to be accepted, we might even have to consider, as EVERSLED, J., hinted (*ibid* 11), whether it could be held that there was desertion if sexual intercourse was only tolerated on rare and exceptional occasions. For these reasons, which are in substance those given by TUCKER, L.J., and EVERSLED, J., I would dismiss the appeal.

I must add that, having had the opportunity of reading the opinion of LORD NORMAND about to be delivered, I concur in his observations on the irrelevance to the present issue of decisions of the Court of Sessions in Scottish cases. Equally, nothing that the House decides on the meaning of the word "desertion" in the English law of divorce should be taken as relevant to the meaning of that word in Scots law.

LORD WRIGHT: My Lords, I agree. LORD UTHWATT has asked me to say that he also agrees with the opinion which has just been delivered.

LORD SIMONDS: I also agree.

LORD NORMAND (read by LORD SIMONDS): My Lords, my reasons for thinking that this appeal fails may be very briefly stated. *Jackson v. Jackson* (1) is the only case of those cited in which the question arose for decision whether persistent refusal of sexual intercourse, without any other conduct on the part of either spouse making for the disruption of the marriage, is desertion, and the decision was that it was not desertion. Nothing intervened between the date of that decision and the passing of the Matrimonial Causes Act, 1937, to cast any doubt on the soundness of the decision. It must, therefore, be assumed that the legislature, in passing the Act of 1937, used the word "desertion" in a sense consistent with the law as expounded in *Jackson v. Jackson* (1).

Certain Scottish cases were referred to by counsel for the appellant, but there are differences between the law of England and the law of Scotland on divorce for desertion which have by no means been removed by recent legislation and which are a result of the different history of the law of divorce in the two countries since the Reformation. The recent cases of *Bell v. Bell* (3) and of *Wilkinson v. Wilkinson* (4) show how the construction of the Divorce (Scotland) Act, 1938, is influenced by the former law in this very matter of divorce for desertion. It is seldom that it can be profitable to cite Scottish decisions on divorce in an English case or English decisions in a Scottish case. In the present instance the Scottish cases certainly afford no help in such cases.

Appeal dismissed.

Solicitors: *Henry I. Sidney & Co.* (for the appellant); *Treasury Solicitor* (for the King's Proctor).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

CHRISTIE AND ANOTHER v. LEACHINSKY.

[HOUSE OF LORDS (Viscount Simon, Lord Thankerton, Lord Macmillan, Lord du Parc), December 2, 3, 5, 6, 9, 10, 1946;

Distinguished. TIMS v. JOHN LEWIS & Co., LTD. [1951] 1 All E.R. 814.

Trespass—False imprisonment—Need to make charge known to person arrested—Arrest without warrant—Charge of unlawful possession under local Act—Charge not justifying original arrest or continuing detention under arrest—Reasonable and probable cause for suspecting felony—Dismissal of charge at police court—Re-arrest inside the court—Subsequent charge of larceny—Charge dismissed—Liverpool Corporation Act, 1921 (c. lxxiv), ss. 507, 513.

On Aug. 31, 1942, the respondent was arrested by the appellants, who were police officers, and charged under the Liverpool Corporation Act, 1921, s. 507, with unlawful possession of a bale of cloth. Admittedly, the arrest was not authorised by the section, but the police *bona fide* and on reasonable grounds believed that he had stolen the cloth. He was detained in custody until the following day when he was brought before the magistrate and remanded in custody until Sept. 8. Thereafter he was remanded on bail until Sept. 15. At the hearing the respondent was discharged, it being stated that the Leicester police had decided to prosecute him for larceny, and before leaving the court he was re-arrested. Later in the day, the Leicester police, charging him with larceny, took him to Leicester with a view to his committal for trial, but the charge was dismissed by the magistrates. The respondent claimed damages for false imprisonment and trespass to the person. Although the offence of unlawful possession under the Act of 1921 was one for which in the circumstances there was no power of arrest without warrant, the appellants pleaded that their action was justified because they had reasonable and probable cause for suspecting, and, in fact, suspected, that the respondent had stolen or feloniously received the bale of cloth.

HELD: (i) an arrest without warrant, either by a policeman or by a private person, can be justified only if it is an arrest on a charge which is made known to the person arrested unless the circumstances are such that the person arrested must know the substance of the alleged offence, (e.g., where the alleged wrongdoer is caught red-handed), or where he forcibly resists arrest; the circumstances of the present case were not covered by any such qualification; and, therefore, the initial arrest and imprisonment were unlawful and constituted false imprisonment.

(ii) as regards the re-arrest on Sept. 15, the respondent knew what was the alleged felony in respect of which he was being detained, and so, although it took place inside the court, this arrest was lawful.

PER VISCOUNT SIMON: The authorities seem to establish the following propositions:—

1. If a policeman arrests without warrant upon reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized.

2. If the citizen is not so informed, but is nevertheless seized, the policeman, apart from certain exceptions, is liable for false imprisonment.

3. The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained.

4. The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is one of substance, and turns on the elementary proposition that in this country a person is, *prima facie*, entitled to his freedom and is only required to submit to restraint on his freedom if he knows in substance the reason why it is claimed that restraint should be imposed.

5. The person arrested cannot complain that he has not been supplied with the above information as and when he should be, if he himself produces

the situation which makes it practically impossible to inform him, *e.g.*, by immediate counter-attack or by running away.

These propositions equally apply to a private person who arrests on suspicion.

[AS TO ARREST WITHOUT WARRANT, see HALSBURY, Hailsham Edn., Vol. 9, pp. 85-97, paras. 112-122; and FOR CASES, see DIGEST, Vol. 14, pp. 175-186, Nos. 1534-1653.]

Cases referred to :

- (1) *Dumbell v. Roberts*, [1944] 1 All E.R. 326; 113 L.J.K.B. 185; 170 L.T. 227; 108 J.P. 139; Digest Supp. A
- (2) *Entick v. Carrington* (1765), 19 State Tr. 1029; 2 Wils. 275; 14 Digest 189, 1694.
- (3) *Walters v. Smith (W. H.) & Son, Ltd.*, [1914] 1 K.B. 595; 83 L.J.K.B. 335; 110 L.T. 345; 78 J.P. 118; 14 Digest 177, 1549.
- (4) *Mackalley's Case* (1611), 9 Co. Rep. 65 b; Cro. Jac. 279; 14 Digest 313, 3288.
- (5) *Rutland's (Countess) Case* (1606), 6 Co. Rep. 52 b; Moore, K.B. 765; 38 Digest 68, 441. B
- (6) *R. v. Howarth* (1828), 1 Mood. C.C. 207; 15 Digest 822, 8981.
- (7) *R. v. Ford* (1817), Russ. & Ry. 329; 15 Digest 784, 8442.
- (8) *Hooper v. Lane* (1857), 6 H.L. Cas. 443; 27 L.J.Q.B. 75; 30 L.T.O.S. 33; 41 Digest 75, 86.
- (9) *Cowles v. Dunbar and Callow* (1827), 2 C. & P. 565; Mood. & M. 37; 14 Digest 177, 1542.
- (10) *Samuel v. Payne* (1780), 1 Doug. K.B. 359; 14 Digest 178, 1555. C
- (11) *Williams v. Dawson*, unreported.
- (12) *Hobbs v. Branscomb* (1813), 3 Camp. 420; 14 Digest 178, 1557.
- (13) *Beckwith v. Philby* (1827), 6 B. & C. 635; 9 Dow. & Ry. K.B. 487; 4 Dow. & Ry. M.C. 394; 5 L.J.O.S.M.C. 132; 14 Digest 177, 1544.
- (14) *Hadley v. Perks* (1866), L.R. 1 Q.B. 444; 7 B. & S. 375; 35 L.J.M.C. 177; 14 L.T. 325; 30 J.P. 485; 14 Digest 178, 1561.
- (15) *R. v. Curran* (1826), 1 Mood. C.C. 132; 15 Digest 786, 8473. D
- (16) *R. v. Woolmer* (1832), 1 Mood. C.C. 334; 15 Digest 784, 8444.
- (17) *R. v. Bentley* (1850), 14 J.P. 671; 4 Cox C.C. 406; 15 Digest 823, 8989.

APPEAL by defendants from a decision of the Court of Appeal, reported [1945] 2 All E.R. 395, allowing the appeal of the plaintiff against a decision of STABLE, J., without a jury, at Lancashire Assizes, dated June 20, 1944. The Court of Appeal held that (i) (LAWRENCE, L.J. dissenting) the common law power of arrest was limited to a specific charge and arrest must be made only on that charge, and so a person could not be lawfully arrested for a misdemeanour merely because the constable reasonably suspected him of having committed a felony; and (ii) a re-arrest of the plaintiff after the dismissal of the charge under the Liverpool Corporation Act was not justified and amounted to false imprisonment. The facts appear in the opinions of VISCOUNT SIMON and LORD DU PARCQ, and are summarised in the headnote.

Hemmerde, K.C., Nelson, K.C., and Patrick O'Connor for the appellants.
Laski, K.C., and Rose Heilbron for the respondent.

The House took time for consideration.

Mar. 25. VISCOUNT SIMON: My Lords, the respondent is a "waste" merchant who deals in what are commonly called "rags", with a warehouse in Beaufort Street, Liverpool. The two appellants are respectively a detective constable and a detective sergeant in the Liverpool City Police Force. The respondent has brought an action against the appellants (together with other police officers who have now been dismissed from the suit) for damages for false imprisonment, alleging that he was wrongfully arrested and detained by them on Aug. 31, 1942. The trial judge, STABLE, J. directed judgment to be entered for the defendants (including the present appellants), but the Court of Appeal (SCOTT, LAWRENCE and UTHWATT, L.J.J.) reversed this decision and ordered judgment to be entered for the plaintiff (the present respondent) against the appellants for damages, such damages to be assessed by judge and jury. I agree with SCOTT, L.J., that the main issue raised is of great importance and requires examination, for it concerns the liberty of the subject and the extent of the powers of the police to arrest without warrant.

The facts which raise this issue are as follows. The respondent was in the habit of buying his supplies from various towns and had recently from time to time made purchases from a tailoring firm in Leicester called Michaelson.

On Aug. 26, 1942, he there bought three bales of waste cuttings for £4 6s. 0d., such waste being habitually sold by weight. On Aug. 27 he called with a van to pay for and collect what he had bought and, according to his story, incidentally asked Mr. Michaelson if he had any "remnants" out of which to make a dress for his wife. Mr. Michaelson said he had many, and in the result the respondent bought the lot for £22, and they were packed in a single bale. The contents were pieces of cloth, stockinet, and linings. The bale is referred to in the evidence as "a bale of cloth." The respondent paid cash for the whole purchase. He consigned the four bales, together with 23 other bales of waste bought from other sellers in Leicester, by carrier to his warehouse in Liverpool, describing the whole consignment, for the purpose of the carrier's charges, as "waste." STABLE, J., considered that no sinister inference should be drawn from this misdescription. On Saturday, Aug. 29, the Liverpool police (apparently having already some suspicion on grounds which were not alleged in the pleading or explained at the trial) examined the goods while in the hands of the carrier and so ascertained that one of the bales contained pieces of cloth and not mere "waste." It is possible that the interest of the police was aroused because of war-time restrictions on the sale and purchase of cloth. On the morning of Monday, Aug. 31, the appellants secretly watched the unloading of the bales and their removal into the respondent's warehouse by the back entrance. The respondent was present and assisted in the work. He himself carried the bale of cloth inside and placed it near the door. The other bales, which required to be weighed to check the purchases, were placed in another part of the premises. The appellants now went round to the front door of the warehouse, entered it without any search warrant, and told the respondent they were making enquiries about a bale of cloth which had been delivered to him. The respondent professed to know nothing about any cloth, and the appellants set to work to search the premises. The respondent asked if a search warrant was not necessary, but the appellant Morris told him that he was "not exceeding his powers at all"—an assertion which seems quite contrary to the law. The appellants, not being satisfied with the respondent's explanation, arrested him on a charge of "unlawful possession" under the Liverpool Corporation Act, 1921, and took him in custody to Essex Street Bridewell.

There can be no doubt that the Liverpool Corporation Act did not authorise this arrest at all. The Act does not use the term "unlawful possession," though this is the customary phrase used in connection with an infringement of the Act. The phrase is, in fact, somewhat misleading. The following provisions are included in part II of the Act :

S. 507 (1): Any person brought before any court of summary jurisdiction charged with having in his possession any thing which there is reasonable ground to believe or suspect has been stolen and (*sic*) who does not account to the satisfaction of the court for his possession of the same shall be liable to a penalty not exceeding £5 or in the discretion of the court to imprisonment for any term not exceeding two months with or without hard labour. (2) If any person so brought before any court shall declare that he received such thing from some other person or that he was employed as a carrier agent or servant to convey the same for some other person such court shall cause such other person and also if necessary every former or pretended purchaser or other person through whose possession the same shall have passed to be brought before a court and examined . . . (5) For the purposes of this section . . . the expression "stolen" means stolen or unlawfully acquired or detained.

By s. 573 :

It shall be lawful for any police constable and all such persons as he shall call to his assistance to arrest and detain without warrant—(1) Any person whose name and residence shall be unknown to such constable and cannot then be ascertained by him and who shall commit any offence against . . . the provisions of . . . this part of this Act.

Inasmuch as the appellants knew the respondent's name and also knew his place of residence in Southport where he had lived for the last eighteen years and moreover arrested him in his own warehouse in Beaufort Street, the Act manifestly gave the appellants no right to arrest the respondent for "unlawful possession" without a warrant.

What is surprising, and is a matter for severe comment, is that the appellant, Christie, admitted at the trial that he knew at the time that he had no power

to arrest without warrant under the Liverpool Corporation Act in the circumstances and that the arrest was, nevertheless, made on this charge because it was the "most convenient" course. It is much to be hoped that the Liverpool police will be instructed not to disregard the limitations laid down by law in this connection again. In another aspect the Liverpool Act is a curious one, for the misdemeanour created by it only arises if the individual, when brought before the magistrate, fails at that stage to account for what is in his possession. No offence, therefore, can be committed before he is brought before the magistrate and the power of the police to arrest and detain an individual (whether with or without a magistrate's warrant, according to circumstances) is not a power to charge him with having committed the crime of "unlawful possession" (for up to that time he has not committed any breach of the Act), but rather a power to arrest and detain him if his name and residence are unknown to the police so as to bring him before the court to give his explanation. The suspicion that a thing "has been stolen" is, of course, quite different from the suspicion that the individual was a party to stealing it or has received it knowing that it was stolen.

The respondent was brought to Essex Street police station about noon in custody, and later was charged by the appellant, Christie, before Police Sgt. Tindall, who was then the officer on duty, with "unlawful possession" under the Liverpool Act. Christie told Tindall that "bail was not advisable." The respondent was kept a prisoner all night and had an uncomfortable experience when being removed about midnight from one place of detention to another in a police van containing two drunken negroes. The next morning he was brought before the stipendiary on the charge of "unlawful possession" and the prosecuting constable asked for his remand for a week in custody. The stipendiary may not have been told that when the police arrested the respondent they already knew his name and address. At any rate he acquiesced in the police request. About 1.30 p.m., on the day of his arrest, the respondent, after being "cautioned" by Christie, made a signed statement in which he gave a full account of how he acquired the property and gave the name and address of Michaelson, from whom he had bought the four bales and to whom he had paid cash for them. The Liverpool police, however, took no steps to bring Michaelson before the Liverpool magistrate and on Sept. 8 the respondent was brought up again and remanded on bail for a further week until Sept. 15. In the meantime, the Leicester police interviewed Michaelson, who, for some reason, told a pack of lies, asserting that he had never sold the contents of the bale of cloth to the respondent or at all, and that the articles in that bale had been taken from him without his authority. On Sept. 15, as the Leicester police were intending to prosecute the respondent for larceny, the Liverpool police applied to the stipendiary for leave to withdraw the proceedings before him, and this was done. (A further allegation of false imprisonment occurs at this point, which I will deal with later.) When the respondent was subsequently brought before the court at Leicester his solicitor triumphantly exploded the case against him and showed up Michaelson for the liar he was. In the result, therefore, the respondent has not been proved guilty of any offence and he has spent a week in prison, after being arrested on a charge of "unlawful possession" in circumstances where an arrest on this charge was contrary to law. Any liability of the police, however, for the arrest of Aug. 31 ended when the stipendiary ordered the remand in custody, for the remand was the action of the magistrate for which the appellants cannot be held responsible as for false imprisonment.

If there were nothing to add to the above facts, it would be clear that the appellants, by arresting the respondent without a warrant on Aug. 31 on a charge of unlawful possession when they knew his name and residence, were acting illegally and were liable to pay damages for false imprisonment: see *Dumbell v. Roberts* (1). Indeed, this was admitted at the trial, but by an amendment of their defence it was pleaded that at the time of the arrest they had reasonable and probable cause for suspecting, and, in fact, suspected, that the respondent had stolen or feloniously received the bale of cloth. STABLE, J., found that this was true, but neither the pleading nor the evidence suggested that the respondent was told that he was arrested on this ground. The question to be determined is, therefore, whether, when a policeman arrests X. without a warrant, on

reasonable suspicion that he has committed a given felony, but gives X. no notice that he is arrested on suspicion of such felony, he is acting within the law.

There is nothing in the judgment of the trial judge to indicate that this vital question was ever argued out before him at all. STABLE, J., had no difficulty in holding that in the circumstances arrest on the charge of "unlawful possession," standing by itself, was an unlawful imprisonment, but the fact that the police reasonably suspected larceny or felonious receiving appeared to him to provide a complete defence, though they did not arrest for this charge. The judge said :

Of course, if when the police had arrested Mr. Leachinsky, all they had believed was that Mr. Leachinsky was in unlawful possession under the Act of this bale—if that was their state of mind, at the time of the arrest they could not justify the detention—a wrongful arrest—thereafter by setting up the fact, if fact it had been, that Mr. Leachinsky had committed some other felony of which they were wholly unaware at the time of making the arrest. The law, it seems to me, on that point is quite plain. But if they believed he had committed a felony when they arrested him, if there were reasonable grounds for that belief, and they arrested him because they so believed, that act, which was legal and justifiable at that time, does not become illegal thereafter because for convenience a charge of unlawful possession is brought in Liverpool in order that the real charge of larceny may be prosecuted by the police before the court in Leicester, which was really concerned in the matter. The test as I understand it is what was the state of mind of the police at the time of the arrest. Why did they arrest him ? If they arrested him because they believed he had committed a felony and there were reasonable grounds for so believing, they do not lose the protection of the law. And what was not a wrongful act at the time does not become an actionable wrong because thereafter the proceedings in Liverpool are confined to what was really a mere formality, unlawful possession, and the prosecution for felony is relegated to the appropriate court.

The all-important question in this appeal is whether this passage correctly embodies the law. If a policeman arrests without warrant when he entertains a reasonable suspicion of felony, is he under a duty to inform the suspect of the nature of the charge, and if he does not do so, is the detention a false imprisonment ?

In the Court of Appeal SCOTT, L.J., strongly insisted that it was a false imprisonment. Arrest, he pointed out, was the first step in a criminal proceeding against a suspected person on a charge which was intended to be judicially investigated. If the arrest was authorised by magisterial warrant, or if proceedings were instituted by the issue of a summons, it is clear law that the warrant or summons must specify the offence. This rule is now embodied in the Criminal Justice Act, 1925, s. 32, but it is a principle involved in our ancient jurisprudence. Moreover, the warrant must be founded on information in writing and on oath and, except where a particular statute provides otherwise, the information and the warrant must particularise the offence charged. The famous case of *Entick v. Carrington* (2), dealing with the illegality of "general warrants" is an illustration of the principle. Again, when an arrest is made on warrant, the warrant in normal cases has to be read to the person arrested. All this is for the obvious purpose of securing that a citizen who is *prima facie* entitled to personal freedom should know why for the time being his personal freedom is interfered with. SCOTT, L.J., argued that, if the law circumscribed the issue of warrants for arrest in this way, it could hardly be that a policeman acting without a warrant was entitled to make an arrest without stating the charge on which the arrest was made, and he contrasted what he took to be the general law on this subject with the exceptional situation created by the well-known reg. 18B of the Defence (General) Regulations, 1939, according to which during the emergency the Home Secretary could, if satisfied that it was necessary to do so, make an order with respect to a particular person "directing that he be detained" which detention "shall be deemed to be" lawful custody. With the judgment of SCOTT, L.J., his colleague, UTHWATT, J., agreed. He said ([1945] 2 All E.R., at p. 412) :

... a person cannot be lawfully arrested for a misdemeanour by a constable merely because the constable reasonably suspects him of having committed a felony.

And he quoted the passage in HAWKINS' PLEAS OF THE CROWN, 8th ed., vol. 2, ch. 12, p. 120, that if a private person is pleading a justification for arresting a man on suspicion,

It seems to be certain, that . . . regularly he ought expressly to show that the very same crime for which he made the arrest, was actually committed.

The relevance of this quotation becomes clear on examining the decision of *Walters v. Smith (W. H.) & Son, Ltd.* (3). LAWRENCE, L.J., agreed in the conclusion reached by the Court of Appeal, though he based his view on the previous decision of the Court of Appeal in *Dumbell's* case (1). The Lord Justice, however, indicated his doubts whether this decision was not open to challenge, basing himself, as I understand, largely on the assumption that a constable, when making an arrest without warrant on reasonable suspicion of felony, may do so "without giving any reason to the person arrested" inasmuch as "the constable is not bound to say anything at all." With all respect to the Lord Justice, I am unable to agree with the propositions quoted, and I take the view that *Dumbell's* case (1) was rightly decided.

When the appeal came before your Lordships' House the arguments which had prevailed before the Court of Appeal were repeated, but it was not, apparently, realised by counsel on either side that there is direct authority, both in text books of acknowledged weight and in cases actually decided, that in normal circumstances an arrest without warrant either by a policeman or by a private person can be justified only if it is an arrest on a charge made known to the person arrested. I owe most of what follows to the erudition of LORD DU PARCQ, who made a careful investigation of the recorded law after the arguments were concluded.

Take first the text books. BURN'S JUSTICE OF THE PEACE is a work of acknowledged authority which has gone through more than thirty editions. It originally appeared in 1755, and the author, the Rev. Richard Burn, D.C.L. (who also brought out three successive editions of BLACKSTONE'S COMMENTARIES), deals in detail with the law of arrest without warrant. He says (vol. I, p. 302) that "where a constable acts without warrant by virtue of his office of constable, he should, unless the party be previously acquainted with it, notify that he is a constable, or that he arrests in the Queen's name, and for what." HALE'S PLEAS OF THE CROWN, vol. 2, ch. X, p. 82, dealing with arrest by a private person on suspicion says: "note that in all arrests he must acquaint the party with the cause of his arrest." ARCHIBALD'S METROPOLITAN POLICE GUIDE (7th ed., p. 713) is a more modern book which affirms that the general rule is that, in arresting without warrant on suspicion, the person making the arrest, whether constable or private person, should at the time state on what charge the arrest is being made.

The propositions laid down in the text books are supported by judicial decisions to some of which I will briefly refer. What is particularly noteworthy is that in many of these decisions an exception to the general rule is explained and justified, and this indirectly establishes what the general rule is. For example, in *Mackalley's* case (4), the decision of the Star Chamber in the *Duchess of Rutland's* case (5) was followed, to the effect that it is not necessary to state the ground of arrest when the party makes resistance before the person arresting him "can speak all his words." *Mackalley's* case (4) arose out of an arrest based on a plaint of debt which led to the debtor and his friends resisting the official arrester with fatal results, and it was ruled that "an officer making an arrest, ought to show at whose suit, out of what court, and for what cause he made the arrest, when the party arrested submits himself to the arrest, but not when the party resists." In *Rex v. Howarth* (6), it is laid down that there is no need to tell a man why he is being arrested when he must, in the circumstances of the arrest, know the reason already. Another qualification may be gathered from the decision of *Rex v. Ford* (7), to the effect that it is not necessary for a person making an arrest to state the charge in technical or precise language.

These citations, and others which are referred to by LORD DU PARCQ, seem to me to establish the following propositions:

1. If a policeman arrests without warrant on reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized.
2. If the citizen is not so informed, but is nevertheless seized, the

policeman, apart from certain exceptions, is liable for false imprisonment.

3. The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained.

4. The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is a matter of substance, and turns on the elementary proposition that in this country a person is, *prima facie*, entitled to his freedom and is only required to submit to restraint on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed.

5. The person arrested cannot complain that he has not been supplied with the above information as and when he should be, if he himself produces the situation which makes it practically impossible to inform him, e.g., by immediate counter-attack or by running away.

There may well be other exceptions to the general rule in addition to those I have indicated, and the above propositions are not intended to constitute a formal or complete code, but to indicate the general principles of our law on a very important matter. These principles equally apply to a private person who arrests on suspicion. If a policeman who entertained a reasonable suspicion that X had committed a felony were at liberty to arrest him and march him off to a police station without giving any explanation of why he was doing this, the *prima facie* right of personal liberty would be gravely infringed. No one, I think, would approve a situation in which, when the person arrested asked for the reason, the policeman replied: "That has nothing to do with you. Come along with me." Such a situation may be tolerated under other systems of law, as, for instance, in the time of *lettres de cachet* in the eighteenth century in France, or in more recent days when the Gestapo swept people off to confinement under an overriding authority which the executive in this country happily does not in ordinary times possess. This would be quite contrary to our conceptions of individual liberty. If I may introduce a reference to the well known book, DALTON'S COUNTRY JUSTICE, that author, dealing with arrest and imprisonment, says: "The liberty of a man is a thing specially favoured by the common law."

There are practical considerations, as well as theory, to support the view I take. If the charge on suspicion of which the man is arrested is then and there made known to him, he has the opportunity of giving an explanation of any misunderstanding or of calling attention to other persons for whom he may have been mistaken, with the result that further enquiries may save him from the consequences of false accusation. It must be remembered that in former days arrest was practised not only in certain cases of suspected crime, but as a preliminary in civil suits also.

I entertain no doubt that in the present case the appellants are not exonerated from liability for false imprisonment by satisfying the judge that they had a reasonable suspicion that the respondent had been guilty of theft or of receiving stolen goods knowing they had been stolen, when they never told the respondent that this was the ground of his arrest. Instead of doing so, they gave a different ground which, as Christie admitted, was not a good excuse for arresting him at all.

The respondent alleged a second false imprisonment on Sept. 15, 1942, for which the appellant, Christie, was responsible, and the Court of Appeal has held that the claim for damages in respect of this second imprisonment succeeds. The circumstances were that when on that date the respondent, who was on remand, appeared before the stipendiary magistrate, the Liverpool police asked leave to withdraw the charge of "unlawful possession" on the ground that the Leicester police (misled by Michaelson) had decided to prosecute the respondent for larceny and were on their way to arrest him. The magistrate assented to the withdrawal of the only charge that was before him, and, accordingly, discharged the respondent. Instead of coming out from the dock into the body of the court, the respondent was, by Christie's intervention, motioned to descend the steps to the cells below and was detained at Bridewell until the arrival, some hours later, of a Leicester policeman, who charged the respondent with stealing cloth from Michaelson and took him into custody. The difference between the facts of the first detention on Aug. 31 and the second detention on Sept. 15 is that on the second occasion the respondent knew what was the alleged

felony in respect of which he was being detained. Christie's action on this second occasion was a detention which, in substance if not in form, amounted to an arrest on suspicion of a felony which the respondent knew to be that of larceny, and the case seems to be covered by the exception contained in proposition 3 above. COMYN'S DIGEST, title, Imprisonment, H.5, indicates that an arrest should not take place "in the face of the court," but, on examining the authorities cited, it seems to me that what is meant is that the proceedings of a court and the part taken by litigants and witnesses are not to be disturbed by the execution of an arrest. The gallery at the Old Bailey is not, I presume, an Alsatia for wanted criminals, but it is certainly a better practice to carry through such detentions as the law authorises outside. This, in substance, is what Christie did and I do not agree with the Court of Appeal that damages should be awarded for what happened to the respondent on Sept. 15. I move that, as regards the first imprisonment, the appeal should be dismissed, but that, as regards the second imprisonment, it should be allowed.

LORD THANKERTON : My Lords, I have had the privilege of considering the opinion just delivered by my noble and learned friend on the Woolsack and also the opinions about to be delivered by my noble and learned friends, LORD SIMONDS and LORD DU PARCQ, and I desire to express my concurrence with them.

LORD SIMONDS : My Lords, I agree with SCOTT, L.J., in thinking that this case raises questions of importance affecting the liberty of the subject and for that reason think it right to state in my own words why I am of opinion that this appeal should be dismissed.

The admirably clear and accurate statements of the facts by the trial judge relieves me of the necessity of any prolonged examination of them. I proceed on the basis that, when the appellants arrested the respondent at his premises in Liverpool at about noon on Aug. 31, 1942, they, in fact, suspected that he had stolen a bale of cloth, or had received it knowing that it was stolen, and, further, that they had reasonable grounds for that suspicion. I accept the view adopted by the judge and also by LAWRENCE, L.J., in the Court of Appeal that it is not inconsistent with a reasonable suspicion of felony that the possibility of what is colloquially called a "black market" offence should also have been in his mind. I agree further with the judge in the view which he took of the plea of justification in the defence and the course that he consequently followed of allowing an amendment. It appears to me that the plea as originally drawn clearly indicated that the defendants relied on the power of arrest at common law as well as on the provisions of the Liverpool Corporation Act, 1921, and that the plaintiff suffered no prejudice whatever by an amendment at the trial which put that plea in proper form.

If, then, the appellants reasonably suspected that the respondent had committed a felony, was it not their right to arrest him without a warrant? And, if they did so arrest him, how is it that the arrest can be branded as illegal and an action for false imprisonment lie against them? My Lords, it is here that the crux of the matter lies and it is not easy so to state the law as not, on the one hand, to impinge upon the liberty of the subject, or, on the other hand, to make more difficult the duty of every subject of the King to preserve the King's peace. It was, I think, this difficulty that led LAWRENCE, L.J., to the conclusion that the appellants were not precluded from pleading their reasonable suspicion of felony, which would have justified arrest, by the fact that they at no time charged the respondent with anything but a misdemeanour, which in the circumstances did not justify arrest. The learned Lord Justice states his view of the law thus ([1945] 2 All E.R. at p. 411):

It is argued that it is unfair not to let the person arrested know what the charge against him is and no doubt it is desirable that he should be informed as soon as possible of the facts which are said to constitute a crime on his part and ultimately when the indictment is framed what the actual charge is. But the undoubted fact that the charge may be altered seems to me to show that the right to know the charge only comes into existence when the indictment is finally drawn.

My Lords, in my opinion this statement of the law, which the learned Lord Justice proceeds to apply with perfect logic to the present case, cannot be accepted without qualification.

First, I would say that it is the right of every citizen to be free from arrest

unless there is in some other citizen, whether a constable or not, the right to arrest him. I would say next that it is the corollary of the right of every citizen to be thus free from arrest that he should be entitled to resist arrest unless that arrest is lawful. How can these rights be reconciled with the proposition that he may be arrested without knowing why he is arrested? It is to be remembered that the right of the constable in or out of uniform is, except for a circumstance irrelevant to the present discussion, the same as that of every other citizen.

- A Is citizen A. bound to submit unresistingly to arrest by citizen B. in ignorance of the charge made against him? I think, my Lords, that cannot be the law of England. Blind, unquestioning obedience is the law of tyrants and of slaves. It does not yet flourish on English soil. I would, therefore, submit the general proposition that it is a condition of lawful arrest that the man arrested should be entitled to know why he is arrested, and then, since the affairs of life seldom admit an absolute standard or an unqualified proposition, see whether any qualification is of necessity imposed on it. This approach to the question has, I think, a double support. In the first place, the law requires that, where arrest proceeds on a warrant, the warrant should state the charge on which the arrest is made. I can see no valid reason why this safeguard for the subject should not equally be his when the arrest is made without a warrant. The exigency of the situation, which justifies or demands arrest without a warrant, cannot, as it appears to me, justify or demand either a refusal to state the reason of arrest or a mis-statement of the reason. Arrested with or without a warrant, the subject is entitled to know why he is deprived of his freedom, if only in order that he may without a moment's delay take such steps as will enable him to regain it. In the second place, I find assistance in the analogous procedure in civil proceedings in olden days and in imprisonment for debt. On the former, the judgment of SCOTT, L.J., in this case is illuminating. The sheriff, who by judicial writ was directed to bring the defendant before the court, was not left, nor did he leave the defendant, in ignorance of the demand that must be met. Common justice and common sense required that the defendant should know why he should on such and such a day be brought before the King's justices at Westminster or wherever it might be. So also in regard to imprisonment for debt. On this subject much information is to be found in *Hooper v. Lane* (8). I think it necessary only to cite a single passage from the speech of LORD CRANWORTH, C., (6 H.L. Cas. 550):
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[The sheriff] is bound, when he executes the writ, to make known the ground of the arrest, in order, among other reasons, that the person arrested may know whether he is or is not bound to submit to the arrest.

Here is a clear illustration of the principle on which I base this opinion that, if a man is to be deprived of his freedom, he is entitled to know the reason why.

- F If, then, this is, as I think it is, the fundamental rule, what qualification, if any, must be imposed upon it? The cogent instances given by LAWRENCE, L.J., are conclusive that an arrest does not become wrongful merely because the constable arrests a man for one felony, say, murder, and he is subsequently charged with another felony, say, manslaughter. It is not enough to say that in such a case the accused man could not recover any damages in an action for false imprisonment. It is more than that. It is clear that the constable has not been guilty of an illegal arrest, if he reasonably suspected that murder had been done. Again, I think it is clear that there is no need for the constable to explain the reason of arrest if the arrested man is caught redhanded and the crime is patent to high Heaven. Nor, obviously, is explanation a necessary prelude to arrest where it is important to secure a possibly violent criminal. Nor, again, can it be wrongful to arrest and detain a man on a charge of which he is reasonably suspected with a view to further investigation of a second
- H charge on which information is incomplete. In all such matters a wide measure of discretion must be left to those whose duty it is to preserve the peace and bring criminals to justice.

These and similar considerations lead me to the view that it is not an essential condition of lawful arrest that the constable should at the time of arrest formulate any charge at all, much less the charge which may ultimately be found in the indictment, but this, and this only, is the qualification which I would impose on the general proposition. It leaves untouched the principle, which lies at the heart of the matter, that the arrested man is entitled to be told what is the

act for which he is arrested. The "charge" ultimately made will depend on the view taken by the law of his act. In ninety-nine cases out of a hundred the same words may be used to define the charge or describe the act, nor is any technical precision necessary—for instance, if the act constituting the crime is the killing of another man, it will be immaterial that the arrest is for murder and at a later hour the charge of manslaughter is substituted. The arrested man is left in no doubt that the arrest is for that killing. This is, I think, the fundamental principle, that a man is entitled to know what, in the apt words of LAWRENCE, L.J., are "the facts alleged to constitute crime on his part." If so, it is manifestly wrong that a constable arresting him for one crime should profess to arrest him for another. Of what avail is the prescribed caution if it is directed to an imaginary crime? And how can the accused take steps to explain away a charge of which he has no inkling?

I turn then to the present case which appears to me to present a strange combination of circumstances. For, while I doubt not that the appellants reasonably suspected the respondent of having committed a felony, yet I must on the evidence conclude that they refrained from bringing home to his mind at the time of arrest that that was their suspicion. Their minds, it is clear, were running on the provisions of the Liverpool Act, that curiosity of penal legislation, about which I need say no more than has already fallen from your Lordships. It is from that Act alone (though the *ipsissima verba* do not occur in it) that the expression "unlawful possession," with which this case is riddled, is derived. So, when counsel asked the appellant, Christie, in cross-examination: "You made your arrest in the terms that he was arrested for being in unlawful possession of the cloth"? though he may well have wondered what was meant by "in the terms that," he answered: "Yes." And to the next question: "You have always, so far as you were concerned, dealt with him in terms of being in unlawful possession of the cloth...? It has never been, so far as you are concerned, any other charge"? he answered: "No." So, also, in the station charge book the charge was entered as "unlawful possession of a quantity of cloth at the warehouse 196, Beaufort Street on Aug. 31, 1942."

It is clear then that, whatever may have been the secret thought of the constables at the time of the arrest and detention, they allowed the respondent to think that he was being arrested for being "in unlawful possession" of certain goods, an offence, if it be an offence, which was at the most a misdemeanour within the Liverpool Act and could not, except under conditions which did not here obtain, justify an arrest without a warrant, and was described in terms not calculated to bring home to him that he was suspected of stealing or receiving the goods. In these circumstances the initial arrest and detention were wrongful. He was not aware and was not made aware of the act alleged to constitute his crime, but was misled by a statement which was calculated to suggest to his uneasy conscience that he was guilty of a so-called black market offence. It is no answer that the constables had no sinister motive. They had from the administrative point of view a perfectly good motive. It will be found in an answer to a question, which, though it related to a later stage of the proceedings, is equally applicable to the earlier: "Why did you not then charge him with larceny?" To this the revealing answer was: "Because that larceny was committed at Leicester and it would then be a matter of withdrawing one charge and handing him over to Leicester. Unlawful possession was the most convenient charge at the time until he could be handed over to the Leicester City Police."

My Lords, the liberty of the subject and the convenience of the police or any other executive authority are not to be weighed in the scales against each other. This case will have served a useful purpose if it enables your Lordships once more to proclaim that a man is not to be deprived of his liberty except in due course and process of law.

On the second part of the case, *viz.*, the alleged wrongful imprisonment on Sept. 15, I will add only a few words. Here I find myself in complete agreement with the conclusions reached by the trial judge and LAWRENCE, L.J. On that day Christie suspected the respondent of a felony with which the Leicester police proposed to charge him. He had good grounds for his suspicion. For it was the misfortune of the respondent that the doubts engendered by his own equivocation had been strengthened by the false statements of Michaelson, his associate in the transaction, so that his belated candour did not carry the con-

viction that it otherwise might have done. I see no reason, therefore, why Christie, entertaining the reasonable suspicion, which he had no reason to doubt the Leicester police shared, should not have arrested the respondent and detained him to await their arrival. Here, as it appears to me, there was no question of convenience superseding the law. On the contrary, Christie was acting within the law and in accordance with his duty. It is not necessary to decide the question whether it was unlawful to effect the arrest actually in court. I should

A hesitate to say that such an arrest is necessarily unlawful, but in any case the difference between being arrested on one side of the door of the court or the other is unsubstantial and I agree that the rule of "*de minimis*" is applicable. Therefore, while concurring in the motion that the appeal should be dismissed, I would add that in the assessment of damage only the first arrest and consequent imprisonment should be considered.

B My Lords, since writing this opinion, I have had the advantage of seeing in print the speeches of LORD SIMON and LORD DU PARCQ. I am fully in agreement with them and am happy to find that the authorities, which are now brought to the attention of the House, amply support the conclusions at which I had arrived.

C LORD DU PARCQ: My Lords, it is common ground between the parties to this appeal, and was admitted by the appellant, Christie, in the witness-box, that the only charge made against the respondent at the time of his arrest and during the period described in the order of the Court of Appeal as the "first imprisonment" was a charge under the Liverpool Corporation Act, s. 507 (1). It is beyond doubt that the appellants had no right to arrest the respondent without a warrant on that charge. There is, I think, equally no doubt that, at common law,

D . . . a constable is justified in arresting a person without a warrant, upon a reasonable suspicion of a felony having been committed, and of the person being guilty of it, although no felony has in fact been committed.

In stating this proposition, I have quoted a passage from BULLEN AND LEAKE'S PRECEDENTS OF PLEADING (3rd ed. 104). I should have said that this proposition was both indisputable and undisputed, but for the fact that I understood counsel for the respondent to tell the House that he was prepared to challenge it if it were thought desirable that he should deal with the point. Certainly it has come to be regarded as a settled principle of our law. It confers on the police one of the few privileges which they enjoy at common law, and it is relevant to the serious question which your Lordships have to decide to observe how gradually, and one may almost say grudgingly, the courts came to grant to the peace officer a right denied to the private citizen, who cannot justify an arrest on reasonable suspicion of felony if the suspected felony has not in fact been committed. The law at first recognised no distinction in this respect between the private citizen and the peace officer, who was thus put into a position of difficulty. If he were called on by a private citizen of repute to arrest a person for felony, he was in duty bound to do so. The oath administered to a High Constable in the seventeenth century contained the words: "You shall do your best endeavour (upon complaint to you made) to apprehend all felons, barretors and rioters," and petty constables were called on to swear that in the presence of the High Constable they should "be aiding and assisting unto him," and in his absence they should "execute his office." (The oaths are set out fully in CAPT. MELVILLE LEE'S HISTORY OF POLICE IN ENGLAND (1901) 111). ABBOTT, C.J., was, therefore, stating a long established rule when he said, in 1827, that "if a reasonable charge of felony is given, a constable is bound to take the offender into custody." (*Cowles v. Dunbar* (9)). It might turn out that the

F constable's informant was mistaken, and that no felony had been committed, and then the officer would be held liable in an action for false imprisonment. A solution was found in 1780, when it was held that a constable could justify arrest made on a charge preferred by another person, although no felony had in fact been committed. (*Samuel v. Payne* (10)). This case did not decide, however, that the constable could safely arrest on suspicions of his own, however reasonable they might be, if no felony had been committed. Indeed, it remained the better opinion for many years that in such a case he was not protected. BULLER, J., in 1788, stated the law as it was then understood in these words:

That if a peace officer of his own head takes a person into custody on suspicion, he must prove that there was such a crime committed; but that if he receives a person into custody on a charge preferred by another of felony or a breach of the peace, then he is to be considered as a mere conduit; and if no felony or breach of the peace was committed, the person who preferred the charge alone is answerable.

This ruling of BULLER, J., in *Williams v. Dawson* (11) was in terms approved by LORD ELLENBOROUGH in 1813 (*Hobbs v. Branscomb* (12)). In 1827, however, LORD TENTERDEN, C.J., giving the judgment of the Court of King's Bench in *Beckwith v. Philby* (13), distinguished the case of the constable from that of the private individual, and said that

... a constable having reasonable ground to suspect that a felony has been committed, is authorised to detain the party suspected until inquiry can be made by the proper authorities.

This would seem to conclude the matter, but the old rule died hard, and even in 1869, in DR. BURN'S JUSTICE OF THE PEACE (30th ed. 295), a doubt is expressed whether the constable who acts on his own initiative is in any different position from the private citizen. Save in some exceptional cases, no such doubt can be justified today. The judges of England have long regarded the law on this point as settled—see, for instance, the judgment of BLACKBURN, J., in *Hadley v. Perks* (14) (L.R. 1 Q.B., 456) and that of SIR RUFUS ISAACS, C.J., in *Walters v. Smith (W. H.) & Son, Ltd.* (3) ([1914] 1 K.B. 602)—and juries have long been directed as a matter of course in accordance with the rule stated in the passage which I have quoted from BULLEN and LEAKE. Your Lordships, I think, will all agree with STABLE, J., and the Court of Appeal that the generally accepted view is without doubt correct.

The question which gives to this appeal its importance and interest may be stated fairly, I think, as follows. In the circumstances of this case was it open to the appellants, who arrested and imprisoned the respondent without a warrant on a charge, formally made, on which they could not lawfully so arrest him, to justify that arrest and imprisonment by proof that, at and after the time of the arrest, they suspected him, on reasonable grounds, of having committed one or other of certain felonies? In so stating the question I have assumed that the police spoke the truth when they said that they suspected Leachinsky of felony, and that they had reasonable grounds for their suspicion. STABLE, J., so found, and I am not prepared to differ from this finding of fact. The appellants, in para. 17 of their Case, set out the contention, which their counsel sought to maintain at the Bar,

... that where a police constable has reasonable and probable cause to suspect and does suspect that a person has committed a felony he may lawfully arrest that person without specifying any particular felony or even telling that person that he is arresting him on suspicion of felony.

If this contention were accepted, it would not necessarily follow that a constable acts lawfully if he specifies as the ground of arrest some charge (not itself justifying arrest without warrant) other than that for which he is in fact making the arrest. The contention, however, constitutes a necessary step in the appellants' argument, and must be examined. Even if the appellants' proposition be read as referring only to the moment of arrest, it is not an accurate statement of the general rule. My noble and learned friend on the Woolsack has cited authorities which, while they show that circumstances may justify an arrest without a statement of the reason for the arrest, do not invalidate, but rather assume and affirm, the general rule which my noble friend has quoted from BURN'S JUSTICE OF THE PEACE, to which rule they must be regarded as exceptions. The principles established by the authorities are agreeable to common sense, and follow from the governing rule of the common law that a man is entitled to his liberty, and may, if necessary, defend his own freedom by force. If another person has a lawful reason for seeking to deprive him of that liberty, that person must as a general rule tell him what the reason is, for, unless he is told, he cannot be expected to submit to arrest or be blamed for resistance. The right to arrest and the duty to submit are correlative. This principle is applicable both to arrests in execution of civil process and to arrests on a criminal charge. It was stated in this House by LORD CRANWORTH, L.C., in *Hooper v. Lane* (8) where he said (6 H.L. Cas., 550) that a sheriff

... is bound, when he executes the writ, to make known the ground of the arrest,

in order, among other reasons, that the person arrested may know whether he is or is not bound to submit to the arrest.

While this is the general rule, it is certainly true that officers and ministers of public justice, of whom SIR MATTHEW HALE says in his *PLEAS OF THE CROWN* (Vol. II, c. X) that they are under a greater protection of the law than private persons, are often justified in making an arrest without a preliminary or simultaneous statement of the charge. The law does not encourage the subject to resist the authority of one whom he knows to be an officer of the law. In *Mac-kalley's* case (4), where it was a serjeant-at-mace who made the arrest, it was said that if the party knows the person arresting him to be an officer he must not offer resistance, "and if he has no lawful warrant he may have his action for false imprisonment." That case, however, plainly recognised that the officer was under a duty to state the ground of the arrest "when the party arrested submits himself to the arrest." The present case was not one of those exceptional (I do not say rare) instances in which no charge need be stated at the time of arrest. Mr. Leachinsky was not so ill-advised as to offer resistance to the police, who had no excuse at all to offer for not performing their duty to acquaint him with the ground of arrest except, it would seem, ignorance of the law. I am glad to think that this ignorance is exceptional, and in this regard some of the answers given by Detective-Sgt. Moorhouse, of the Leicester city police, when under cross-examination, are significant and reassuring. It must be admitted that the form of the questions which he was answering is not to be commended, and that objection might well have been taken to them, but his answers are of value as showing what the witness, as an experienced police officer, understood his duty to be. I will quote four questions and answers :—

(Q) When a man is arrested, immediately on arrest he is told what he is arrested for, is he not ?—By me. I always tell him what he is arrested for.

(Q) The law is, even if you be a police officer of the highest rank, you cannot detain a man without telling him why he is detained, can you ?—He should be told why he is detained.

(Q) At once ?—Yes.

(Q) Meaning by "at once" the earliest reasonable moment ?—The earliest reasonable moment.

In my opinion, those answers correctly state the policeman's duty. In cases where a statement of the charge at the moment of arrest is, in the circumstances, excused, there is still a duty to acquaint him with it at the first reasonable opportunity. Arrest (as is said in DALTON'S "COUNTRY JUSTICE," 1727 ed., 580) "may be called the beginning of imprisonment," and these appellants were called on to justify the whole imprisonment and not its beginning alone.

I find it difficult to believe that the appellants would have sought to defend their conduct if the fact had been that Leachinsky had been arrested and taken to prison without ever being given a reason for his arrest until he came before the magistrate. It is a curious feature of this case that the arrest and the subsequent proceedings were carried out with what must have seemed to any man unskilled in the law to be a careful attention to all the requisite formalities. The appellants did not omit to charge the respondent at the time of his arrest.

They charged him, in due form, with an offence which, as the appellant, Christie, admittedly knew, did not justify the arrest. They cautioned him when he was arrested, and I must assume, in the absence of evidence as to the words used, that the form prescribed by the Judges' Rules was followed, and that he was asked the question: "Do you wish to say anything in answer to the charge?"

The caution was twice repeated—when the police arrived with the prisoner at the police station, and again when he was taken before Sgt. Tindall, the "Bridewell sergeant." He was thus, with impressive solemnity, invited on three separate occasions to defend himself on a charge which was not the charge for which he was arrested. This repetition of a deceptive formula does not disguise the fact that the appellants wholly failed in their duty to tell him what that charge was.

The omission to tell a person who is arrested at, or within a reasonable time of, the arrest with what offence he is charged cannot be regarded as a mere irregularity. Arrest and imprisonment, without a warrant, on a charge which does not justify arrest, are unlawful and, therefore, constitute false imprisonment, whether the person making the arrest is a policeman or a private individual.

This follows in my opinion from the decision of the judges in *Rex v. Curvan* (15). Curvan had been arrested by a constable, without a warrant, for "insulting a man on a road." The constable was acting on a complaint which had been made to him, but the alleged offence did not, of course, justify Curvan's arrest without a warrant. He escaped, and later, one Walby, a private person, on whom the constable had called for assistance, stopped him and attempted to arrest him, threatening him with a stick. Curvan, after telling Walby that he would stab him if he did not let him go, cut him in the face with a knife. He was subsequently tried on an indictment, one count of which charged him with feloniously cutting Walby "with intent to obstruct, resist, and prevent the lawful apprehension and detainer for a certain offence, for which he was then liable by law to be apprehended and detained." He was convicted on this count. HOLROYD, J., who tried the case, reserved it for the opinion of the judges, who held "that the original arrest was illegal, and that the recaption would also have been illegal; and therefore the case would not have been murder if death had ensued, and consequently the prisoner was entitled to an acquittal." The importance of this decision for the present purpose is not so much that it strikingly demonstrates to what lengths a man may go in the defence of his liberty as that it emphasises the illegality of an arrest without a warrant on a specified charge which does not justify such an arrest. If, when a charge which does not justify arrest has been expressly made, the person charged is entitled to resist apprehension, I find it impossible to suppose that the law will hold the arrest good if it subsequently appears that the officer had in his own mind an unexpressed suspicion that a felony had been committed. The right to resist is, as I have tried to show, always limited by the duty to submit to arrest by an officer of the law even though the reason for arrest is not at once stated. *Rex v. Woolmer* (16) was a case in which a man's failure to observe this distinction led to his conviction and punishment for a violent attack on the watchman who was seeking to apprehend him, but, if a reason has been stated which is on the face of it insufficient to justify arrest without warrant, no man could safely defend his liberty if some other ground for the arrest, which the officer had deliberately chosen to conceal from him, could subsequently be brought forward by way of justification. The prisoner in *Rex v. Curvan* (15) could not properly have been convicted even if it had been proved at his trial that the constable had in his mind a reasonable suspicion that he had committed a felony.

I have already reminded your Lordships of the reluctance of the courts to accord to the officer of the law any rights or privileges which are denied to private citizens. SIR JAMES FITZJAMES STEPHEN wrote in a passage which was cited by SCOTT, L.J. ([1945] 2 All E.R. 402):

... with some few exceptions, he may be described as a private person paid to perform as a matter of duty acts which, if so minded, he might have done voluntarily: HISTORY OF THE CRIMINAL LAW, Vol. I, 494.

The learned author said further that when the police constable had made an arrest he was under precisely the same obligations as a private person, and I believe this to be a correct statement of the common law. It can hardly be maintained that it would be a mere irregularity, against which the law provides no sanction, if a private person were to arrest and detain a fellow subject without intimating to him the reason for his imprisonment, or that such a person could strengthen his position in the eye of the law by stating an inadequate reason and keeping a better one in reserve. I know of no previous case in which the police, to say nothing of private persons, have claimed a right to keep their prisoner in ignorance of the charge which he has to meet. It is worthy of note that when one Bentley was tried and convicted at the Central Criminal Court in 1850 in consequence of violent resistance which, being drunk at the time, he had offered to the constable arresting him, and it was part of his defence that the constable had not told him for what he was being arrested, TALFOURD, J., in his charge to the jury laid stress on the fact that the constable had told the prisoner "that if he went to the station he should know the charge against him": see *R. v. Bentley* (17).

Finally, the duty to make a definite charge against a person who has been arrested without a warrant has been impliedly affirmed by the legislature. The Criminal Justice Administration Act, 1914, s. 22, which replaced the Summary Jurisdiction Act, 1879, s. 38, provides:

(1) On a person being taken into custody for an offence without a warrant, a superintendent . . . may in any case, and shall, if it will not be practicable to bring such person before a court of summary jurisdiction within 24 hours after he was so taken into custody, inquire into the case, and, unless the offence appears to such superintendent . . . to be of a serious nature, discharge the person upon his entering into a recognisance . . .

A The offence to be inquired into is the offence for which the person has been arrested.

For these reasons I take the same view of the law as that which has been more concisely expressed by my noble and learned friend on the Woolsack, and I agree with him that the arrest of the respondent and his detention down to the time when he was first brought before a magistrate were unlawful, and that he is entitled to recover damages for false imprisonment in respect of them.

B I have not so far dealt with the "second imprisonment" referred to in the order of the Court of Appeal. In my opinion, the appellant, Christie, was justified in detaining the respondent from the time of his acquittal on the charge under the Liverpool Corporation Act until the Leicester police took him into custody. This seems to me to be plain, in the light of the admitted facts, on the principle stated in *Beckwith v. Philby* (13) which I have already cited. Christie said in his evidence that he had almost immediately told the respondent the true ground of this detention. The respondent was not asked whether he had been so informed, partly because of the state of the unamended pleadings when he first went into the witness-box, and partly, no doubt, because STABLE, J., expressed the view that the matter was irrelevant. I think, however, that there is no reason to doubt that Christie's evidence on this point was true, and I did not understand counsel for the respondent to challenge its accuracy. The only question which remains is whether Mr. Leachinsky ought to have been allowed to leave the court by another exit, and not directed to go immediately into confinement, and it is suggested that what was done was tantamount to an arrest in the face of the court, and was thus unlawful on the authority of COMYN'S DIGEST (Imprisonment, H. 5). If Mr. Leachinsky had gone out by the door of the court he would, and could lawfully, have been at once arrested, so that on any view he could not be said to have suffered serious damage by the alleged irregularity. I am of opinion, however, that, although it is, no doubt, undesirable, speaking generally, that an arrest should be made in court, such an arrest, while it might well be a contempt of court in certain circumstances, will not, if in other respects justified, give rise to an action for damages unless, indeed, the person arrested is one who has a duty to be in court (as, for instance counsel, solicitor, or witness) when different considerations may apply. The authorities cited in COMYN'S DIGEST all deal with arrest in execution of civil process, and, even if it be right to regard this as an immaterial distinction they do not seem to me to assist the respondent.

F In the result, I think that this appeal fails on the main issue, although the order of the Court of Appeal will require modification in respect of the "second imprisonment." I must add, however, that, although I agree in the result with the judgment of SCOTT, L.J., on the main issue, I must not be taken to approve all the statements of the law which it contains. Some of these statements will be seen, I think, to be inconsistent with the view of the law which I have stated, but it is right that I should deal particularly with two of them. First, if, as I think, the Lord Justice intended to lay down that the charge must be specifically and precisely formulated, without "duplicity" in the technical sense of that word, at the time of arrest, I think that his view is contrary to authority and much too strict. If it were right, it would put great difficulties in the way not only of the police but of private persons who felt it to be their duty to make an arrest on suspicion. It is, moreover, manifestly contrary to what was decided by the judges in *Rex v. Ford* (7), a case in which the charge was most inaptly stated at the time of arrest. Ford violently resisted arrest, and his defence that he was not charged with any legal offence did not avail him. The judges held that, although the charge was defective, this defect was immaterial, and "that it was not necessary the charge should contain the same accurate description of the offence as an indictment." Secondly, I think that the observations of the Lord Justice as to the impropriety of arresting on a minor charge a man suspected of murder may be understood in a sense which the Lord Justice

cannot, I think, have intended them to bear. If all that the Lord Justice means is that the police have no right to arrest a man suspected of murder on a minor charge solely in order to prevent his escape, and with no belief in or reasonable suspicion of his guilt on that minor charge, then I think that his opinion is plainly right. If, however, his words are to be taken to mean that it is wrong to arrest such a suspect on a minor charge, itself of such a nature as to justify arrest without a warrant, of which the police believe him to be guilty, when their real or principal motive is to prevent his escape from justice, and that in such a case arrest and detention on the minor charge would constitute false imprisonment, I must say, with great respect, that this seems to me to be a highly questionable proposition. I concur in the motion which is about to be proposed from the Woolsack.

VISCOUNT SIMON: My Lords, LORD MACMILLAN, who is not able to be present today, authorises me to say that he concurs in the opinions which have been expressed in this case.

Appeal dismissed in part.

Solicitors: *Cree & Son*, agents for *W. H. Buines*, Liverpool (for the appellants); *Sidney Pearlman*, agent for *Silverman & Livermore*, Liverpool (for the respondent).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

Applied. SIMPSON v. SIMPSON.
1951] 1 All E.R. 955.

WATT (OR THOMAS) v. THOMAS

[HOUSE OF LORDS (Viscount Simon, Lord Thankerton, Lord Macmillan, Lord Simonds and Lord du Parcq), November 18, 19, 21, 22, 25, 26, 1946, March 25, 1947.]

Practice—Appeal—Judge without jury—Question of fact—Principles on which court acts.

Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

On a petition for divorce by the husband on the ground of his wife's cruelty the Lord Ordinary refused to grant a decree. The Second Division of the Court of Session reversed the decision of the Lord Ordinary, the judge whose opinion formed the judgment of the court repeatedly refusing to accept the opinion of the Lord Ordinary on the evidence, resulting from an assessment of its value which must have been materially affected by the appearance of the witnesses and the way in which they gave their evidence. On appeal to the House of Lords:—

HELD (VISCOUNT SIMON dissenting): without having seen or heard the witnesses the House was not in a position to come to any satisfactory conclusion on the printed evidence; there was no justification for rejecting the views of the Lord Ordinary, and the duty of an appellate court in regard to the decision of a judge sitting without a jury on a question of fact, when there was no misdirection, had been misconceived or disregarded; and the appeal should, therefore, be allowed.

Qu.: how far the risk of retaliation by the injured spouse is a relevant consideration in proceedings for divorce founded on cruelty.

[AS TO PRINCIPLES ON WHICH COURT ACTS ON HEARING APPEALS, see HALSBURY, Hailsham Edn., Vol. 26, p. 122, para. 241; and FOR CASES, see DIGEST, Practice, pp. 769-771, Nos. 3348-3362.

AS TO WHAT CONSTITUTES CRUELTY, see HALSBURY, Hailsham Edn., Vol. 10,

pp. 649-654, paras. 954-962; and FOR CASES, see DIGEST, Vol. 27, pp. 281-291, Nos. 2518-2261.]

Cases referred to:

- (1) *Powell v. Streatham Manor Nursing Home*, [1935] A.C. 243; 104 L.J.K.B. 304; 152 L.T. 563; Digest Supp.
- (2) *Yuill v. Yuill*, [1945] 1 All E.R. 183; [1945] P. 15; 114 L.J.P. 1; 172 L.T. 114; Digest Supp.
- (3) *Dunn v. Dunn's Trustees*, 1930 S.C. 131; Digest Supp.
- A (4) *Kinnell v. Peebles*, 17 R. (Ct. of Sess.) 416.
- (5) *Paterson v. Paterson* (1850), 3 H.L. Cas. 308; *sub nom. Paterson v. Russell* (or *Paterson*), 15 L.T.O.S. 537; 27 Digest 282, 2533.
- (6) *Evans v. Evans* (1790), 1 Hag. Con. 35; 27 Digest 281, 2522.
- (7) *Russell v. Russell*, [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 771; 27 Digest 291, 2661.
- (8) *Graham v. Graham* (1878), 5 R. (Ct. of Sess.) 1093.
- (9) *Adair v. Adair*, 1924 S.C. 798; 1924 S.L.T. 749.
- B (10) *Meacher v. Meacher*, [1946] 2 All E.R. 307; [1946] P. 216; 175 L.T. 405.
- (11) *Dawson v. Dawson*, 1925 S.C. 221; 27 Digest 457, *t.*
- (12) *Main v. Main*, 1945 S.C. 469; 1945 S.L.T. 276.
- (13) *Forth v. Forth* (1867), 36 L.J.P. & M. 122; 16 L.T. 574; 27 Digest 494, 5274.
- (14) *Robins v. National Trust Co.*, [1927] A.C. 515; 96 L.J.P.C. 84; 137 L.T. 1; Digest Supp.
- (15) *Clarke v. Edinburgh & District Tramways Co.*, 1919 S.C. (H.L.) 35.
- C (16) *Kilpatrick v. Dunlop*, 1916 S.C. 631 *n.*
- (17) *Hvalfangerselskapet Polaris A-S v. Unilever, Ltd., Lever Bros., Ltd. and another* (1933), 46 Ll.L.R. 29.
- (18) *Maguire v. M'Neil (Charles), Ltd.*, 1922 S.C. 174.
- (19) *Duffy v. Duffy*, 1946 Sessions Notes 116.
- (20) *Nisbet v. Nisbet* (1896), 4 S.L.T. 142.

D APPEAL by the wife from a judgment of the Second Division of the Court of Session (the LORD JUSTICE-CLERK (COOPER), LORD MACKAY and LORD STEVENSON), dated Dec. 5, 1945, and reported 1946 S.C. 81, reversing the decision of the Lord Ordinary (LORD PATRICK), dated Aug. 17, 1945, who refused to grant to the husband a decree of divorce on the ground of the wife's cruelty. The facts appear in the opinion of VISCOUNT SIMON.

L. Hill Watson, K.C., and *J. A. Crawford* (both of the Scottish Bar) for the wife.

E *Hector McKechnie, K.C.*, and *W. E. R. Hendry* (both of the Scottish Bar) for the husband.

The House took time for consideration.

Mar. 25. VISCOUNT SIMON: My Lords, this is the wife's appeal from a judgment of the Second Division of the Court of Session (LORD JUSTICE-CLERK COOPER, LORD MACKAY, and LORD STEVENSON), reversing the decision of the LORD ORDINARY (LORD PATRICK), who refused to grant to the husband a decree of divorce on the ground of his wife's cruelty. The main ground for this reversal was that the members of the Court of Session took a different view from that of the Lord Ordinary of the facts as disclosed by the evidence given at the original hearing, and of the inferences properly to be drawn therefrom. The reasons for taking this different view are set out in an elaborate opinion delivered by LORD MACKAY. The main question, therefore, which the House has to determine is whether there is sufficient justification for reversing the conclusion reached by the Lord Ordinary.

G Before entering on an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. H Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (*e.g.*, on a Case Stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached on that evidence should stand, but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide, but if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at at the trial, and especially if

that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given. What I have just said reproduces in effect the view previously expressed in this House, e.g., by VISCOUNT SANKEY in *Powell and Wife v. Streatham Manor Nursing Home* (1) ([1935] A.C. 250), and in earlier cases there quoted. LORD GREENE, M.R., admirably states the limitations to be observed in the course of his judgment in *Yuill v. Yuill* (2) ([1945] 1 All E.R. 184). LORD PRESIDENT CLYDE, in *Dunn v. Dunn* (3) (1930 S.C. 144) summarised the scope of appellate correction, with copious citation of earlier authority, and I agree with him that the true rule is that expounded by LORD PRESIDENT INGLIS in *Kinnell v. Peebles* (4) (R. (Ct. of Sess.) 423), that a court of appeal should "attach the greatest weight to the opinion of the judge who saw the witnesses and heard their evidence," and, consequently, should not disturb a judgment of fact unless they are satisfied that it is unsound. It not infrequently happens that a preference for A.'s evidence over the contrasted evidence of B. is due to inferences from other conclusions reached in the judge's mind rather than from an unfavourable view of B.'s veracity as such. In such cases it is legitimate for an appellate tribunal to examine the grounds of these other conclusions and the inferences drawn from them, if the materials admit of this, and, if the appellate tribunal is convinced that these inferences are erroneous and that the rejection of B.'s evidence was due to the error, it will be justified in taking a different view of the value of B.'s evidence. I would only add that the decision of an appellate court whether or not to reverse conclusions of fact reached by the judge at the trial must naturally be affected by the nature and circumstances of the case under consideration.

What I have said applies to appeals from a judge sitting alone. Conclusions of fact embodied in the verdict of a jury cannot be subjected to the same degree of re-examination, for the course of reasoning by which the verdict has been reached is not disclosed, and, consequently, the verdict of a jury on fact must stand if there was any evidence to support it and if the conclusion is one at which a reasonable jury, when properly directed, might reasonably arrive.

I now turn to the evidence in the present case. The parties were married on Feb. 27, 1927, and have two children—Lornie born in Mar., 1928, and Maurice born in August, 1931. It is an important fact that the family home was a house at Alyth which belonged to the wife. There husband and wife lived together with a fair degree of happiness till the latter half of 1939, when relations began to deteriorate—the wife says because her husband showed too much attention to a lady employed in his business and named Miss Margaret Stewart. By Sept., 1939, the situation was that the wife deeply resented this friendship and insisted that it should cease, while the husband valued Miss Stewart's services to his business and regarded his wife's attitude as quite unreasonable.

[HIS LORDSHIP said that the wife's jealousy developed into an obsession. Scenes occurred during one of which she kicked her husband. When he insisted that she must occupy a separate room for sleeping that his rest should not be broken, she constantly disturbed him by getting up in the night and banging the doors in the house. He, on his side, reacted to her reproaches by maintaining silence. During 1940 she repeatedly insisted that he should leave the house altogether, and hand over his key to her. Finally, on Sept. 7, she came to his room early in the morning to tell him to "clear out," demanding the house-key and threatening to "split his head open" if he stayed. The wife did not deny that she made this threat. Later in the day, while he was shaving upstairs in the bathroom, she again lost control of herself, came to the door to demand the house-key, abused Miss Stewart without getting any answer from him, and finally carried out her threat by striking him on the side of the head. There was plenty of corroboration that the assault was serious. There was evidence from a specialist in nervous diseases and the family doctor that

the husband's subsequent condition was consistent with his having been treated as he alleged, and that it would be dangerous for him to resume married life under such conditions. HIS LORDSHIP continued :—] While not subscribing to all the strictures made on the Lord Ordinary's opinion by LORD MACKAY, I have come to the conclusion that the Second Division was right in recalling the interlocutor and that the decree of divorce thus granted should stand.

- The Lord Ordinary had to deal with two issues :—(1) Had the husband
A proved the wife's cruelty ? (2) If he had, was there, nevertheless, any adequate reason disentitling him to a decree of dissolution of the marriage ? The wife's cruelty, in the necessary sense, was in my opinion clearly proved. I do not think there is any material difference between the law of England and that of Scotland as to the general nature of the ill-treatment which may constitute cruelty in a matrimonial cause. LORD BROUGHAM, in *Paterson v. Paterson* (5) (3 H.L. Cas. 308) asserted the substantial identity of the conception in the two countries. It is, generally speaking, conduct of such a character as to cause
B danger to life, limb or health (whether of body or of mind) or as to give rise to a reasonable apprehension of such danger, but the leading judicial authorities in both countries who have dealt with this subject are careful not to speak in too precise and absolute terms, for the circumstances which might conceivably arise in an unhappy married life are infinitely various. LORD STOWELL, for
C example, in *Evans v. Evans* (6) (1 Hag. Cons. 37, 38) avoids giving a "direct definition" while insisting that "mere austerity of temper, petulance of manners, rudeness of language, want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty." Again, LORD DAVEY in *Russell v. Russell* (7) ([1897] A.C. 468), points out that the courts have declined "to lay down any hard and fast definition of legal cruelty," but none the less concurred with the majority
D of the House in affirming that the principle acted on is that of "giving protection to the complaining spouse against actual or apprehended violence, physical ill-treatment, or injury to health." The same principle is recognised as governing the concept of *saevitia* in Scots law : see FRASER ON HUSBAND AND WIFE 2nd ed., vol. 2, pp. 788-900. There is, indeed, one difference which is suggested to exist at the present time between the law of England and the law of Scotland as regards the right to divorce on the ground of the cruelty of the other spouse.
E Before the Scottish Act of 1938, the only remedy for such cruelty was an action of separation, and for such an action to succeed in Scotland it was not enough to rely on past acts of cruelty, for judicial separation was "considered as belonging to the department of preventive police" (FRASER ON HUSBAND AND WIFE, 2nd ed., vol. 2, p. 877), and the court intervened only when its order was needed for the future protection of the pursuer. Thus, in *Graham v. Graham* (8),
F which was a case in which a wife complained of the past cruelties of her husband, LORD PRESIDENT INGLIS observed (5 R. (Ct. of Sess.) 1095) that the true issue was "whether the wife can with safety to person and health live with him now." LORD ASHMORE's decision in *Adair v. Adair* (9) was to the same effect. It is, I think, questionable whether, on the proper construction of the Act of 1938, this consideration of the prospect of future danger to the pursuer is relevant, but I do not find it necessary in the present
G case to reach a decision on the point. There was undisputed medical evidence that, in view of the husband's condition after the assault of Sept. 7 and of the wife's pathological state, there was danger for the future. The definition of the nature of cruelty is unchanged by the Act, and what is here involved is not the meaning of the expression, but the conditions attached to the remedy. As long as the remedy was separation without dissolution of marriage, it is easy to understand how the Scottish courts came to refuse the remedy if there was
H no reason to suppose that the cruelty might be repeated, but when Parliament authorises a decree of dissolution on the ground that the defender "has been guilty" of cruelty, defined as it was defined for the purposes of separation, it seems difficult to introduce as a necessary condition that further cruelty must be apprehended, though this was necessary if the remedy of separation was being sought. This view appears to me to be strengthened by the terms of s. 4 of the Act. In England, at any rate, it has been held by the Court of Appeal that under the Matrimonial Causes Act, 1937 (where, however, the words differ from those used in the Scottish Act) a decree of dissolution on the ground of cruelty

is based on past behaviour, and that there is no condition that the decree should be withheld "unless there is also a reasonable fear that further acts of cruelty will be committed" (*Meacher v. Meacher* (10)).

I do not see how a deliberate blow on the head, delivered after a threat of such an assault if he did not give up the house-key, and leading to the condition described by Dr. Paris, can—even if standing alone—be dismissed as not constituting legal cruelty: see *Dawson v. Dawson* (11). If the assault alleged to have occurred a year before is disregarded or excused, there is still also the persistent banging of doors at night which, even if the frequency of this performance is exaggerated, is admitted by the wife to have occurred and was a wanton disturbance of his sleep contributing to his nervous debility. The Lord Ordinary's main reason for refusing the decree seems to be, not that the wife did not in Sept., 1940, treat her husband with cruelty, but that he deserved all he got. He says: "In my opinion, he has no good reason to complain of what happened to him after Aug., 1939," i.e., after motoring Miss Stewart to the Highland show and annoying his wife by the suggestion that the lady should be included in a family excursion to Bournemouth. However reprehensible or inconsiderate was his behaviour down to Aug., 1939, or later, I cannot regard this as excusing the assault of Sept., 1940, especially as Miss Stewart left the husband's service and finally passed from the scene in the previous July. It is deplorable that this degree of mutual friction and discord should have existed between them, but I cannot regard the behaviour of the husband in this case as having "provoked" the assault of Sept. 7 in any relevant sense—in the sense in which a husband's shortcomings in relation to his wife may sometimes disentitle him to a decree for adultery or desertion. Neither can the husband's right to a decree for cruelty be denied on the ground of the wife's pathological condition which was producing increased nervous irritability. I conclude, therefore, that the appeal should be dismissed. In the view I take, it is not necessary to pronounce on the correctness of decisions such as *Main v. Main* (12), and *Forth v. Forth* (13), where one of the considerations supporting the decree for relief was that otherwise the complaining party might be tempted to retaliate. It is due to the husband to say that neither his pleadings nor his evidence suggest that he might be provoked to do so.

LORD THANKERTON: My Lords, for the first time in Scotland cruelty was made a ground of dissolution of marriage by s. 1 (1) (c) of the Divorce (Scotland) Act, 1938, which provided as follows:

1. (1) Without prejudice to the power of the court to grant decree of divorce on the ground of adultery, it shall be competent for the court to grant decree of divorce on any of the following grounds, that is to say, that the defender— . . . (c) has been guilty of such cruelty towards the pursuer as would justify, according to the law and practice existing at the passing of this Act, the granting of a decree of separation *a mensa et thoro*.

I agree with my noble and learned friend on the Woolsack that, under the law and practice then existing, apart from the question of the quality of *saevitia* or cruelty, the court treated the matter as one of future protection for the complaining spouse, and that past acts of cruelty were only relevant in estimating future risks. It may well be open to argument that the Act of 1938 only imports the pre-existing law and practice as regards the quality of the cruelty required to be established, but does not retain the consideration of future risks. It is not necessary to consider that question for the purposes of the present appeal, and I, therefore, reserve it for future consideration, and express no opinion on it.

My Lords, I am of opinion that LORD MACKAY, whose opinion formed the judgment of the Second Division, has misconceived or disregarded the duty of an appellate court in regard to the decision of a judge, sitting without a jury, on a question of fact (when there is no misdirection), which has so repeatedly been laid down in your Lordships' House in cases from England and Scotland alike. The only suggestion by LORD MACKAY of the Lord Ordinary having misdirected himself was as to onus of proof, but the Lord Ordinary, quite rightly, makes no reference to onus of proof, for, as has often been pointed out, no question of burden of proof as a determining factor of the case arises on a concluded proof, except in so far as the court is ultimately unable to come to a definite conclusion on the evidence, or some part of it, and the question will arise as to which party has to suffer thereby. The Lord Ordinary came to a definite

conclusion on the evidence, and no question of onus did, or could, arise: *Robins v. National Trust Co.* (14) ([1927] A.C., per LORD DUNEDIN, 520). I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus:—

I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.

II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question. It will hardly be disputed that consistorial cases form a class in which it is generally most important to see and hear the witnesses, and particularly the spouses themselves, and, further, within that class, cases of alleged cruelty will afford an even stronger example of such an advantage. Normally, the cruelty is alleged to have occurred within the family establishment, and the physique, temperament, standard of culture, habits of verbal expression and of action, and the interaction between the spouses in their daily life, cannot be adequately judged except by seeing and hearing them in the witness box. The law has no footrule by which to measure the personalities of the spouses. In cases such as the present it will be almost invariably found that a divided household promotes partisanship, and it is difficult to get unbiased evidence.

It may be well to quote the passage from the opinion of LORD SHAW in *Clarke v. Edinburgh & District Tramways Co.* (15) (1919 S.C. (H.L.), 37), which was quoted with approval by LORD SANKEY, L.C., in *Powell v. Streatham Manor Nursing Home* (1) ([1935] A.C. 250). LORD SHAW said:

In my opinion, the duty of an appellate court in those circumstances is for each judge to put it to himself, as I now do in this case, the question, Am I—who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case—in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

LORD SHAW had already pointed out that these privileges involved more than questions of credibility. He said (*ibid.*, 36):

... witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced on the printed page.

I may add that, after it became usual to have the printed transcript of the evidence in place of the judge's notes, it was argued in at least one case that, having the *verbatim* transcript of the evidence, the matter was more at large for the appellate court, but it is undoubted that the principle has not been relaxed—if, indeed, it has not been tightened—by the later decisions. I am aware that this contention was put forward in *Kilpatrick v. Dunlop* (16). In reference to this contention LORD HALSBURY says (1916 S.C. 632 n):

I am unable to determine one thing or the other, namely, whether the appellant or respondent was worthy of credit. It is a question of credit, where each gives a perfectly coherent account of what he has done and said, and contradicts the other. Under these circumstances it is impossible that the Court of Appeal should take upon itself to say, by simply reading printed and written evidence, which is right, when it

has not had that decisive test of hearing the verbal evidence and seeing the witnesses, which the judge had who had to determine the question of fact, and to determine which story to believe.

In other words, whereas you might formerly find in the judge's notes some indication of the impression made on his mind by the witnesses, no trace of any such impression is to be found in the cold, mechanical, record of the evidence.

As regards the third proposition that I have ventured to express, an illustration of it will be found in the decision of this House in *Hvalfangerselskapet Polaris A-S v. Unilever, Ltd.* (17), which is fully referred to by LORD GREENE, M.R., in *Yuill v. Yuill* (2), and would also appear to illustrate the same proposition. I do not pause to consider whether the decision of the First Division of the Court of Session in *Dunn v. Dunn's Trustees* (3) can be similarly justified, but I cannot accept LORD PRESIDENT CLYDE's conclusion after a review of many of the authorities (1930 S.C. 145). I think his expressed feeling that he might be underestimating the "significance of the constant and increasing insistence by the House of Lords on the 'privileges' of the judge of first instance" was justified. LORD CLYDE laid stress on the *dictum* of LORD PRESIDENT INGLIS in *Kinnell v. Peebles* (4) (17 R. (Ct. of Sess.), 424), but, in my opinion, that *dictum* is not inconsistent with the decisions of this House, for the reasons stated by LORD SKERRINGTON in *Maguire v. M'Neil (Charles), Ltd.* (18) (1922 S.C. 189), to which LORD PRESIDENT CLYDE does not refer in *Dunn's* case (3), although he took part in its decision.

My Lords, I am clearly of opinion that this present case falls under the second of my propositions, for I am satisfied, with all respect to my noble and learned friend on the Woolsack, that I am not in a position, without enjoying the advantage of seeing and hearing the witnesses, of coming to a satisfactory conclusion on the printed evidence. Point is given to this by an opening comment in the opinion of the Lord Ordinary:

As in most of these cases, the evidence of the parties is not altogether to be relied on. Partisanship, brooding over their wrongs or fancied wrongs, has coloured and distorted their recollection. In addition I think that at times they have both been guilty of deliberate misstatement. Where they contradict each other on any issue of fact it is necessary to choose the version which accords best with the proved history of their relations with one another.

LORD MACKAY repeatedly declines to accept the opinion of the Lord Ordinary on the evidence, resulting from an assessment of its value, which must have been materially affected by the appearance of the witnesses and the way in which they gave their evidence. I can find no justification for rejecting the views of the Lord Ordinary. LORD MACKAY even declines to accept the evidence of John Watt, whom the Lord Ordinary accepted as a witness of truth and accuracy. In view of his misconception as to his duty as an appellate judge, I find it unnecessary to consider the various criticisms, including certain inaccuracies, to which LORD MACKAY's opinion has been subjected. It is enough for me that I am satisfied that he could not have formed a satisfactory opinion without having seen and heard the witnesses, let alone his not having found that the Lord Ordinary's opinion could not be explained or justified by his having seen and heard the witnesses.

It is right that I should illustrate the difficulty that I feel in forming a satisfactory opinion without having seen and heard the witnesses by a reference to two of the crucial incidents in the case, namely, the incident of Saturday, Sept. 7, 1940, and the banging of doors at night and the waking up of the husband in the autumn of 1939. As regards the former incident, the husband's story—according to his diary—was that, while shaving, the wife pushed and kicked him and knocked him twice into the bath, and that he had to go to the doctor suffering with his ears. In the witness box the kicks disappeared and, instead of being knocked twice into the bath, he stated he had put his foot into the bath to preserve his balance. There is really no evidence to prove that the box on the ear was a serious one. There is no evidence of external bruising or laceration, and it is notorious that a very slight blow—especially on an ear inclined to delicacy—may produce unexpected internal inflammation. I think that the Lord Ordinary's view that this incident was not such as to lead the husband to fear that his health or life was in danger, which was evidently based largely on his observation of the witnesses, is not open to exception.

The same remark applies to the banging of doors at night and the waking

up of the husband by the wife in the autumn of 1939. The Lord Ordinary took the view that these occurrences were exaggerated, and he accepted the wife's story that it happened at times owing to insomnia and a feeling of loneliness. As regards both these matters I am not in a position to assess the value of the evidence without having seen and heard the witnesses.

I desire to add that, having in view the opinion formed by the Lord Ordinary of the evidence, I am of opinion that he was justified in his strictures on the conduct of the husband towards the wife, for he neglected the duty of mutual forbearance and help when she was in a nervous and irritable condition, which his merely negative attitude was calculated to enhance. For the same reason, his persistent attitude as to Margaret Stewart was inexcusable, and the departure of the latter in July, 1940, could not be expected to remove from the wife's mind and outlook the unfortunate results of that attitude.

I am, accordingly, of opinion that there is no justification for interference with the decision of the Lord Ordinary, but there is one further matter on which I feel bound to make some observations, although it does not appear to affect the present case very closely. I refer to the second part of a *dictum* of LORD RUSSELL in an Outer House case, *Main v. Main* (12) (1945 S.C. 471), of which LORD MACKAY has expressed approval in this case, namely,

It appears to be well settled that conduct which would amount to cruelty if practised by a husband towards his wife will equally amount to cruelty if practised by a wife towards her husband; and that in the latter case it is relevant to consider the interests of the wife in relation to the question whether her conduct may be likely to endanger her own safety by provoking her husband to retaliate: see FRASER ON HUSBAND AND WIFE, 2nd ed., vol. 2, p. 906; WALTON ON HUSBAND AND WIFE, 2nd ed., p. 79.

The case in which LORD RUSSELL made that statement was *Main v. Main* (12) (1945 S.C. 471). In *Duffy v. Duffy* (19), decided by the Second Division on Nov. 1, 1946, LORD MACKAY repeated his approval of LORD RUSSELL's *dictum*. The Lord Justice-Clerk and LORD STEVENSON concurred with LORD MACKAY generally, but LORD JAMIESON doubted whether the wife's safety was a relevant consideration in an action founded on her cruelty.

The passage in FRASER ON HUSBAND AND WIFE, 2nd ed., vol. 2, p. 906, is as follows:

In such a case, where the husband asks for judicial separation, the question is not simply whether the husband's safety is endangered; but the court will also consider the interests of the wife, and whether her conduct may not endanger her safety by provoking the husband to retaliate.

The only authority cited by the author for this assertion is a *dictum* to that effect by SIR JAMES P. WILDE, JUDGE ORDINARY, in *Forth v. Forth* (13) (36 L.J.P. & M. 122). The learned author had already described judicial separation as belonging to the department of preventive police for the protection of the injured spouse, and I know of no warrant for incorporating in the law of Scotland this *dictum* of an English judge. Until LORD RUSSELL took notice of it there is no trace of its having been accepted by the Scottish courts. It is not correct to describe it as well settled in the law of Scotland, and I may add that it appears to have long since lapsed into obscurity in England. It is interesting to note that in *Nisbet v. Nisbet* (20), which is stated in WALTON ON HUSBAND AND WIFE, 2nd ed., to be the only reported case of a husband's action based on the wife's cruelty, there is no mention of this doctrine, although the question of risk of retaliation was raised. The case was tried by LORD KINCAIRNEY, who said (4 S.L.T. 158):

It may be that the pursuer is able to take care of himself, but he could only protect himself from his wife's violence by retaliation, and his mere ability to retaliate cannot disentitle him to decree of separation.

This risk of retaliation by the husband may well be relevant in assessing the degree and quality of the wife's cruelty in an action by him, and I am unable to see why it might not also arise in a wife's action as relevant to the degree and quality of the husband's cruelty, for there may well be cases where the wife could protect herself by retaliation.

On the whole matter, accordingly, I propose that the appeal should be allowed, that the interlocutor of the Second Division, with the exception of the decerniture as to expenses, should be recalled, and that the interlocutor of the Lord Ordinary should be restored. The husband should pay the wife's costs of the appeal.

LORD MACMILLAN (read by LORD THANKERTON) : My Lords, a court of law provides at the best but an imperfect instrument for the determination of the rights and wrongs of the most personal and intimate of all human relationships, that of husband and wife. No outsider, however impartial, can enter fully into its subtle intricacies of feeling and conduct, but when a case involving such questions arises the court must do its best to judge dispassionately between the parties, though it may sometimes be left with a doubt whether, with the imperfect means at its disposal, it has achieved perfect justice, especially where the evidence is widely conflicting. The case now before the House provides a typical example of the difficulties I have indicated, but it is also a typical case for the application of the well-established rule defining the proper approach of an appellate court to the consideration of a decision on fact by the court of first instance, a rule which, in my opinion, is of special force in matrimonial disputes.

The appellate court had before it only the printed record of the evidence. Were that the whole evidence it might be said that the appellate judges were entitled and qualified to reach their own conclusion upon the case, but it is only part of the evidence. What is lacking is evidence of the demeanour of the witnesses, their candour or their partisanship, and all the incidental elements so difficult to describe which make up the atmosphere of an actual trial. This assistance the trial judge possesses in reaching his conclusion but it is not available to the appellate court. So far as the case stands on paper, it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial judge, who has enjoyed advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on questions of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved, or otherwise to have gone completely wrong.

But I need not pursue this topic which has been so fully expounded in many cases in this House and today again by my noble and learned friends who have preceded me. It is sufficient for me to say that agreeing with LORD THANKERTON in all that he has said, I do not find in the opinion of LORD MACKAY, which embodies the views of the Second Division of the Court of Session, or in the criticism to which the judgment of the Lord Ordinary was subjected at your Lordships' Bar, any adequate justification for reversing the decision which the Lord Ordinary reached. If the case on the printed evidence leaves the facts in balance, as it may be fairly said to do, then the rule enunciated in this House applies and brings the balance down on the side of the trial judge. I would only add that I also expressly reserve my opinion on the question whether under the Act of 1938 the pursuer who seeks divorce on the ground of cruelty is bound to prove reasonable apprehension of a recurrence of the cruelty. I, accordingly, concur in the motion that the appeal be allowed.

LORD SIMONDS : My Lords, I have had the advantage of reading the opinions of my learned and noble friends, VISCOUNT SIMON and LORD THANKERTON, in this case. At the conclusion of the hearing I had formed the clear opinion that this appeal must be allowed and, though I distrust my own judgment when it differs from that of my noble and learned friend on the Woolsack, yet, having, after an appreciable interval, reviewed the case, I must adhere to my opinion and am happy that in doing so I find myself at one with my noble and learned friend, LORD THANKERTON with whose judgment I am in entire concurrence.

On the appeal, so far as it raises a question of law in regard to *saevitia* as a ground of divorce in the law of Scotland, I do not think it necessary to add anything to what has already been said, but it was mainly on the question of fact that this appeal was brought and on this I would add a few words. From time to time this House has propounded the principles on which an appellate court should review the findings of fact of a judge sitting without a jury, and, if I may respectfully say so, I am well content to accept what has fallen from both my learned and noble friends upon this matter. I would, in particular, say that I concur in the three propositions stated by my noble and learned friend, LORD THANKERTON. In my opinion, whatever may be the correct way of stating the

principle, the learned judges of the Second Division were not justified in taking a different view of the facts of this case from that taken by the Lord Ordinary. In fact, they did so, and, recalling his interlocutor, granted a decree of divorce to the respondent to this appeal.

- A My Lords, the husband sought a decree of divorce from the wife on the ground of her cruelty to him. The evidence was heard on four days and fills nearly 400 pages of type-script. Witnesses included husband and wife, his and her relations, doctors and a maidservant. At the end of it all the Lord Ordinary, in a reserved judgment in which he carefully reviewed the evidence, stated with complete accuracy the question involved in the suit. In it, also, there is a clear recognition of the fact that the picture of the domestic lives of this man and woman must be surveyed as a whole, before a true judgment can be formed of their possible future relations. I then ask on what the judges of the Second Division founded which led them to reverse the decision of the Lord Ordinary.
- B My Lords, I must venture to say with all deference that they appear to me to have disregarded the principles laid down in this House for the guidance of courts of appellate jurisdiction where the appeal is against a finding of fact by a lower court.

- C Applying those principles to this case I am satisfied that an appellate court, having none of those advantages which the trial judge enjoyed of hearing and observing the witnesses, was not justified in concluding that he was so clearly wrong that their judgment of fact should be substituted for his. I concur in the motion that the appeal be allowed.

- D LORD DU PARCQ : My Lords, at the conclusion of the arguments of counsel I was left with a clear conviction that the recalling of the Lord Ordinary's interlocutor was not justified either by the reasoning of LORD MACKAY or on the grounds submitted for your Lordships' consideration at the Bar. Since then, I have had the privilege of reading in print the opinions of my noble and learned friend on the Woolsack and of my noble and learned friend, LORD THANKERTON, and seeing that they have arrived at differing conclusions, I have felt bound to give further consideration to the evidence. Having done so, I am confirmed in the opinion which I had at first formed, and thus find myself in agreement with my noble and learned friend, LORD THANKERTON.

- E If it be right to say that there is no difference between the law of Scotland and the law of England for the present purpose, it may be argued that the Lord Ordinary attached undue importance to the fact that, if the parties were to come together again, there was no reasonable apprehension of danger to the pursuer's life or health. I have considered the Lord Ordinary's findings and his reasons on the assumption that the law to be applied in the present case does not differ from that of England, and, having made that assumption, I am satisfied that his decision would have been the same, and rightly so, if he had conceived himself to be bound by precisely the same principles which guide the English courts. It is unnecessary, therefore, to decide today whether any difference now exists between the principles applicable in the two countries in a case where it is sought to dissolve a marriage on the ground of cruelty.
- F

- G I was a party to the decision of the Court of Appeal in *Yuill v. Yuill* (2) to which my noble and learned friend on the Woolsack has referred. I am happy that it should meet with approval in this House and I agree with my noble friend's statement of the result of earlier cases. All the authoritative decisions which relate to the proper attitude of an appellate court towards the findings of fact of the trial judge naturally tend to lay emphasis on one aspect of the question, either on the fact that the appellate court's duty to see justice done may constrain it to reject the judge's findings, or on the undesirability of deciding a case on a written record against the view of the judge who heard the witnesses, but, though one aspect may be emphasized, the other must always be present to the mind of the court. Thus, in *Yuill v. Yuill* (2), where the decision of the judge was reversed, LORD GREENE, M.R., said ([1945] 1 All E.R. 188) :
- H

It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest considerations, that it would be justified in finding that the trial judge had formed a wrong opinion.

My Lords, I am satisfied that this is not one of those very rare occasions. There are, no doubt, cases in which it is proper to say, after reading the printed record, that, after making allowance for possible exaggeration and giving full

weight to the judge's estimate of the witnesses, no conclusion is possible except that his decision was wrong. I can come to no such conclusion in the present case. The opinion of the Lord Ordinary, if I may respectfully say so, seems to me to be careful, wise and fair. I agree with the reasoning as well as the conclusions of my noble and learned friend, LORD THANKERTON, and concur in the motion which he has proposed.

Appeal allowed with costs.

Solicitors : *Shaen, Roscoe & Co.*, agents for *McCosh & Hunter*, Perth, and *Bryson & Davie*, S.S.C., Edinburgh (for the wife); *Stoneham & Sons*, agents for *Simpson & Marwick*, Edinburgh (for the husband).

[Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

**Re TEMPLE. Ex parte THE OFFICIAL RECEIVER.
THE TRUSTEE v. OFFICIAL ASSIGNEE OF BOMBAY.**

[CHANCERY DIVISION (Romer and Roxburgh, JJ.), February 24, March 10, 1947.]

Bankruptcy—Successive bankruptcies—First bankruptcy in England—Second bankruptcy in India—Assets available after second bankruptcy—Conflict of laws—Bankruptcy Act, 1914 (c. 59), s. 21 (2), s. 39 (as substituted by Bankruptcy Act, 1926 (c. 7), s. 3).

On Mar. 2, 1927, the bankrupt was adjudicated bankrupt in England and at all material times was still undischarged. In 1933 the official receiver became trustee of the estate. On Aug. 25, 1942, the bankrupt was adjudicated insolvent in Bombay, and on Nov. 20, 1945, he was discharged from that insolvency subject to a suspension of two months. In 1944 the bankrupt became entitled under the will of his mother to certain property which was duly accounted for by her executors to the official receiver.

HELD : there was no rule of law, no statutory provision, and no principle of equity which required the court to direct the transmission of the fund in question to the official assignee of the debtor in India.

Semble, if an order purporting to approve a scheme of arrangement under s. 21 (2) of the Bankruptcy Act, 1914, is invalid for want of jurisdiction in the court which made it, that defect is not remedied either by the fact that there was no appeal against the order or by the further fact that some thirteen years have passed since the order was made.

[AS TO PROPERTY ACQUIRED BY BANKRUPT AFTER SECOND BANKRUPTCY, see HALSBURY, Hailsham Edn., Vol. 2, p. 222, para. 291; and FOR CASES, see DIGEST, Vol. 4, Nos. 2344, 2345.]

APPEAL from an order of His Honour JUDGE HANCOCK, sitting in bankruptcy at Kingston County Court, whereby he adjudged that a certain sum in the hands of the official receiver as trustee in bankruptcy of the bankrupt under a bankruptcy in England should be handed over to the official assignee of the bankrupt in Bombay where the bankrupt had subsequently been adjudicated insolvent. The facts are set out in the judgment.

Aronson for the official receiver.

Bagram for the official assignee of Bombay.

ROMER, J. : This is an appeal from an order of the county court judge of the Kingston County court sitting in bankruptcy whereby he adjudged that a certain sum of £1,959 odd which is now in the hands of the appellant, who is the official receiver and the trustee in bankruptcy of the bankrupt under his English bankruptcy, to which I shall again refer, should be paid over to the respondent, who is the official assignee of the debtor in India.

The facts generally of the case may be stated from the official receiver's report of July 29, 1946, from which it appears that the bankrupt was adjudicated bankrupt in the Kingston county court on Mar. 2, 1927, and is still undischarged. His statement of affairs disclosed unsecured liabilities of £33,083 7s. 2d., and, after a dividend of 3½d. had been paid in Oct., 1933, on proofs admitted at £12,019 19s. 2d. the non-official trustee was released and the official receiver became trustee of the estate. At the date of adjudication the bankrupt was

possessed of 25,000 ls. shares in Page Estates, Ltd., a company incorporated for the purpose of acting as relator to the Crown in proceedings for the recovery of escheated estates. That company never did any effective business and was dissolved on Mar. 25, 1938. On Dec. 30, 1931, a meeting of creditors convened by the then trustee was held, at which the proposal, hereinafter referred to, was approved by a large majority. To facilitate its acceptance three family creditors for £15,798 16s. 9d. agreed that their claims should be postponed to those of the other creditors. The said proposal was as follows:—(1) That a dividend estimated at 5½d., but which was, in fact, only 3½d., should be paid out of assets other than the said 25,000 shares. (2) That a company to be known as Richard Durand Temple Trust, Ltd., should be registered by the then trustee with a nominal capital of £100 with which said sum the bankrupt's said 25,000 shares should be bought. (3) That Richard Durand Temple Trust, Ltd., should issue to the bankrupt's creditors redeemable notes providing for the payment of the balance of their claims plus interest at 4% per annum "such notes not to be redeemable until they (*i.e.*, Richard Durand Temple Trust, Ltd.) should be successful in realising" the said 25,000 shares in Page Estates, Ltd. (4) That, subject to this payment, 75% of the capital of Richard Durand Temple Trust, Ltd., should be held in trust for the postponed creditors and the remaining 25% in trust for the bankrupt. By an order dated Apr. 20, 1933, made on an application by the then trustee for directions, the registrar of the county court approved the said proposal to wind up the estate in the above-mentioned manner. On Aug. 25, 1942, the bankrupt was adjudicated insolvent in the High Court of Justice, Bombay. He was discharged from that insolvency subject to a suspension of two weeks by an order of that High Court dated Nov. 20, 1945. On Sept. 10, 1943, the bankrupt's mother, Lady Agnes Fanny Temple, died. Under the terms of her will, which was proved on Feb. 8, 1944, the bankrupt became entitled to certain chattels and shares, the proceeds of which, amounting to £1,969 15s. 1d. after deducting the costs of realising these assets, have been accounted for by her executors to the official receiver, who now holds the said sum. The official receiver desires the directions of the court as to whether (1) he should pay the said sum of £1,969 15s. 1d. to the official assignee, or (2) he should distribute it rateably among all the creditors in the English bankruptcy, or (3) he should distribute it rateably among the three creditors who agreed by the said proposal that their debts should be postponed, or (4) he should distribute it rateably among the creditors other than the said three postponed creditors, or (5) he should pay it to the bankrupt. It is only necessary to add that it appears that the debtor compounded with his creditors at some time before his 1927 bankruptcy.

The debtor at some subsequent time went to India, and in Aug., 1942, while there he was adjudicated bankrupt. When the matter came before the judge of the Kingston county court on Sept. 6, 1946, there were represented before him by counsel, in addition to the official receiver and the official assignee in Bombay, the family creditors and the ordinary creditors. Having heard elaborate argument from the various parties concerned, the judge reserved his judgment, and, in a written judgment, he decided in effect, first, that the order of the registrar of Apr. 20, 1933, was an approval of a scheme for the final settlement of the debtor's affairs; secondly, that the registrar had no power to make that order; but, thirdly, as there had been no appeal from it, it should not be treated as a nullity after all these years. He, accordingly, decided that the fund should be paid over to the official assignee. There are two separate points to be decided by this court, first, as to the effect of the registrar's order of Apr. 20, 1933, and, secondly, if the effect of that order was not to terminate the bankruptcy, then what are the rights of the official receiver and the official assignee in Bombay as trustees of successive bankruptcies, the first being in the United Kingdom and the second in India.

[His LORDSHIP reviewed the facts, and referred to the Bankruptcy Act, 1914, s. 16 (5) (6) (7) (8) (9) (10) (11) (12) (13), s. 21, s. 26 (2) (3), s. 56 (7) (9), s. 79 (3), and s. 102 (1) (2) (5), and the Bankruptcy Rules, rr. 6, 7, 204, 205, and continued:] My conclusions on the first part of this case are that, if the registrar purported by his order to treat the trustee's application as an application under s. 21 and approved a scheme for winding up the estate, his order was made without jurisdiction. Secondly, such want of jurisdiction is

not remedied either by the fact that there was no appeal or by the further fact that some years had passed since the order was made. It seems to me that, if the order was invalid for want of jurisdiction when it was made, it is invalid now and always has been invalid. That is on the assumption that the order was made approving a scheme of arrangement under s. 21 so as to bind dissenting creditors. An alternative view of the matter is that he was merely approving an application for directions under s. 79 (3) as to dealing with the assets which were then in his hands, in which case there would be no reason why he should not approve such a dealing with the assets existing then. I do not propose to indicate any view whether the registrar was intending to act under s. 21 or whether he was purporting to give directions under s. 79 (3). Accordingly, I come to the conclusion that, whichever he was intending to do, the first bankruptcy has never been determined and is still subsisting. It follows that, *prima facie*, the asset which has now fallen into the hands of the trustee is an asset in his bankruptcy.

The second point taken by counsel for the official assignee was to say, that being so and having regard to the Indian bankruptcy, the money should be handed over to the assignee in Bombay. That depends to some extent on Indian law. The provision of the law in this country dealing with successive bankruptcies is s. 39, which was introduced into the Bankruptcy Act, 1914, by s. 3 of the Act of 1926. It provides that, where there are successive bankruptcies, any property acquired by the bankrupt since he was last adjudged bankrupt shall vest in the trustee in the subsequent bankruptcy. That has, in fact, been law ever since the year 1913. It is said by counsel that he cannot rely, as I understand it, on that section itself because that section is specially referable by its terms only to bankruptcies in this country, but, he says, the law of India would follow the law of this country in that respect and it would be right for the courts of this country to recognise the claim of the official assignee in Bombay to have these assets handed over to him in the same way as, in a second bankruptcy in this country, they would have been handed over to the trustee in the second bankruptcy. I should think the question whether the law of India does, in fact, follow the law of this country in that respect is open to some question on the evidence before us. I should feel inclined to say that the onus is on the official assignee to satisfy the court on that point, as on others, and that he has failed to discharge that onus. When, however, the matter was before the county court judge, it does appear that some suggestion was made on behalf of the assignee about putting in evidence on the point, but the matter was arranged by counsel on the basis of some text book which was read. That is not a course which we can adopt if only for the reason that other parties besides those before us are interested in the case and they ought not to be bound by what might conceivably be a fallacious statement, but, even assuming that the law of India is the same as ours in this respect and that the second trustee in bankruptcy in India in the case of two successive bankruptcies would be entitled to an asset such as the present, I am unable myself to see on what principle this court should direct the transmission to India of this fund, knowing as it does, that there are English creditors in the first bankruptcy who are unsatisfied and unpaid. It seems to me impossible to rest the argument on principles of equity because it is not by reason of any principle of equity that property of a bankrupt who is subjected to two successive bankruptcies passes to the second rather than to the first, because the equity, if there was any, was the other way before the present rule was made in 1913. The rule, such as it is, is wholly statutory in this country and it is confined to bankruptcies in the United Kingdom. From that some inference might be drawn, I suppose, that it was not intended to extend to bankruptcies abroad, but, be that as it may, we have the position that there is no English statute which would require the court to send this asset to be administered by the foreign trustee, nor is there any English rule of equity which would require a similar step. I, for my part, fail to see how there can be room for such an equity where you have a court still administering a fund for the benefit of creditors which must be asked to deprive them of an asset which falls to be administered for the benefit of somebody else and to be administered by some other official. Counsel for the official assignee has failed to adduce any argument, to my mind, that such a course ought to be adopted and has not produced any authority in support

of it. Such authority as there is, in the somewhat limited discussion which has taken place on this point, has been brought to our notice and is to be found in DICEY'S CONFLICT OF LAWS. It seems to point to the opposite conclusion, because in that work the rule is laid down in r. 125 :

Where a debtor has been made bankrupt in more countries than one, and, under the bankruptcy law of each of such countries, there has been an assignment of the bankrupt's property, which might, under any of the foregoing rules, operate as an assignment of his property in England, effect will be given in England to that assignment which is earliest in date.

For an assignment one has to look to r. 81 :

An assignment of a bankrupt's property to the trustee in bankruptcy under the Bankruptcy Act, 1914 (English bankruptcy) is, or operates as, an assignment of the bankrupt's (1) immoveables (land), (2) moveables, whether situate in England or elsewhere.

- B It is suggested that that does not apply to property subsequently coming to the debtor, but is confined in its operation to property which the bankrupt had at the time of his adjudication. That, I think, is putting too narrow a view on it having regard to the fact that a trustee is entitled under the bankruptcy provisions of this country to both present and future property acquired prior to the date of discharge. I see no reason to put the narrow interpretation on the rule which has been suggested. It is, I think, unnecessary to decide
- C the point because it seems to me the answer to counsel's contention is that he has put forward no reason which is satisfactory, at least to my mind, in support of it. He can point to no rule of law in this country, no English statute, no principle of English equity, which would require the court to send this asset abroad, and for want of any such satisfactory argument or reasoning, I do not propose to accept the contention. I would allow the appeal.

- D ROXBURGH, J. : I am in complete agreement on all points.

Appeal allowed. Costs of both parties out of the fund.
Solicitors : Tarry, Sherlock & King (for both parties).
[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

- E HALLIDAY v. BARBER, WALKER & CO., LTD.

[HOUSE OF LORDS (Viscount Simon, Lord Wright, Lord Simonds, Lord Normand and Lord Oaksey), March 10, 11, April 1, 1947.]

Workmen's Compensation—Costs—Travelling expenses of workman attending for examination by medical referee—No arbitration actual or pending—Jurisdiction of county court judge—Workmen's Compensation Act, 1925 (c. 42), s. 19 (2), sched. I (7)—Workmen's Compensation Rules, 1926 (S.R. & O. 1926, No. 448), rr. 57 (9), 76. (4).

- On Aug. 21, 1940, a workman was injured while at work, and the employers, recognising that the accident which caused the injury was within the Workmen's Compensation Act, 1925, without contest made to him weekly payments on the basis of total incapacity. The agreement to make these payments was never registered. On Feb. 22, 1945, the employers, exercising the right conferred on them by s. 18 of the Act, had the workman examined by their own doctor, and on Feb. 26, they served on the workman a notice under s. 12 (3) of their intention, in view of the doctor's certificate, to reduce the weekly payments to 15s. on the ground that his incapacity was no longer total. The workman then served on the employers a counter-notice, enclosing the certificate of his own doctor, who disagreed and declared that he was not able to follow his occupation and that payment for total incapacity should continue. On Mar. 13, the employers applied to the county court for an order referring the matter to a medical referee for a certificate, pursuant to s. 19 (2), as to the workman's condition and fitness for employment. The registrar of the court made the order, and the workman, who was required to travel some 20 miles on each of two occasions for the purpose, was examined by the medical referee. He certified (contrary to the view of the employers' doctor) that the workman was only fit for very light work. As the result of this certificate

and as the workman could not be provided with light work, the employers continued to pay him compensation on the basis of total incapacity. The county court judge ordered the employers to pay the expenses incurred by the workman in attending on the medical referee :

HELD : (i) a reference to a medical referee under s. 19 (2) of the Act is a proceeding for settling a disputed question arising under the Act as to the liability to pay compensation, and s. 21, while prescribing arbitration by a committee or arbitrator or a judge of county courts as the ordinary method for settling disputed questions, also leaves room for the special provision in s. 19 by which the particular question in dispute is settled by the medical referee, and, therefore, the costs incidental to the reference to the medical referee were within the jurisdiction of the county court judge under para. 7 of sched. I to the Act.

(ii) jurisdiction also lay under the Workmen's Compensation Rules, 1926, rr. 57 (9), 76 (4).

Decision of the Court of Appeal (DU PARCQ and TUCKER, L.JJ., SCOTT, L.J., dissenting), [1946] 1 All E.R. 471, reversed.

[FOR THE WORKMEN'S COMPENSATION ACT, 1925, s. 19 (2), SCHED. I (7), see HALSBURY'S STATUTES, Vol. 11, pp. 560, 594.]

Cases referred to :

- (1) *Brown v. Sherwood Colliery Co., Ltd.*, [1940] 2 All E.R. 525; [1940] 1 K.B. 726; 109 L.J.K.B. 761; 162 L.T. 316; Digest Supp.
- (2) *Summers v. Baird (Wm.) & Co., Ltd.*, 1926 S.C. 762; 1926 S.C. (H.L.) 24; 18 B.W.C.C. 714; 34 Digest 484, 3995, *iv*.

APPEAL by the workman from a decision of the Court of Appeal (DU PARCQ and TUCKER, L.JJ., SCOTT, L.J., dissenting) dated Jan. 17, 1946, and reported [1946] 1 All E.R. 471, allowing an appeal from a county court judge who had ordered the employers to pay the expenses incurred by the workman in attending for examination by a medical referee under the Workmen's Compensation Act, 1925, s. 19 (2). The majority of the Court of Appeal held that, as no arbitration had taken place and none was pending, the employer having met the workman's claim voluntarily, the county court judge had no jurisdiction to make such an order. The workman appealed.

Beney, K.C., and *Gilbert Dare* for the workman.

Phineas Quass and *Martin Jukes* for the employers.

The House took time for consideration.

April 1. VISCOUNT SIMON : My Lords, although the amount involved in the present appeal is only 14s., the question to be decided is one which may be of importance in many other cases. That question is whether, after an injured workman has complied with an order duly made, under s. 19 (2) of the Workmen's Compensation Act, 1925, to submit himself for examination by a medical referee at the time and place appointed, the county court judge has jurisdiction to award to the workman costs in respect of the expenses incurred in travelling for the purpose of complying with the order. The Court of Appeal (DU PARCQ and TUCKER, L.JJ., SCOTT, L.J., dissenting) has held that, where there has been no previous arbitration instituted in respect of the workman's claim to compensation (because the employers met the claim voluntarily), no such jurisdiction exists.

The facts in the present case are few and simple. On Aug. 21, 1940, the workman was seriously injured while at work for the employers, and the latter, recognising that the accident which caused the injury was within the Act, without contest made to him weekly payments on the basis of total incapacity for a number of years. The agreement to make these payments was never registered. On Feb. 22, 1945, the employers, exercising the right conferred on them by s. 18 of the Act, had the workman examined by their own doctor, and on Feb. 26 served on the workman a notice under s. 12 (3) of their intention, in view of the doctor's certificate, to reduce the weekly payment to 15s. on the ground that his incapacity was no longer total incapacity. The workman then served on the employers a counter-notice, enclosing the certificate of his own doctor, who disagreed and declared that he was not able to follow his occupation and that payment as for total incapacity should continue. There-

upon, on Mar. 13, the employers applied to the county court for an order referring the matter to a medical referee for a certificate, pursuant to s. 19 (2), as to the workman's condition and fitness for employment. The registrar of the court duly made the order and the workman, who was required to travel some 20 miles to Mansfield on two occasions for the purpose, was examined by the medical referee. He certified (contrary to the view of the employers' doctor) that the workman was only fit for very light work. As the result of this certificate and as the workman could not find such light work, the employers continued to pay to the workman compensation on the basis of total incapacity.

A Now, it is not disputed that, if the weekly payments previously made by the employers to the workman had been arrived at by an award which settled a dispute between them, there would have been jurisdiction in the county court judge to award these costs, for there would have been an arbitration and the subsequent application and order under s. 19 would be proceedings connected with the arbitration, but the contention is that, inasmuch as the employers' liability to the workman under the Act and the weekly payments made by them to him were not in dispute, there has been no "arbitration," and, consequently, that the Act contains no provision authorising the award of these costs. A more unmeritorious distinction it would be hard to conceive, for in both cases alike the workman is compelled to incur the expense of travel on the application of his employer, who wishes to cut down the amount of the weekly compensation, while the workman wishes to continue to receive it at the old figure. Nevertheless, the question, of course, is whether the Act and rules made under it authorise the award of costs when at the earlier stage there was no conflict which required to be settled by arbitral award.

D I have come to the conclusion, on the words of the Act, that costs can be awarded in respect of the expenses of the workman's journey in both cases alike, and that too narrow a view as to the effect of the Act has been taken by the majority of the Court of Appeal. Section 21 deals with the procedure for settling any question which arises in any proceedings under the Act and says that "the question, if not settled by agreement, shall, subject to the provisions of this Act, be settled by" arbitration in accordance with sched. I. The words "subject to the provisions of this Act" may well refer to the provisions in s. 19. The employers' application for a reference to the medical referee itself states that a "question has arisen as to the workman's condition and fitness for employment, and no agreement can be come to between the company and the workman with reference to such question." Indeed, the language of s. 19 (2) makes it plain that the reference to the medical referee is authorised only "in the event of no agreement being come to between the employer and the workman" on this matter. The medical referee's jurisdiction depends on this absence of agreement and his certificate is conclusive as to the condition of the workman and his fitness for employment (s. 19 (3)). In effect, therefore, the medical referee arbitrates between the parties on this disputed question. It follows that the costs incidental to the reference to the medical referee are within the jurisdiction of the county court judge, for by para. 7 of sched. I to the Act any costs of or incidental to the arbitration and proceedings connected therewith are in his discretion. The same conclusion might be reached by referring to the Workmen's Compensation Rules, especially to r. 76 (1) and (4), and, perhaps, also to r. 57 (9), but I prefer to base my conclusion on the broad construction that the reference to the medical referee is a procedure for settling a disputed question arising under the Act and that s. 21, while prescribing arbitration by a committee or an arbitrator or a judge of county courts as the ordinary method for settling disputed questions, also leaves room for the special provision in s. 19 by which this particular question in dispute is settled by the medical referee.

H Previous decisions to which we were referred do not appear to me greatly to advance the matter. In *Brown v. Sherwood Colliery Co., Ltd.* (1), the only question which was argued was whether the order for costs in favour of the workman in respect of a reference to a medical referee was final or interlocutory, and it was assumed without argument that the order was one which there was jurisdiction to make. Nevertheless, the judgment of GODDARD, L.J., is instructive, as he observes ([1940] 2 All E.R. 34) that an order for costs on a reference to a medical referee can be made:

... either when a workman makes a claim which the employer does not admit,

or where the employer seeks to discontinue payments which he has been making.

In *Summers v. William Baird & Co., Ltd.* (2), the workman had been awarded weekly compensation as for total incapacity until further order of the court. Later, his employers, alleging that he was fit for light work on the surface (which he denied), applied for a reference to a medical referee. The referee reported that the workman was not yet fit for light work. The workman applied for his expenses in the medical reference, but this was refused by the arbitrator on the grounds that there was no existing arbitration in connection with which he could pronounce an award of such expenses. The House of Lords confirmed the view of the Court of Session that the workman was entitled to these expenses, holding that the original arbitration was not dead, but that an award under an arbitration is a continuing award. LORD DUNEDIN said (1926 S.C. (H.L.) 26) :

If the appellants here had in any particular week refused to pay the money, what the respondent would have done would have been to get an extract, and then charge, and get the money by the ordinary processes of execution. It is impossible to talk of the process here being dead.

That was enough to determine the case then under consideration, but I do not think this decision obliges us to hold that, if previously there has been no contested arbitration, the workman cannot recover his expenses in such a case as the present. I move that the appeal be allowed with costs.

LORD WRIGHT : My Lords, I agree with the opinion which has just been delivered by VISCOUNT SIMON.

LORD SIMONDS : My Lords, I have had the privilege of reading the opinion which LORD OAKSEY is about to deliver. I concur in his reasoning and conclusion and have nothing to add.

LORD NORMAND : My Lords, I also am of opinion that the appeal should be allowed. I think that the travelling expenses necessarily or reasonably incurred by a workman in obedience to an order, under s. 19 of the Workmen's Compensation Act, 1925, to submit himself for examination by a medical referee are "costs of the application" within the meaning of r. 57 (9) of the Workmen's Compensation Rules. They are costs occasioned by the granting of the application, and, as it seems to me, no less costs of an application than are the costs of opposing an application, but, if that view be erroneous, I think that these travelling expenses are clearly within the words of para. 7 (1) of sched. I to the Act, "the costs of and incidental to the arbitration and proceedings connected therewith." These comprehensive words cover costs incidental to any proceeding connected with an arbitration. Admittedly, the travelling expenses are costs incidental to a proceeding and the only question, therefore, is whether that proceeding, the medical reference, is connected with an arbitration. There was a dispute between the workman and his employers about his capacity to earn wages, and, under s. 21, that dispute could be settled only by agreement or, subject to the provisions of the Act, by the arbitration of a county court judge. The parties failed to agree and, therefore, it was necessary to resort, subject to the provisions of the Act, to the arbitration of a county court judge. A medical reference under the Act is in itself an arbitration proceeding and for certain purposes it comes in place of an arbitration by a county court judge. Moreover, when the application for the reference is made by one of the parties only it may, under the proviso to s. 19 (2), result in an arbitration by the county court judge. In the Scottish case of *Summers v. Baird* (2) the workman had made an application for the expenses caused to him by a medical reference and the question arose whether the sheriff substitute, who in Scotland is the arbitrator under the Act, had jurisdiction to award them. One of the grounds of the judgment in favour of the workman is stated thus in the speech of LORD DUNEDIN (1926 S.C. (H.L.) 26) :

The Act of Sederunt is in the same position as the Rules of Court in England . . . The Act of Sederunt of 1924, in s. 9, deals with incidental applications. The learned counsel said : "These are incidental applications under an arbitration, and this is not an arbitration." I think "incidental applications" means incidental to any proceedings under the Act, and s. 9 makes it exceedingly clear.

LORD DUNEDIN goes on to say that s. 9 of the Act of Sederunt brings the whole code of arbitration proceedings into a medical reference, and he points out that no one supposes that it is not competent in an arbitration to award expenses. That case illustrates in a very clear way the necessary connection between a medical reference and arbitration proceedings. The English rules of court are not in the same terms as the Act of Sederunt, but that does not affect the point that the House of Lords recognised the good sense and propriety of treating the workman's expenses incidental to a medical reference as if they were costs incidental to arbitration proceedings under the Act.

It may, I think, be useful to refer to an argument for the employers that these expenses, even if covered by the terms of para. 7 (1) of sched. I to the Act, cannot be awarded at the discretion of the county court judge unless they are also covered by the rules of court. I think there is no difficulty in finding a rule of court for them and r. 76 (1) seems to me to be the appropriate rule, but this is not a case in which the discretion to award costs depends on the making of rules of court. Paragraph 7 (1) of sched. I provides that the costs shall be in the discretion of the county court judge and the rules of court merely regulate procedure. If, therefore, the rules had failed to make appropriate provision for the procedure, the workman would none the less have had the right to ask the county court judge to award his expenses and the county court judge could not have denied his own jurisdiction.

LORD OAKSEY: My Lords, I am of the same opinion. The judgment of the majority in the Court of Appeal proceeds on the view that, although para. 7 of sched. I of the Workmen's Compensation Act, 1925, may cover such expenses as those now in question if the rules of court are apt to cover them, the rules of court, and, in particular, rr. 57 (9) and 74 (4), do not cover them. The argument for the employers before your Lordships' House took a wider scope based on the contention that such expenses are not costs of or incidental to an arbitration or proceedings connected therewith within the meaning of para. 7 of sched. I. I am unable to agree with either view. In my opinion, expenses incurred by the workman in carrying out the order of the registrar to submit himself for examination by the medical referee in accordance with s. 19 (2) of the Act are costs of and incidental to proceedings connected with an arbitration within the meaning of para. 7 of sched. I. Section 21 lays down the procedure for settling any question which arises in any proceedings under the Act and provides that, if not settled by agreement, it shall, subject to the provisions of the Act, be settled by arbitration. A question arose as to the employers' liability to pay compensation or as to the duration of compensation when they applied on Mar. 23, 1945, to the registrar for the matter to be referred to the medical referee. This question was not settled by agreement, but by the referee's decision, that is to say, either by arbitration within the meaning of s. 21, or, it may be, under the words "subject to the provisions of this Act" by a reference to the medical referee which is equivalent to an arbitration. In either case, in my view, the proceeding is "connected with an arbitration" within the meaning of para. 7 of sched. I. Moreover, quite apart from the construction which I put on s. 21, I think that the fact that by s. 19 (2), where, as here, the application is made for the reference by one party only, the registrar or the judge may order an arbitration instead of a reference would bring the proceeding within the meaning of the words "connected with an arbitration."

Counsel for the employers also argued that the question was settled by agreement because the medical referee reported that the workman was fit for light work and the employers agreed none the less to pay compensation as for total incapacity, but this, in my view, does not show that the question which had arisen as to the workman's fitness to work was settled by agreement. It was not; it was settled by the reference. No question was settled by agreement. All that happened was that the employers could not or did not find light work for the workman, and, therefore, paid as for total incapacity.

I turn now to r. 57 (1) and (9) and r. 76 (4). Rule 57 (1) provides generally that the following rules shall apply to applications to the registrar, pursuant to s. 19, to refer any matter to a medical referee, and r. 57 (9) provides that the costs of any application to the registrar may be allowed by special order

of the judge. It is clear that there was an application to the registrar pursuant to s. 19 to refer the matter to the medical referee and that the granting of that application necessarily involved an order under r. 57 (4) that the workman should submit himself for examination by the medical referee. To hold, in such circumstances, that the expense of carrying out that order is not part of the costs of the application to the registrar appears to me too narrow a construction of the words. Assuming, however, that such an expense is not within r. 57 (9), I am unable to see why it is not covered by r. 76 (4). It is a proceeding under the Act since it is a proceeding to settle a question as to the duration of compensation and, *ex hypothesi*, there is no provision made by the rules or by the scale of costs for it. For these reasons I agree with the motion proposed by the noble viscount on the Woolsack.

Appeal allowed with costs.

Solicitors: *Taylor, Jelf & Co.*, agents for *Hopkin & Son.*, Mansfield (for the workman); *Johnson, Weatherall & Sturt*, agents for *Parker, Rhodes, Cockburn & Co.*, Rotherham (for the employers).

[*Reported by C. St.J. NICHOLSON, Esq., Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS v. AUSTRALIAN MUTUAL PROVIDENT SOCIETY.

[HOUSE OF LORDS (Viscount Simon, Lord Wright, Lord Porter, Lord Simonds, Lord Normand), January 30, 31, February 3, March 31, 1947.]

Income Tax—Assurance company—Branch in United Kingdom—Head office abroad—Profits—Income from investments of life assurance fund—Inclusion of income from investments exempted from United Kingdom tax—Income Tax Act, 1918 (c. 40), sched. D, case III, r. 3 (1).

The respondent society carried on mutual life assurance business, having its head office in Australia and a branch office in London. The society claimed relief under the Finance Act, 1923, s. 24, on the ground that the assessments to tax made on it for the years 1937-1940 were excessive by reason of an error. The income from the investments of the society's life assurance fund included interest and dividends which, by the provisions of the Income Tax Act, 1918, s. 46, sched. C, r. 2 (d), and sched. D, Miscellaneous Rules, r. 7, were exempt from income tax in the United Kingdom because the society was not resident here. In 1937 the total income from the society's life assurance fund was £4,145,067, of which £72,354 was exempt from tax in the United Kingdom. The fraction of the society's total income chargeable to tax as "profits" under the Income Tax Act, 1918, sched. D, case III, was .05565268, calculated according to r. 3 of that Case. Since, however, the total income included the £72,354 which was exempt, the society claimed relief in respect thereof, contending that that sum should be deducted from the fraction .05565268 of the society's whole income of its life assurance fund.

HELD: in the application of r. 3 the income to be taxed was not, in whole or in part, receipts, exempted or otherwise, but was a conventional figure or notional sum which might include the proceeds of exempted investments, and as r. 3 (4) authorised a reduction of the tax on the sum arrived at only if contributions to United Kingdom income tax had been made from other sources, no reduction of liability on the ground that exempted investments entered into the calculation, was called for.

Hughes v. Bank of New Zealand, [1938] 1 All E.R. 778, and *Cadbury Bros., Ltd. v. Sinclair* (1933), 103 L.J.K.B. 29, distinguished.

Decision of Court of Appeal, [1946] 1 All E.R. 528, reversed.

[AS TO INVESTMENT INCOME OF FOREIGN ASSURANCE COMPANIES, see HALSBURY, Hailsham Edn., Vol. 17, p. 185, para. 383; and FOR CASES, see DIGEST, Vol. 28, pp. 57-61, Nos. 293-309.]

Cases referred to:

(1) *Hughes v. Bank of New Zealand*, [1938] 1 All E.R. 778; [1938] A.C. 366; 107 L.J.K.B. 306; 158 L.T. 463; 21 Tax Cas. 472; Digest Supp.

(2) *Cadbury Bros., Ltd. v. Sinclair* (1933), 103 L.J.K.B. 29; 149 L.T. 412; 18 Tax Cas. 157; Digest Supp.

APPEAL by the Crown from a decision of the Court of Appeal, dated Mar. 7, 1946, reported [1946] 1 All E.R. 528, reversing a decision of MACNAGHTEN, J., ([1946] 1 All E.R. 236). MACNAGHTEN, J., in an appeal by way of Case Stated by the Special Commissioners of Income Tax, held that the assessments which had been made on the respondent society were correct under sched. D, case III, r. 3. The society claimed that £72,354 should be deducted from that part of its income liable to tax in the United Kingdom under r. 3, and this contention was upheld by the Court of Appeal. The facts appear from the opinion of VISCOUNT SIMON, and are fully set out at [1946] 1 All E.R. 236.

The Solicitor-General (Sir Frank Soskice, K.C.) and R. P. Hills for the Crown.

J. Millard Tucker, K.C., and J. S. Scrimgeour, K.C. for the respondents.

The House took time for consideration.

Mar. 31. VISCOUNT SIMON: My Lords, this is an appeal from an order of the Court of Appeal (LORD GREENE, M.R., SOMERVELL AND COHEN, L.JJ.) allowing an appeal by the respondent society from the order of MACNAGHTEN, J. The judge had dismissed the respondent society's appeal from a decision of the Commissioners for the Special Purposes of the Income Tax Acts on a Case Stated by those commissioners.

The respondent society carries on mutual life assurance business, having its head office in Sydney, New South Wales, but it has a branch in London through which it carries on a portion of its life assurance business. The appeal relates to the computation of the assessable income arising from the profits of the London branch for the years ending Apr. 5, 1937, 1938, 1939 and 1940 respectively and turns on the proper interpretation and application of the Income Tax Act of 1918, sched. D, case III, r. 3, which provides as follows:—

3. (1) Where an assurance company not having its head office in the United Kingdom carries on life assurance business through any branch or agency in the United Kingdom, any income of the company from the investments of its life assurance fund (excluding the annuity fund, if any), wherever received, shall, to the extent provided in this rule, be deemed to be profits comprised in this schedule and shall be charged under this Case. (2) Such portion only of the income from the investments of the life assurance fund for the year preceding the year of assessment shall be so charged as bears the same proportion to the total income from those investments as the amount of premiums received in that year from policy holders resident in the United Kingdom and from policy holders resident abroad whose proposals were made to the company at or through its office or agency in the United Kingdom bears to the total amount of the premiums received by the company: Provided that in the case of an assurance company having its head office in any British possession, the Commissioners of Inland Revenue may, by regulation, substitute some basis other than that herein prescribed for the purpose of ascertaining the portion of the income from investments to be so charged as being income derived from business carried on in the United Kingdom. (3) Every such charge shall be made by the Special Commissioners as though the company under the provisions of this Act had required the proceedings relating to the charge to be had and taken before those commissioners. (4) Where a company has already been charged to tax, by deduction or otherwise, in respect of its life assurance business, to an amount equal to or exceeding the charge under this rule, no further charge shall be made under this rule, and where a company has already been so charged, but to a less amount, the charge shall be proportionately reduced.

Since the respondent society was not resident in the United Kingdom for the purposes of United Kingdom income tax, it was entitled to exemption from that tax in respect of interest and dividends of securities and investments falling either (a) within the Income Tax Act, 1918, s. 46, or (b) within r. 2 (d) of sched. C, or (c) within r. 7 of the Miscellaneous Rules of sched. D.

The investments of the life assurance fund of the respondent society included some investments which were exempted from income tax under each of these heads. For example the income from these exempted investments in the calendar year 1935 amounted to £72,354, and, if this figure is relevant, it would enter into the calculation of assessable profit for the fiscal year 1936-7. When the present appeal reached your Lordships' House a curious, and somewhat embarrassing situation was disclosed. In the courts below, and before

the Special Commissioners, it seems to have been assumed, both on the side of the Inland Revenue and on the side of the respondent society, that the application of r. 3 to the latter was in some way affected by the existence of this exempted income, and that the question between them was, what was the proper method of making the adjustment called for on this account? But in the course of the argument before us, the House invited the Solicitor-General to explain why the calculation under r. 3 was affected by the fact of exempted income at all. A good deal of the subsequent discussion revolved around this point, and, consequently, your Lordships have now to decide two questions: first, what is the proper construction and application of r. 3 when an assurance society which falls within that rule holds investments exempt from income tax among the investments of its life assurance fund; and, secondly, what is the right decision in the case now before us where the Revenue has in effect made the concession that the existence of exempted income makes a difference to the calculation?

The present r. 3 had its origin in the Finance Act, 1915, s. 15. As counsel for the Revenue pointed out to us, before the Act of 1915 there was much difficulty in getting income tax from a life assurance company resident abroad with a branch here. Such a company could avoid United Kingdom income tax on its income from investments, even though it had a branch in the United Kingdom, by so arranging its affairs that its investments were foreign investments, the proceeds of which were not caught by United Kingdom income tax. It is true that the company might be regarded as carrying on in this country a trade through its branch, but there was much practical difficulty in arriving at the figure under case I of sched. D of annual profits of such a branch for, in the case of life assurance business, the true profits attributable to the branch could not be ascertained in the normal manner, as is shown by provisions in the Assurance Act, 1909, for a quinquennial valuation. The Finance Act, 1915, s. 15, was, it would seem, aimed at meeting this difficulty, and it did so by providing for a conventional figure, which should be "deemed to be profits" comprised in sched. D, on which a non-resident life assurance company, with a branch in the United Kingdom, would make a contribution to United Kingdom income tax, however it arranged its investments. The provisions now contained in r. 3 of case III call for the use of certain factors in order to arrive at this conventional figure on which such an assurance company as the respondent society is required to pay tax in respect of the annual profit of its life assurance business carried on in this country.

The rule itself is expressed in clear terms, and we are not entitled to read into it anything which is not there, unless on the true construction of the Income Tax Acts as a whole there is some statutory provision which must be treated as modifying it, in order to give it its true effect. In sub-s. (1) of the rule, there is no justification for reading "any income of the company from the investments of its life assurance fund" as though it ran, "any income of the company from such part of the investments of its life assurance fund as are not exempt from income tax." Yet this is the interpretation which is primarily favoured by the Crown. "The investments of its life assurance fund" must mean all such investments and not a residue of them after first subtracting what may be called "exempted investments." Sub-section (2) directs how the fraction is to be arrived at which is to be applied to the total of such investments, and naturally involves a comparison between two totals, one attributable to the life assurance business as a whole and the other attributable to the United Kingdom part of it. In the present case the proviso to sub-s. (2) was put into operation and the necessary fraction was obtained by the use of it. There is no dispute as to what the proper fraction is in this instance—it is roughly one-twentieth.

The language of sub-s. (4) seems to me to be equally clear. Its effect is to secure that the company's contribution by way of tax under the rule shall be abated, or even wiped out altogether, to the extent to which the company is charged to tax independently of the rule, but there is no justification for reading the words "where a company had already been charged to tax" as though they meant "where the company would be charged to tax if the investments it held were not investments the produce of which is exempt

from tax." The relief given by sub-s. (4) arises from the company paying tax apart from the rule, not from the company holding exempted investments.

A From 1915 to 1936, as I understand, the practice of the Revenue, acquiesced in, or, at any rate, not challenged, in litigation, by life assurance companies with their head office abroad and a branch in the United Kingdom, was to charge tax on the conventional sum thus arrived at, treating as immaterial the fact that the life assurance fund might contain investments the proceeds of which were not subject to tax, but in 1938 this House decided the appeal of *Hughes v. Bank of New Zealand* (1), upholding a decision in the Court of Appeal given in Dec., 1936, when LORD WRIGHT was presiding as Master of the Rolls. The point there arising had nothing to do with r. 3 of case III of sched. D, and nothing to do with the taxing of life assurance companies. What was being considered was the taxation under case I of a bank resident in New Zealand with a branch in London. The question was whether, in calculating the profit of the branch by setting off expenses against receipts, it was right to include on the receipts side the interest on certain investments the proceeds of which were by statute exempt from tax. If these amounts were included, the result would be nothing short of the taxing of interest which was not to be taxed. The issue is made exceedingly clear by examining the statement of debits and credits printed in LORD THANKERTON'S opinion (21 Tax Cas. 518), and by studying his subsequent observations. In the Court of Appeal LORD WRIGHT had said (*ibid.*, p. 492) :

D . . . it would be rather deplorable if, notwithstanding what I regard as the clear language of s. 46, the owner, not being ordinarily resident in the United Kingdom, was still taxed on the interest as part of his trading profits, and in my view that is not the true construction of the section . . . If they are not taxable at all, then obviously they can neither be charged under case III of sched. D nor under any case of sched. D at all.

E Read in the light of the issue before him, the words of my noble and learned friend, and the decision of this House, do not, in my opinion, help the respondent society, and, consequently, do not call for any change in the practice previously adopted as correct in applying r. 3 of case III. In *Hughes v. Bank of New Zealand* (1), what was in issue was the taxing of receipts which were exempt from tax. In the application of r. 3, the thing to be taxed is not, in whole or in part, exempted receipts, but is a conventional or notional sum—calculated, it is true, by the use of figures which might include the proceeds of exempted investments—but a sum "deemed to be profits," to be charged as such, without any deduction save that provided for in sub-s. (4).

F The other decision which was thought to be helpful to his case by counsel for the respondent company was that of *Cadbury Bros., Ltd. v. Sinclair* (2), where it was held, in reference to r. 5 (1) of the rules applicable to cases I and II of sched. D, that the assessment of profits of Cadbury Bros. must be made by excluding the annual value of certain lands, notwithstanding that these lands of the taxpayer were, by a statute of 1660 (12 Car. R. 2 di No. 34), exempt from every form of taxation, and, therefore, could not be charged to tax under sched. A. To do otherwise would be to impose tax on an income which was in terms not to be taxed. This decision also does not, as it seems to me, afford guidance in the present case, for the reason already indicated. G Once it is accepted that r. 3 of case III is not one which taxes income from investments, whether exempted or not, but one which taxes a conventional sum calculated as the rule directs, it becomes reasonably clear that the sum to be taxed is not varied by inquiring whether one of the factors in the calculation contains income from exempted investments. If variation is required on this ground, it must be provided by legislation. The Finance Act, 1940, s. 21, vetoes the suggested variation for the future, as far as s. 46 of the Act of 1918 is concerned, but I do not think this can be read as a recognition that the previous law required it.

H As I am differing from the Court of Appeal, where SOMERVELL, L.J. delivered the judgment of the court, I must indicate why, with the greatest respect to the Lord Justice, I find myself unable to accept his reasoning. He points out that sub-s. (4) of the rule permits a set-off against the charge on what is to be "deemed to be profits," of the whole of the tax charged, by deduction or otherwise, in respect of the company's life assurance business,

and this set-off may be sufficient to extinguish the charge under the rule altogether. The argument then proceeds thus. If the source of the set-off was tax borne by investments subject to tax, the set-off would be effective in reducing or might even extinguish the charge under the rule. If, however, these investments were changed into exempted investments, there would be nothing to set-off. This is true, but I cannot agree that such a result amounts to taxing indirectly the exempted investments. The resulting tax flows from the language of the rule, which authorises a reduction of the tax on the sum arrived at only if contributions to United Kingdom income tax have been made from other sources.

In my opinion, therefore, no reduction of liability on the ground that exempted investments enter into the calculation is called for, but inasmuch as there is no cross appeal and the Crown is merely seeking the reversal of the order of the Court of Appeal, the motion to be put to the House should be that the appeal be allowed. LORD NORMAND, who is not able to be here, authorises me to say that he concurs in this opinion.

LORD WRIGHT: My Lords, I have considered in print the opinion which has just been delivered by VISCOUNT SIMON and I agree with it.

The question is what effect is to be given to r. 3 of case III, sched. D, and the incorporated statutory regulation. The provisions of the rule are set out by my noble and learned friend, and I do not repeat them, nor do I recapitulate the facts which he has set out. It was stated by counsel for the Crown that up to 1938 the practice was to treat the rule as a self-contained provision, enacted in 1915 and directed to secure that non-resident foreign and colonial assurance companies should bear some share of taxation for the benefit of the British Revenue in respect of the part of their business carried on at their English branch. As it was difficult to assess their profit in the ordinary method, r. 3 was devised as a rough and ready way of imposing some tax on their British profits by assessing a definite proportion of their income from the securities of their life assurance fund. The proportion was arrived at by a ratio based on the comparison between one part of their liability (which may be described as British liability), *i.e.*, their liability on life assurance policies effected on proposals made in Britain or of which the holders are in Britain, and the total amount of their liability on all life assurance policies. This is a conventional charge. The ratio, which in this case is roughly one-twentieth of the total premium receipt on life assurance business, is fixed and artificial. In the year of assessment 1936/1937, this ratio, when applied to the total sum of the life assurance fund, gave a figure of £230,684, as the British income of the respondent society on the basis directed by r. 3. No specific investments were taxed. The rule provided that the income from the fixed specified percentage of the securities in question was "to be deemed to be profits comprised in this schedule" [sched. D], and was to be charged under case III of that schedule. It was, therefore, a charge under the Case on a notional figure deemed to be a figure of profit. No doubt, it was possible to give a list of the securities which formed at any particular time the life assurance fund and to value them individually and add up the total, but there was nothing to show which of these securities were to be deemed to fall within the twentieth portion of the securities.

Of the securities comprising the life assurance fund there were certain investments amounting in value to £72,354 the income of which was specially exempted from tax. No allowance was made in the assessment under r. 3 of case III on account of these exemptions. That was not at first questioned by the respondent society, but after the decision of this House in *Hughes v. Bank of New Zealand* (1), the respondents claimed that these exempted securities should have been segregated and the total amount of the income from them in the year of charge deducted from the total "British" income so that the charge under r. 3 would have been proportionately reduced. The society, accordingly, made a corresponding claim for repayment of part of the tax so assessed on the ground of error or mistake under the Finance Act, 1923, s. 24, in its return, but, as the hearing of the appeal before your Lordships proceeded, it was pointed out by VISCOUNT SIMON that the real question to be determined was whether, on the true construction of r. 3, there had been any error or mistake. To decide that it was necessary to construe r. 3, and I think that it has now been made clear

that the rule was correctly applied. Its application was not affected by the decision in *Hughes v. Bank of New Zealand* (1). In that case r. 3 was not considered. It was not necessary to consider it at all. Rule 3 deals with the life assurance fund of assurance companies. The decision just referred to deals with a bank. The exemption under the Income Tax Act, 1918, s. 46, directly and plainly applies to the specified securities in question, but r. 3, as already explained, is not a plain or simple clause of exemption as were the clauses considered in *Hughes v. Bank of New Zealand* (1). It is, on the contrary, a charging provision intended to charge the society on the basis of a fixed percentage of the total British income. That was merely a convenient mode of imposing some charge on the assurance company in consideration of the privilege it enjoyed in trading in this country. The charge was a tax on the investment income only as a machinery to tax the general profits of the British business, and as a manner of measuring the charge by an arbitrary figure derived from a percentage of the investment income. In this connection it was not material to distinguish between exempted and unexempted income. All that was needed was a yardstick. This is borne out by the actual language of r. 3. It is positive in its terms. The only qualification is to be found in sub-s. (4) which provides for a set-off of charges on the society outside r. 3. The effect of the sub-rule is to secure that the fixed and conventional assessment under r. 3 is to be reduced proportionately if the company has already been charged apart from the charge under r. 3.

As VISCOUNT SIMON has pointed out, the decision in the *Bank of New Zealand* case (1) affords no guidance in the present appeal, nor do the expressions which he quotes from my judgment in the Court of Appeal ([1937] 1 K.B. 430). What I said there was quite correct in respect of the issues then before the court and of the securities then in question. The special provisions of r. 3 were not there relevant and were not before either the Court of Appeal or this House. In truth, as already observed, the charge under r. 3 is not a charge on the specified investments except in form. It is an artificial mode of charging the general profit of the British business. Rule 3, not being qualified except for sub-s. 4, and being a charging section, must receive its appropriate effect from the court, notwithstanding an apparent, but not real, conflict between it and the Income Tax Act, 1918, s. 46. The difficulties involved in attempting to reconcile r. 3 and s. 46 and bring them both into operation are illustrated by the judgments in the tribunals below in the present case, but these difficulties do not arise if, as I think, r. 3 is the dominant and overriding enactment in this regard. If the court has failed to give effect to the purpose of the legislature, it is for the latter to cure the error. However, as LORD SIMON has pointed out, the only amendment of the law, namely, that contained in the Finance Act, 1940, s. 21, is not retrospective and cannot help the court in deciding this appeal. For these reasons and for the reasons explained by LORD SIMON, I shall concur in the motion which he will put to the House.

LORD PORTER (read by LORD SIMONDS): My Lords, the decision in this case turns on the true construction of r. 3 of the rules applicable to case III of sched. D of the Income Tax Act, 1918. The Revenue authorities say that the terms of the rule are plain. Its object is to determine what are to be regarded as the taxable profits of a non-resident assurance company with a branch in this country. Tax, in their contention, is not imposed on the income of its investments in the case of such a company. It is imposed on a purely notional sum of profits. They point out that if an assurance company is resident in this country they can either assess it under case III of sched. D on the income from its investments or under case I of that schedule on the profits of the business which it carries on, and agree that, if the former alternative is adopted, the interest derived from its tax-exempt investments must be excluded in computing what its income is. Indeed, I understood them to be prepared to concede that the exclusion of such interest cannot be avoided if the alternative method of taxing the company on its profits is adopted, since it is not permissible by any device to levy tax on such investments either directly or indirectly: see *Hughes v. Bank of New Zealand* (1). Similarly, if tax is being levied on profits, the taxable value of tax free land must be excluded from the credit side of the account in ascertaining what these profits are: see *Cadbury Bros. Ltd. v. Sim.*

clair (2). In each of these cases, however, the object was to determine what sums were to be brought into computation in ascertaining the actual profit. In the former case the profits of the English branch of a non-resident company charged, not on a conventional basis, but on the actual profits earned by that branch in this country; in the latter, the actual profits of a company which was resident here. In neither case did notional profits come in question, nor, indeed, is there any very obvious reason for applying these principles to notional profits calculated by adopting, in the case of a non-resident company with a branch here, some conventional method of finding the proportion which the income of the English branch bears to the income of the business of the company as a whole.

Where, as in this case, notional or conventional profits alone come in question, your Lordships have to decide whether the possession of tax-exempt investments has any effect in reducing the quantum of those profits, and, if it has, to determine the extent of that reduction. The respondents, on their part, assert, in the first place, that r. 3 does not prescribe a method of calculating profits under case I of sched. D, but, on the contrary, the word "profits" in the rule merely means income which is subject to tax under case III. Such income, they say, is that which is set out under the specific heads to be found in r. 1 of the rules applicable to that case under the sub-headings (a) to (f), and the matters included under those heads are confined to investment income and nowhere deal with profits as such. In support of this argument they point to the phraseology used in r. 3. What is being taxed, in their submission, is "income" not "profits." It is only deemed to be profits, and not even profits of any kind, but profits "comprised in this schedule" and "charged under this Case." Nor, they say, can the Revenue authorities escape this result by attempting to assess the income tax payer under case I in respect of profits as an alternative to charging him under case III. Rule 3, they argue, alone gives validity to the charge and no alternative method is permitted. If, then, it is income from investments which is being taxed in this country and the company on which the charge is made holds tax-exempt investments, that company, it is maintained, should have the benefit of the exemption to the extent to which it is assessed to tax, otherwise it is charged on its tax-exempt investments either directly because they form part of its income or, at any rate, indirectly in being compelled to pay on the income of its other securities which have not been brought into this country and should be exempt from taxation imposed here. This criticism would, I think, have force if applied to such circumstances as existed in *Hughes v. Bank of New Zealand* (1) and *Cadbury Bros. Ltd. v. Sinclair* (2), in both of which the tax was imposed on actual profits and the tax-free asset was part of the assets of the branch or company on whom it was imposed, but it has no application to a case where the profits or income, the subject of charge, is a notional sum calculated in a conventional way, nor do I think it matters whether it is or is not established that the tax-exempt investments are assets of the branch carried on in this country.

The stress of the respondents' argument was laid on the words "shall be charged under this Case," i.e., under case III, and it was said that those words mean that it is to be charged on the income of investments as such. I cannot think so. In the first place, it is not accurate to say that case III is concerned only with investment income. The general description of the content of that Case in cl. 2 at the beginning of that schedule shows a wider ambit. There the field covered by case III is delineated in the words

Tax in respect of profits of an uncertain value and of other income described in the rules applicable to this case.

In the face of such demarkation of the extent of the tax, there is no justification for limiting it to a charge on investment income. To do so would be to give effect only to the latter half of the definition and to confine the attention to "other income described in the rules applicable to this Case," while neglecting the opening words "profits of an uncertain value."

In any case, when the rules speak of income being taxable under case III they mean, I think, no more than that tax, being imposed under the rules of that Case and there only, must be charged under that Case. It does not mean that the charge is imposed on the income from investments and not on profits. But, say the respondents, let it be granted that the rule means no more than that

notional profits are to be ascertained in a conventional way and then subjected to tax, nevertheless, the Crown will be charging tax on tax-exempt securities if we are not given the benefit of all our tax-exemption when we are being assessed in respect of the profits of the English branch. Unless the taxpayer gets the benefit of this exemption when assessed in this country he will, they maintain, gain no advantage from his purchase of tax-free securities—not in this country because no allowance is made in his assessment here, and not elsewhere because an assurance company not having its head office in the United Kingdom would, in any case, escape liability unless, of course, the tax were deducted at the source. Rule 3 (4), it is said, gives a benefit to those who have paid tax by deduction in England, and, therefore, those who hold tax-free investments should receive a like benefit by being treated as if they had paid tax on those securities. Otherwise they are not enjoying to the full the benefit of the exemption. The answer is, I think, that they receive such benefit as they are given by the rule, and, if no exemption is thus granted, the matter, if this result is not intended, may be one for the legislature, but is not one with which your Lordships can deal.

No doubt, this construction of the rule, if adopted, may in certain circumstances lead to an anomalous position, e.g. if a non-resident company should have invested all its life assurance fund in tax-exempt securities, it would pay tax on the conventionally apportioned sum without any reduction and would be no better off than if the statutory proportion were wholly liable to tax. I agree that this is a hardship, but it does not entitle your Lordships to disregard the plain meaning of the rule. So long as the words are in their present form the result must be looked on as the price which non-resident assurance companies have to pay for engaging in business in this country. I would only add that, even if the arguments for the respondents were accepted in principle, I find difficulty in seeing why the whole of the tax-exemption should be regarded as owed to the English branch. In the case of a bank such as the Bank of New Zealand and in circumstances such as existed in that case (1) any quantity of tax-free securities might have been held by the business as a whole, but exemption was only given to the English branch in respect of those held as part of that branch's assets and brought into account in calculating the amount of profits earned here. Both *Hughes v. Bank of New Zealand* (1) and *Cadbury Bros. Ltd. v. Sinclair* (2) do, in my opinion, decide that, when actual profits are being dealt with, the exempted interest or item must not be included as a credit item in the company's account when determining its profits. It is argued that when in the present case notional profits are being sought for, interest or items of that kind must on similar principles be excluded from the calculation of such profits.

The analogy, however, in my view, if it applies at all, only applies in a case where the *quantum* of actual, not notional, income is being ascertained. In the present case the only actual income which forms a factor in ascertaining the amount of profits is that mentioned in r. 3 (2), i.e., the total income from the investments of the life assurance fund. If, then, that sub-rule requires the interest derived from tax-free investments to be deducted, the logical course would be to deduct it from the actual total investments of the company which are exempt from tax. I cannot for myself see why it should be deducted from a sum which does not represent any real income or profit, but is merely arrived at by a conventional calculation adopted for the purpose of estimating an otherwise almost incalculable sum. It is not as if the tax-exempt investments were assets of the English branch, or as if, indeed, it were possible to separate the assets of the branch from those of the company as a whole—no argument as to or evidence of such a position was presented, and the method of calculating the profits adopted in r. 3 (2) would prevent such a suggestion being put forward. In any case, however, I think the wording of the rule too plain to justify even the modified relief which the Crown have been prepared to give since the decision in *Hughes v. Bank of New Zealand* (1) was decided.

I agree with your Lordships that the appeal should be allowed and the judgment of MACNAGHTEN, J., restored. This is the order asked for by the appellants and it is not, I think, material that the reasoning of your Lordships, including my own, would lead to the withdrawal even of the relief given by the commis-

sioners and by the judge.

LORD SIMONDS: My Lords, I also concur.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Bell, Brod-
rick & Gray* (for the respondent).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* NORTHERN ALUMINIUM CO., LTD.

[HOUSE OF LORDS (Viscount Simon, Lord Wright, Lord Simonds and
Lord Normand), March 6, 7, 31, 1947.]

*Revenue—Excess profits tax—Computation of capital employed in business during
chargeable accounting period—Deduction of debts—"Debt"—Rebate paid
to customer—Consequent reduction of profit—Finance (No. 2) Act, 1939*
(c. 109), *sched. VII, pt. II, para. 2* (1).

The respondent company manufactured aluminium products and during the war it sold these to customers who, in turn, incorporated the articles supplied in aeroplanes which were purchased by the Ministry of Aircraft Production. All the contracts under which aluminium products were sold by the company were made at fixed prices, and in no case did these contracts provide for any variation of the prices therein specified. The company was at all material times a member of an association. On Dec. 16, 1939, a letter was written by the Air Ministry to the association confirming an agreement which had been reached to the effect that during the period from July 1, 1939, to June 30, 1940, prices for certain products manufactured by the members of the association should be reduced by amounts specified in a list. The letter further stated that negotiations were to be entered into not later than June 30, 1940, by representatives of the Air Ministry and of the association in regard to the prices to be charged for the supply of wrought aluminium alloys after that date. In fact, no negotiations were entered into before June 30, 1940, but at a meeting held in November, 1941, the question of reduced prices for goods and the payment of rebate to the Ministry for periods in respect of transactions entered into not earlier than Jan. 1, 1941, was discussed. No discussions took place with regard to any reduction of prices at which goods had been sold by members of the association during the six months from July 1, 1940, to Dec. 31, 1940, and no reductions in prices were ever made nor were any rebates ever paid for that period. On Oct. 12, 1942, heads of agreement were drawn up between the Minister of Aircraft Production, the association, and the member firms of the association which were intended to continue in force until the end of 1943, and to ensure that prices left only a reduced profit in the hands of manufacturers. This agreement regulated prices for the years 1941, 1942 and 1943 and provided that what was called a rebate in respect of the prices at which goods had been supplied by members of the association to their customers should be paid over to the Ministry, which involved an adjustment in the prices charged by the manufacturers of aeroplanes for the machines which they supplied to the government. The result of this was that the profit made by the company, calculated for the purpose of assessment to excess profits tax for the calendar year 1941, which originally stood at the figure of £3,371,120, was subsequently reduced by the sum of £2,743,469, which was the amount of the payment under the agreement of Oct. 12, 1942, made by the company to the Ministry late in 1943. The reduction of profit was manifestly referable to the trading year 1941, and, in accordance with the decision in *Isaac Holden & Sons Ltd. v. Inland Rev. Comrs.* (1924) (12 Tax Cas. 768), the accounts of the company as between themselves and the Revenue, were "re-opened" and the smaller figure of profit now ascertained to be correct was substituted for the original figure of profit in that year. The Crown contended that since this correction had been made retrospectively in calculating the profits of 1941, the company must submit to a new calculation of the capital employed in the business of the company in the corresponding chargeable accounting period, which would result in a reduction of the figure of standard profits with which the profits

of the year 1941 had to be compared and so would increase the amount of excess profits tax imposed on the company for that period :—

HELD : (i) in calculating capital for the purposes of excess profits tax or in deducting “ debts ” which would reduce the amount of that capital, the Finance (No. 2) Act, 1939, sched. VII, pt. II, required that the debts should be “ real debts ” existing at the time.

A (ii) the calculation of capital in a given chargeable accounting period could not be affected by something which did not exist, even *in futuro*, as either a debt or a receipt referable to that period.

B (iii) under para. 4 of pt. II of sched. VII to the Act of 1939, if the contrary is not shown, then, for the purpose of ascertaining the average amount of capital, profits or losses made in the relevant period shall be deemed to have resulted, as they accrued, in a corresponding increase or decrease in the capital employed, but in this case the contrary was conclusively shown, for, whatever might be the correction ultimately arrived at in the figure of profits in 1941, the mere expectation that negotiations to be entered into might result in an agreed variation of the prices charged did not and could not result in a change in the capital employed in the year 1941.

(iv) the sum in question should not, therefore, be deducted in computing the capital of the company for the chargeable accounting period Jan. 1 to Dec. 31, 1941.

C *Decision of the Court of Appeal [1946] 1 All E.R. 546, affirmed.*

[FOR THE FINANCE (No. 2), ACT, 1939, SCHED. VII, PT. II, PARAS. 2 (1), 4, see HALSBURY'S STATUTES, Vol. 32, p. 1222; and FOR THE FINANCE ACT, 1940, s. 34 (4), see *ibid.*, Vol. 33, p. 188.]

Cases referred to :

D (1) *Isaac Holden & Sons, Ltd. v. Inland Revenue Comrs.* (1924), 12 Tax Cas. 768; Digest Supp.
(2) *Inland Revenue Comrs. v. Terence Byron, Ltd.*, [1945] 1 All E.R. 636; 114 L.J.K.B. 345; 172 L.T. 389; Digest Supp.

APPEAL by the Crown from a decision of the Court of Appeal (LORD GREENE, M.R., SOMERVELL and COHEN, L.JJ.), dated Mar. 6, 1945, and reported [1946] 1 All E.R. 546, reversing a decision of MACNAGHTEN, J., dated Nov. 8, 1945, and reported *ibid.*

E The Special Commissioners held that the sum of £2,743,469, being the agreed amount of a rebate for 1941 on the price of goods payable and subsequently paid to the Ministry of Aircraft Production by the respondent company under a certain agreement, was an “ accruing liability ” within the Finance Act, 1940, s. 34 (4), and should, accordingly, be deducted in computing the capital of the company for excess profits tax for the chargeable accounting period from Jan. 1 to Dec. 31, 1941. On an appeal by way of Case Stated MACNAGHTEN, J., upheld the decision of the commissioners, but the Court of Appeal reversed this decision.
F The Crown appealed.

The Solicitor General (Sir Frank Soskice, K.C.) and Reginald P. Hills for the Crown.

Frederick Grant, K.C., and J. S. Scrimgeour, K.C., for the company.

The House took time for consideration.

G VISCOUNT SIMON : My Lords, notwithstanding the sustained and vigorous argument put before the House by counsel for the Crown, I have reached the conclusion that the judgment pronounced by LORD GREENE, M.R., from which the Crown appeals, cannot be successfully challenged and that the conclusion at which the Court of Appeal arrived in reversing the decision of MACNAGHTEN, J., is right.

H The respondent company manufactures aluminium products and during the war it sold these to customers who, in turn, incorporated the articles supplied in aeroplanes which were purchased by the Ministry of Aircraft Production. All the contracts under which aluminium products were sold by the company were made at fixed prices, and in no case did these contracts provide for any variation of the prices therein specified. The company was at all material times a member of the Wrought Light Alloys Association. On Dec. 16, 1939, a letter was written by the Air Ministry to the association confirming an agreement which had been reached to the effect that during the period from July 1, 1939, to June 30, 1940, prices for certain products manufactured by the members of the association

should be reduced by amounts specified in a list. The letter further stated that negotiations were to be entered into not later than June 30, 1940, by representatives of the Air Ministry and of the association in regard to the prices to be charged for the supply of wrought light aluminium alloys (which description may be treated as covering the aluminium products manufactured and sold by the company) after that date. It will be observed that the agreement in regard to prices after June 30, 1940, only provided that negotiations should be entered into. It cannot be construed as meaning that, if negotiations failed to produce agreement, reasonable prices should be substituted for the prices actually charged. In fact, no negotiations were entered into before June 30, 1940, but at a meeting held in November, 1941, the question of reduced prices for goods and the payment of rebate to the Ministry for periods in respect of transactions entered into not earlier than Jan. 1, 1941, was discussed. No discussions took place with regard to any reduction of prices at which goods had been sold by members of the association during the six months from July 1, 1940, to Dec. 31, 1940, and no reduction in prices was ever made nor were any rebates ever paid for that period. A B

On Oct. 12, 1942, heads of agreement were drawn up between the Minister of Aircraft Production, the association, and the member firms of the association (which would include the company) which were intended to continue in force until the end of 1943 and to ensure that prices left only a reduced profit in the hands of manufacturers. This agreement regulated prices for the years 1941, 1942 and 1943 and provided that what was called a rebate in respect of the prices at which goods had been supplied by members of the association to their customers should be paid over to the Ministry. This arrangement, of course, involved an adjustment in the prices charged by the manufacturers of aeroplanes for the machines which they supplied to the government. The result of this was that the profit made by the company, calculated for the purpose of assessment to excess profits tax for the calendar year 1941, which originally stood at the figure of £3,371,120, was subsequently reduced by the sum of £2,743,469, which was the amount of the payment under the agreement of Oct. 12, 1942, made by the company to the Ministry late in 1943. The reduction of profit was manifestly referable to the trading year 1941, and, in accordance with the well-known decision in the *Woolcombers'* case (1), the accounts of the company as between themselves and the Revenue were "re-opened" and the smaller figure of profit now ascertained to be correct was substituted for the original figure of profit in that year. The Crown now contends that since this correction has been made retrospectively in calculating the profits of 1941, the company must submit to a new calculation of the capital employed in the business of the company in the corresponding chargeable accounting period. The result would be to reduce the figure of standard profits with which the profits of the year 1941 have to be compared and so to increase the amount of excess profits tax imposed on the company for that period. C D E F

It is doubtless true that where a trader who comes within the scope of the excess profits tax makes a profit on his year's trading, that profit, so far as it is still in his hands, may enter into the calculation of capital, within the meaning of pt. II of sched. VII to the Finance (No. 2) Act, 1939, for such profit is an asset which remains intact and is available and may be required for the purposes of his trade or business. On the other hand, such profit or part of it may have been used during the year in the purchase of other assets, and in those circumstances to treat the figure of profits as a net increase to assets in the shape of additional money, when the whole or part of it has been transformed into a material asset like new machinery or further stock, would be to count it twice over. There is no dispute, I imagine, between the Revenue and accountants as to the making of the proper adjustments. A very different question, however, arises when the ultimate figure of profits cannot be ascertained at the time from the transactions of the year, but is (as in this case) arrived at by substantial correction years afterwards. By para. 2 of pt. II of sched. VII, debts owing by the taxpayer are to be deducted in calculating for the purposes of tax the amount of the capital employed in the trade or business, but in the present case the company did not, in the period for which the amount of capital is being calculated, owe any debt of £2,743,469 at all. Since the capital in any accounting period is assets *minus* debts, the calculation of capital for 1941 cannot be modified by G H

deducting something which was not, in 1941, a debt at all. MACNAGHTEN, J., construed the letter of Dec. 16, 1939, as though it amounted to a contract that, if the contemplated negotiations did not result in agreement, a reasonable price was to be substituted for the sale price, but the Solicitor-General rightly repudiated this interpretation. The company were never under any obligation or liability to surrender part of the sale price until they agreed to do so in October, 1942, after the calculation of capital for the year 1941 had been correctly made.

- A A mere prospect that negotiations in the future might involve a return of some portion of the profit can no more affect the calculation of capital, according to the prescriptions of the Act, than would a prospect that in the future the company's customers might be benevolently disposed to pay them some additional amount. The assets of the company available for carrying on their trade or business in the year 1941 would neither be diminished nor increased by such speculation. It seems to me, therefore, that the Master of the Rolls was perfectly right in insisting that, in calculating capital for the purposes of excess profits tax or in deducting "debts" which would reduce the amount of that capital, what the statute requires is that the debts should be "real debts" existing at the time. He goes on ([1946] 1 All E.R. 551):

- C You cannot earn profits on a notional debt—it is not an asset. It is not an asset which would ever appear in a balance sheet. It must be in the balance sheet for the year as an existing asset, not something which is written back by a re-opening of the balance sheet in some subsequent year so as to let in something which in that year was not an asset at all . . . It is quite impossible to treat a receipt, which . . . is to be written back into a previous year for the purpose of ascertaining the profits, as being an asset in the shape of a debt within the meaning of these capital provisions.

- D It was suggested in argument before the House that the provisions in pt. II of the schedule for computing capital are in themselves so artificial that there was no difficulty in adopting the further artificiality for which the Crown contended, but it is not the description of the assets which go to make up capital which is artificial, it is the method of quantifying them, e.g., treating an asset acquired by purchase as valued at the price at which it was bought, even though it has lost nearly all its value, as in *Inland Revenue Commissioners v. Terence Byron Ltd.* (2), which departs from proper business and accountancy practice. It is, I think, clear on the words of the existing statutory provisions that the calculation of capital in a given chargeable accounting period cannot be affected by something which did not exist, even *in futuro*, as either a debt or a receipt referable to that period.

- E The Crown advanced a further argument based on an amending section to be found in the Finance Act, 1940. Section 34 (4) of that Act adds to para. 2 (1) of pt. II of sched. VII enacted in the previous year the following words:

- F The debts to be deducted under this sub-paragraph shall include—(a) any such sums in respect of accruing liabilities as are allowable as a deduction in computing profits for the purposes of excess profits tax, or would have been so allowable if the period for which the amount of capital is being computed had been a chargeable accounting period; and (b) in the case of the business of an assurance company, also any sums representing profits of its life assurance business belonging or allocated to, or reserved for, or expended on behalf of, policy holders or annuitants (being sums which would be excluded under sub-s. (1) of section sixteen of the Finance Act, 1923, in computing the profits of the company for the purposes of the Income Tax Acts), and all the said sums shall be deducted notwithstanding that they have not become payable.

- G The Crown contended that this sum of £2,743,469 was an "accruing liability" under (a) and attempted to support this contention, which, in my opinion, is quite unsound, by pointing out that para. (b) referred to something which was not, properly speaking, a "debt," for it dealt with sums representing profits of life assurance business which were set aside for the benefit of policyholders, and the like. Hence, it was said, when the section above quoted provides that deductible debts "shall include (b)" this is bringing within the category of debts something which is not properly speaking a debt at all. I venture to think that the Master of the Rolls' argument on the implication of the word "include" was somewhat overstressed, but it makes no difference in the result, for there seems no ground at all for saying that because what is dealt with in (b) is not, strictly speaking, a debt, therefore a sum "in respect of accruing liabilities" in (a) is not strictly speaking a liability at all, but is a phrase wide enough

to include an unascertained figure which either may, or may not, result from a future negotiation.

Finally, agreement must be made to para. 4 of pt. II of sched. VII to the Act of 1939 which runs as follows :

4. For the purpose of ascertaining the average amount of capital employed in a trade or business during any period, the profits or losses made in that period shall, except so far as the contrary is shown, be deemed—(a) to have accrued at an even rate throughout the period; and (b) to have resulted, as they accrued, in a corresponding increase or decrease, as the case may be, in the capital employed in the trade or business.

That paragraph does, indeed, imply that profits or losses made in a chargeable accounting period may affect the calculation of the average amount of capital employed in that period. But the important words for the present purpose are “except so far as the contrary is shown.” If the contrary is not shown then, for the purpose of ascertaining the average amount of capital, profits or losses made in the relevant period shall be deemed to have resulted, as they accrued, in a corresponding increase or decrease in the capital employed. But in the present case the contrary is conclusively shown, for, whatever may be the correction ultimately arrived at in the figure of profits in 1941, the mere expectation that negotiations to be entered into might result in an agreed variation of the prices charged did not and could not result in a change in the capital employed in the year 1941. In my opinion, therefore, the appeal fails and should be dismissed with costs.

LORD WRIGHT : My Lords, I agree.

LORD SIMONDS : My Lords, I also agree.

LORD NORMAND (read by LORD SIMONDS) : My Lords, I find myself in agreement with what has been said by VISCOUNT SIMON, and also in agreement with the MASTER OF THE ROLLS, to which I cannot usefully add anything.

Appeal dismissed with costs.

Solicitors : *Solicitor of Inland Revenue* (for the appellants) ; *Kenneth Wright & Johnson* (for the respondents).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

FRANKLIN v. MINISTER OF TOWN AND COUNTRY PLANNING.

[COURT OF APPEAL (Lord Oaksey, Morton and Tucker, L.JJ.), March 20, 21, 24, 1947.]

Town and Country Planning—New town—Objections—Onus of proof—Duty of Minister—Need to support proposed order by evidence at public inquiry—New Towns Act, 1946 (c. 68), s. 1 (1) ; sched. I (3).

Pursuant to the New Towns Act, 1946, sched. I, para. 3, the Minister of Town and Country Planning held a public local inquiry into objections to a proposed order under s. 1 (1) of that Act, called the Stevenage New Town Designation Order, 1946, by which Stevenage was designated as a “new town” within the Act. Before the Act became law, the Minister had stated that Stevenage was to be the first of the “new towns.” At the inquiry, no evidence in support of the order was adduced, and the objections then made were subsequently considered and rejected by the Minister. He dealt in writing with the substance of all objections except that directed to the difficulties of water supply and sewage disposal, with regard to which he said he was taking advice, having in mind a scheme which representatives of the Metropolitan Water Board and the Lee Conservancy had agreed would meet the difficulty.

HELD : (i) the inquiry under sched. I, para. 3, was to be held with respect to “any objection,” to the proposed order and not with respect to the proposed order itself, and, therefore, there was no obligation on the Minister to call evidence at the inquiry in support of his proposed order.

Re the Trunk Roads Act, 1936, [1939] 2 All E.R. 464, approved.

(ii) the only obligation which rested on the Minister after the inquiry was fairly and *bona fide* to consider the report of the person by whom the inquiry was held, and after consultation, under s. 1 of the Act, with any local authorities who appeared to him to be concerned, to decide whether it was expedient in the national interest that the new town should be developed as proposed. The objectors had failed to discharge the onus which was on them to show that this obligation had not been carried out and to provide evidence of bias.

Decision of HENN COLLINS, J. ([1947] 1 All E.R. 396) affirmed reversed

When applications are made to the court to quash orders made by Ministers in housing and town planning matters it is desirable that the notice of motion and the affidavits in support thereof should state the matters of complaint and objection with precision and particularity.

[EDITORIAL NOTE.] In an Editorial Note to *Phoenix Assurance Co., Ltd. v. Minister of Town and Country Planning* (*ante* p. 454) it was pointed out that that case, with the decision of HENN COLLINS, J., in the present case (*ante* p. 396), limited the powers of the Minister of Town and Country Planning when making orders under the Town and Country Planning Act, 1944, and the New Towns Act, 1946, in the same manner as that in which the powers of the Minister of Health under the Housing Acts have been restricted in relation to the confirmation of clearance and compulsory purchase orders. In other words, the functions of the Minister were held to be quasi-judicial and his powers must be exercised judicially. The decision of HENN COLLINS, J., in the present case, is now reversed, but it is important to remember that the reversal is on the facts and that his decision on the scope of the Minister's authority is accepted.

AS TO QUASI-JUDICIAL POWERS, see HALSBURY, *Hailsham Edn.*, Vol. 26, pp. 284-288, paras. 604-606; and FOR CASES, see DIGEST, Vol. 38, pp. 94-98, Nos. 697-711.]

Cases referred to :

- (1) *Re the Trunk Roads Act, 1936, and Re the London-Portsmouth Trunk Road (Surrey) Compulsory Purchase Order (No. 2), 1938*, [1939] 2 All E.R. 464; [1939] 2 K.B. 515; 108 L.J.K.B. 555; 160 L.T. 554; Digest Supp.
- (2) *Jackson v. Barry Ry. Co.*, [1893] 1 Ch. 238; 68 L.T. 472; 2 Digest 379, 424.
- (3) *Local Government Board v. Arlidge*, [1915] A.C. 120; 84 L.J.K.B. 72; 111 L.T. 905; 79 J.P. 97; 38 Digest 97, 703.
- (4) *Horn v. Minister of Health*, [1936] 2 All E.R. 1299; [1937] 1 K.B. 164; 105 L.J.K.B. 649; 155 L.T. 335; 100 J.P. 463; Digest Supp.
- (5) *R. v. Board of Education*, [1910] 2 K.B. 165; 79 L.J.K.B. 595; 74 J.P. 259; *sub nom.*, *R. v. Board of Education, Ex p. Swansea, Oxford Street (Church of England) School Managers*, 102 L.T. 578; *affd.*, *sub nom.*, *Board of Education v. Rice*, [1911] A.C. 179, H.L.; 42 Digest 614, 141.

APPEAL of the Minister of Town and Country Planning from an order of HENN COLLINS, J., dated Feb. 20, 1947, reported [1947] 1 All E.R. 396.

On Nov. 11, 1946, the Minister after having held a public local inquiry, made the Stevenage New Town Designation Order, 1946. The objectors, who were residents of Stevenage, opposed the order, and appealed to the court on the grounds that (1) the Minister had not acted within his powers in making the order, and that (2) in considering the objections to the proposed order he failed to carry his duty to give the objections fair and proper consideration. HENN COLLINS, J., held that the order was not *ultra vires*, but that the Minister had been biased in his consideration of the objections, and he, therefore, quashed the order. The facts appear in the judgment of LORD OAKSEY, L.J., and are summarised in the headnote.

The Attorney-General (*Sir Hartley Shawcross, K.C.*) and *H. L. Parker* for the Minister.

Capewell, K.C., and *Squibb* for the objectors.

LORD OAKSEY, L.J. : The material provisions of the New Towns Act, 1946, are as follows. By s. 1 :

- (1) If the Minister is satisfied, after consultation with any local authorities who appear to him to be concerned, that it is expedient in the national interest that any area of land should be developed as a new town by a corporation established under this Act, he may make an order designating that area as the site of the proposed new town.
- (2) The provisions of sched. 1 to this Act shall have effect with respect to the procedure to be followed in connection with the making of orders under this section . . . (3) An order under this section may include in the area designated as the site of the proposed new town any existing town or other centre of population, and references in this Act to a new town or proposed new town shall be construed accordingly.

That would make it possible for the town of Stevenage to be included in the area to be designated. By para. 1 of sched. I :

Where the Minister proposes to make an order under s. 1 of this Act, he shall prepare a draft of the order, describing the area to be designated as the site of the proposed new town by reference to a map, either with or without descriptive matter (which, in the case of any discrepancy with the map, shall prevail except in so far as may be otherwise provided by the draft order) together with such statement as the Minister considers necessary for indicating the size and general character of the proposed new town.

Paragraph 2 prescribes the details which have to be published. Paragraphs 3 and 4 are the most important. By para. 3 :

If any objection is duly made to the proposed order and is not withdrawn, the Minister shall, before making the order, cause a public local inquiry to be held with respect thereto, and shall consider the report of the person by whom the inquiry was held.

By para. 4 :

Subject to the provisions of the last foregoing paragraph, the Minister may make the order either in terms of the draft or subject to such modifications as he thinks fit.

I need not read the proviso.

The application to quash the order which the Minister had made in this case was made on the allegation that, when he made that order, he was biased and had not fairly or *bona fide* considered the report of the person by whom the inquiry was held or the objections which had been made to the proposed order. The facts are as follows. On May 6, 1946, before the New Towns Act, 1946, had been passed on Aug. 1, 1946, the Minister attended at Stevenage Town Hall and made a speech. Before that the Abercrombie Report had been issued indicating the desirability of certain new towns being formed round London, and a committee, called the New Towns Committee, of which Lord Reith was chairman, had been set up by the government and had issued an interim report of which para. 16 stated :

Stevenage is suggested in the Greater London Plan, 1944, as one of the new towns in the outer ring round London. We are informed that the development of this town is a matter of urgency . . .

They added this recommendation :

Arrangements should be made for setting up immediately a public corporation for the development of a new town at Stevenage to proceed with the necessary work in advance of legislation.

It was contended, *inter alia*, that those passages in the interim report showed that the government, and the Minister of Town and Country Planning in particular, had made up their minds that Stevenage was to be one of the new towns under the Act which they anticipated would be passed. When the Minister of Town and Country Planning made his speech at Stevenage the Act had not been passed, the Bill at that time being before the House of Commons. In his speech the Minister used expressions which, it is said, showed his bias and that he had determined that Stevenage should be one of these new towns. In the course of his speech, he said : " I want to carry out in Stevenage a daring exercise in town planning." At that point, according to the reporter, there were jeers and he said : " It is no good your jeering. It is going to be done (applause and boos, and cries of ' Dictator ')." Later on he said : " The project will go forward because it must go forward. It will do so more surely and more smoothly, and more successfully with your help and co-operation." Again, before answering written and verbal questions, he said : " I had a talk with members of your council this afternoon. I am perfectly ready, as I said to your council, to discuss any alternative proposals which will produce an equally good result. That must be a condition. Any alternative plan put forward must be as good as the plan I have submitted to you. I am prepared to consider any reasonable alternative subject to that." On behalf of the objectors it is contended that that does not refer to any alternative other than the adoption of Stevenage as the new town, that is to say, it was based on Stevenage as being the new town. The Minister further said : " While I will consult as far as possible all the local authorities, at the end, if people become fractious and unreasonable, I shall have to carry out my duty. (Voice : ' Gestapo ')." Those were the principal

passages in the speech which are complained of as showing that the Minister at that time had already made up his mind that Stevenage was to be one of the new towns, and it is argued that when, under the first clause of the Bill which became the Act of 1946 and sched. I, the Minister had to consider the objections which were made to the proposal, he approached that question, not in a fair-minded way, but with a closed mind, as it has been called, and that he never lost the attitude of mind which he had when he made that speech. The interim

A report by the New Towns Committee was also relied on as showing that not only the Minister but the whole government had made up their minds that Stevenage should be a new town. It was also pointed out that the speech was not an ordinary impromptu speech, but that it had been settled in advance, the greater part of it being handed to the Press, although the passages to which I have referred, or some of them, were evidently inspired by the hostile attitude of some of those at the meeting.

B On Aug. 1, 1946, the Bill became law with the provisions already read, and on Aug. 3, the Minister prepared the draft Stevenage New Town (Designation) Order, 1946, which was published on Aug. 6. Objections were then made by a number of residents in the area concerned, one on behalf of farmers and one on behalf of certain other residents. There were three main objectors. They were all heard before the officer, a civil engineer, who was appointed as an

C inspector to hold the public local inquiry prescribed by the schedule. That inquiry was held on Oct. 7 and 8, 1946. On Oct. 25, the inspector made a report to the Minister of Town and Country Planning. On Nov. 7, 1946, the Minister issued a letter which discussed each of the most important objections which had been made at the inquiry. Our attention has not been drawn to any other objections which should, or might, have been referred to in that letter. It discussed each objection in turn and gave reasons for not thinking that the objections were such as to make the scheme an improper one to carry out.

D In para. 13 of the letter the Minister discussed the questions of water supply and sewage disposal, both of which had been raised at the public inquiry, evidence having been given on behalf of the Metropolitan Water Board on the question of water supply, and, on sewage disposal, by the officers of the Lee Conservancy Board. The letter stated :

E The problems arising from the provision of an adequate water supply and of efficient sewage disposal for the new town, and the consequent effects on the River Lee and London's water supplies, were the subject of representation by the Metropolitan Water Board, the Lee Conservancy Board and the Lee Conservancy Catchment Board. These problems have been taken into account from the beginning and have been the subject of discussions with the Ministry of Health from an early stage and subsequently with the Metropolitan Water Board and Lee Conservancy Board. After carefully examining the representations made to him, the Minister feels justified in going forward with the

F establishment of a properly planned community and will maintain close contact with the Ministry of Health and the statutory undertakers at every stage of the development. It has been fully recognised from the outset that every possible precaution must be taken to protect London's water supplies from any avoidable risk of pollution. The Minister has, accordingly, appointed a consultant to examine the possibilities of a scheme which will apply to a much wider area than that of the immediate vicinity of Stevenage. As regards the disposal of surface water, the Minister is satisfied that the problems involved can be dealt with effectively and he will ensure that the responsible Government Departments and the interested local authorities are consulted as to the measures to be adopted.

G It is in that paragraph that HENN COLLINS, J., has found the evidence of bias on which he has quashed this order. The evidence which had been produced on behalf of the Metropolitan Water Board and the Lee Conservancy Board was that the amount of sewage which was to be expected if a town of 60,000 inhabitants were established at Stevenage would pollute the River Lee and also the water supply of the city of London unless it were carried into the Lee below the intake of the Metropolitan Water Board from the Lee, and that, if that were done, it would involve the transport of a large amount of water from the River Thames into the River Lee to make up for the amount of water which was taken out of the Lee.

H Besides raising those objections the Metropolitan Water Board and the Lee Conservancy Board also proved that some years before, quite apart from this question of a new town at Stevenage, a scheme had been thought out for the

water supplies and the sewage disposal of a very much larger area in that part of Hertfordshire which would satisfactorily dispose of all their difficulties. It was a wide and comprehensive scheme and the representatives of the Metropolitan Water Board and of the Lee Conservancy Board agreed that that scheme would meet the difficulty. It is that scheme to which the Minister alludes when he says that he "has, accordingly, appointed a consultant to examine the possibilities of a scheme which will apply to a much wider area than that of the immediate vicinity of Stevenage." But quite apart from that scheme, the only objection of the Metropolitan Water Board and the Lee Conservancy Board to the project of forming a new town at Stevenage was really the question of the expense of bringing water from the River Thames into the River Lee. It was never suggested that it was an entirely impracticable scheme. On Nov. 11, 1946, the Minister made the order which has been quashed designating Stevenage as a new town.

The application by the objectors to HENN COLLINS, J., to quash the order was made on affidavit evidence. In answer to the affidavits which were filed by the objectors, which summarised the objections which they had raised before the officer who held the inquiry, the Minister made an affidavit in which he set out the facts and said :

Before causing the said order [of Nov. 11] to be made, I personally carefully considered all the objections made by the objectors, including the present applicants, together with the submissions made and evidence given on their behalf as appearing in the said transcript. I also carefully considered the report of the said Arnold Morris. Prior to preparing the draft of the said order, I had before me, and had considered, a mass of information collected by my Ministry including the report of the Royal Commission on the Distribution of Industrial Population, 1940, Sir Patrick Abercrombie's Greater London Plan, 1944, and the reports of the New Towns Committee, dated Jan. 21, Apr. 9, and July 25, 1946. I had also consulted with all local authorities who appeared to me to be concerned, and also with the Ministry of Agriculture and the Ministry of Health. Subsequent to the preparation of the draft order and up to the time when I caused the said order to be made on Nov. 11, 1946, I obtained no further information, and in deciding to make the said order I had regard to nothing other than the matters set out in para. 8 hereof and the information above referred to. I came to the conclusion that it was expedient in the national interest that the proposed site should be developed as a new town.

Notwithstanding that the Minister had made that affidavit and that the objectors were charging the Minister with bias and with not having fairly considered the objections and report, no application was made to cross-examine him, which, in my opinion, would have been the fair way in which to substantiate allegations that the speech made on May 6, 1946, showed that his mind was already made up and that what he had said in his affidavit was not true. If that matter was to be gone into, as it would be gone into in the ordinary administration of justice, it would have been fair that he should be cross-examined and given an opportunity of answering the allegations. That was not done, however.

HENN COLLINS, J., referring to that speech, said (*ante* p. 398) :

He was bound, in my judgment, to bring to bear on the controversy between himself, as Minister, and the objectors, as the complainants of his administration, a mind open to conviction. The next question is, did the Minister do so? If I am to judge by what he said at the public meeting which was held very shortly before the Bill, then published, became an Act of Parliament, I could have no doubt but that any issue raised by objectors was forejudged. The Minister's language leaves no doubt about that. He was not saying there must be and shall be satellite towns, but he was saying that Stevenage was to be the first of them. But when he made that speech, and gave his answers to questions which were asked, he had no administrative functions in relation to the Act in question, for the Act had not then been passed. Though that was his attitude two days before the Bill received its second reading, it is on the objectors to prove that the Minister was in a like mind, or, at least, had not an open mind, from and after, at latest, the inception of the public inquiry, which was held in Oct., 1946.

In my opinion, the judge was right as a matter of law in saying that the onus rested on the objectors to show that the Minister had not an open mind when he made the order. I am prepared to assume his finding of fact for the purposes of my judgment, although I make no finding on it, that the Minister had been biased when he made his speech. I assume that it was clear, as the judge himself thought, and as I agree, that it was necessary for the objectors

to show that that state of mind was continuing up to the time of the order. The judge goes on to say, after considering further the question of the attitude of mind which the Minister should have (*ante p.* 399):

This is to say not that, in making his decision, he must exclude from his consideration any of the material which was in his mind before the objections were made, but that he must weigh all fairly together. If objections have been raised which, in his honest opinion, are met by other information, albeit extra-judicial, he may simply overrule the objections and the objectors cannot complain. If he says nothing, but simply confirms the order, this court might have little, if any, ground for saying that he had not acted fairly in the light of all his information . . . In this case, however, as was only to be expected of him, the Minister has dealt, in writing, with the substance of the objections [that is by the letter of Nov. 7] with one exception, namely, that directed to the difficulties of water supply and sewage disposal. It is obvious that those difficulties must be met before the scheme can go through. The Minister acknowledges that they have not been met, and that he is taking advice as to how it can be done.

Non constat that any way will be found, and yet with that fundamental problem still outstanding, the Minister confirms his order. How can it be said that he weighed the objection with an open mind when he acknowledges that he did not, and does not, know the force of it?

For that reason, and for that reason alone, as I read this judgment, the judge quashes the order.

In my opinion, the evidence with reference to the disposal of sewage and water supplies and the way in which the matter was considered at the inquiry and in the letter of the Minister of Nov. 7, written before making the order, afford no evidence of bias whatever. It is clear that, on the designation of the new town in the way in which it had to be designated, all the problems raised by the establishment of such a new town could not possibly be gone into in detail. If it had been proved, or if there had been evidence before the Minister, that the question of water supply and sewage disposal could not be carried out—that it was absolutely impracticable—it is possible, in my opinion, that HENN COLLINS, J., might have been right. That, however, was not the evidence before the inspector who held the inquiry. It is quite clear from the evidence and from the Minister's letter that those problems were capable of solution, and it was, therefore, no evidence of bias on the part of the Minister that he should make the order before the particular way in which the problems should be solved had been decided. For those reasons, I am unable to agree with the judge's quashing of the order.

Another point was raised before us. It was argued that the public inquiry which was held was not a proper public local inquiry within the meaning of para. 3 of sched. I to the Act of 1946 because there had been at the inquiry no representative of the Minister of Town and Country Planning and no witnesses had been called on his behalf and the case for the designation of Stevenage had not been put. It was argued that in all analogous cases it had been held that the case for both sides must be put forward before the inspector who held the public local inquiry. The point that the inquiry was not being properly held was not taken at the inquiry, as, in my opinion, it ought to have been taken if the point was going to be raised on appeal. All that was done was that it was suggested to the inspector at the inquiry that witnesses ought to be called in support of the draft order, but it was never suggested that, on the true construction of the New Towns Act, the inquiry was not being properly held. In all the authorities which have been referred to as shewing that at an inquiry there must be an examination of the case of both sides, there was what has been called a *lis*, that is to say, there were two parties contesting and the Minister as an outside party was deciding the contest. In such a case, it seems obvious, that each of the parties must have the opportunity of calling any evidence which he wishes to call, and, if he is prevented from calling it, he is not being properly treated. It cannot, however, be said that he is under any obligation to call any particular witnesses or any witness at all. I do not think it is necessary to go into all the cases which have been cited to us on this point. *Re the Trunk Roads Act, 1936* (1) is the only case which is truly analogous to the present case, for there, there was no *lis*, as here there is no *lis*, and, as here, the Minister in question was a judge in the matter in which he was himself interested from the public point of view. It was there a question of a trunk road, and this very argument was

raised. It was held, to quote the headnote in the Law Reports, that :

... while the position of the Minister was peculiar in that he was both the person making the order and the person holding, by his inspector, an inquiry into it, it was not his duty to call evidence before the inquiry but the duty of the objectors to state their objections and call such evidence as they might be advised. Nothing had taken place at the inquiry which made it necessary to quash the order.

LORD HEWART, C.J., giving the judgment of the court said ([1939] 2 K.B. 522, 523) :

No evidence was called on behalf of the Minister, and as the object of the inquiry was to hear objections to the proposals it was not essential that evidence should be called on his behalf. It was for the objectors to state their objections and to call such evidence as they might think proper in support of those objections.

That is, we are told, the only case in which there had been a similar form of inquiry—an inquiry in which the Minister was both judge and at the same time to a certain extent an interested party. As that case was decided in that way, it seems impossible to argue successfully that Parliament, when it passed para. 3 of sched. I to the Act of 1946, intended to take a different view of the law from that which had been taken in that case. In my opinion, the true construction of para. 3 of sched. I to the New Towns Act, 1946, is that the objections are to be heard at the public local inquiry which is “to be held with respect thereto,” that is to say, with respect to the objections, and there is no obligation on the inspector to insist on having the case in favour of the order put forward by anybody on behalf of the Minister. The only obligation which, in my opinion, rests, on the Minister after that inquiry has been held is fairly and *bona fide* to consider the report of the person who held it, and, under s. 1 of the Act his duty is, after fairly and *bona fide* considering that report, to satisfy himself, after consultation with any local authorities who appear to him to be concerned, whether or not it is expedient in the national interest that the area of land in question should be developed as a new town.

I express no opinion on the policy of the Act. Those are matters with which we have nothing to do. The only question which we have to decide is whether, accepting that construction of the statute, which is in reality that which HENN COLLINS, J., himself adopted, there is any evidence that the Minister did not act in accordance with its terms. In my opinion, the evidence which is relied on by the judge is no evidence of bias, and I think that, in view of the affidavit of the Minister stating what he actually considered and in view of his letter of Nov. 7, 1946, in which he set out the considerations which led him to make the order, the objectors have not discharged the onus which rested on them of showing that the Minister was, when he made the order, in any way biased. I am of opinion, therefore, that the appeal ought to be allowed.

MORTON, L.J. : I agree. On the threshold of this case lies the question : What is the true construction of para. 3 of sched. I to the New Towns Acts, 1946 ? I entirely agree that in that paragraph the words “with respect thereto” mean “with respect to the objections.” It is with respect to the objections that the public local inquiry is to be held. What was the duty of the Minister, having regard to the terms of the Act of 1946 ? In my view, it was his duty to consider, with a perfectly open mind, the report made after the public local inquiry and any other information which might have come to his notice as a result of other inquiries which he had made—inquiries for instance of local authorities who appeared to him to be concerned, under s. 1 of the Act, and of experts whom he might have consulted with a view to obtaining assistance on the matter. It was his duty to consider all these matters with an open mind and to decide in good faith whether it was or was not “expedient in the national interest” that the area of land in question should be developed as a new town. I understood the Attorney-General assented to this view of the matter for the purpose only of the present case. That being the duty of the Minister, I think it clear, as the judge held, that it is for the objectors to satisfy the court that he has not carried out that duty.

With regard to the speech which the Minister made on May 6, 1946, I will only add that it was after that speech had been made that Parliament designated, as the person to give the decision under s. 1, the Minister of Town and Country

Planning. Moreover, after the Act had been passed there occurred these successive stages—first, there were objections by certain individuals and bodies; secondly, there was a public local inquiry which was followed by the letter of Nov. 7, to which my Lord has referred, dealing with the objections and giving the Minister's views on them; and, finally, on Nov. 11, 1946, the Minister made the order which had previously been only a draft order.

A The judge arrived at the conclusion that the objectors had made out their case that the Minister started with a closed mind and retained a closed mind throughout these stages, and I think that he based his judgment very largely, if not entirely, on the position with regard to the disposal of sewage and the water supply. I do not wish to recapitulate what has already been stated with regard to that by my Lord, but I feel that, if the judge's attention had been called to the speeches made at the inquiry on behalf of the Metropolitan Water Board and the Lee Conservancy Board and to the evidence which was given at that inquiry by persons called on behalf of those two bodies, he might well have arrived at a different conclusion. In the course of his judgment he said, "Non constat that any way will be found." I think that he had it in mind that it might turn out to be impossible to dispose satisfactorily of the sewage of the new town and to carry out the proposed scheme without interfering with the water supply to London. In my view, it is clear, on the evidence which was given and the speeches which were made at the inquiry, that

B neither of the bodies in question took the view that this was impossible. They suggested how it could be done, although they did take the view that it would be expensive and, no doubt, would involve a considerable amount of work. The Minister, however, may well have thought that, expensive and difficult as these arrangements might prove to be, yet, balancing the whole matter and having regard, not only to the interests of the inhabitants of one locality, but to the national interest as a whole, the order ought to be made.

C As a result of the provisions of the Act the matter has finally to be decided by a Minister who has himself drafted the proposed order. It is contemplated that objections will be decided by that Minister, although in a sense he is a judge in his own cause, after an inquiry which, according to the usual practice, is held by an official of the Ministry of Town and Country Planning. That, no doubt, places the Minister in a difficult position, but the burden is on the objectors to show that he has in any way failed to discharge his duty, and I agree that they have not established that. It must not be overlooked that the Minister swore an affidavit in which he said, in effect, that he had discharged his duty, and that the objectors did not choose to cross-examine him on it.

D As regards the final point of counsel for the objectors, that no proper public local inquiry was held, as my Lord has pointed out, the form which the inquiry took was not challenged at the inquiry itself. In the course of his address to the inspector, counsel said: "I know that this form of inquiry is prescribed under the Act and I know that of necessity the Minister is, so to speak, the promoter." He then went on to point out certain objections to the form of procedure, but he does not appear to have raised the point at the inquiry that it was incumbent on the Minister to call evidence. However that may be, and allowing him, as he has been allowed, to raise the question on appeal, I agree with the observations of the Divisional Court, in *Re the Trunk Roads Act, 1936 (1)*, which have already been read by my Lord. The decision in that case is not binding on this court, but, in my view, these observations were correct and apply equally to the present case. I agree that this appeal should be allowed.

E As regards the final point of counsel for the objectors, that no proper public local inquiry was held, as my Lord has pointed out, the form which the inquiry took was not challenged at the inquiry itself. In the course of his address to the inspector, counsel said: "I know that this form of inquiry is prescribed under the Act and I know that of necessity the Minister is, so to speak, the promoter." He then went on to point out certain objections to the form of procedure, but he does not appear to have raised the point at the inquiry that it was incumbent on the Minister to call evidence. However that may be, and allowing him, as he has been allowed, to raise the question on appeal, I agree with the observations of the Divisional Court, in *Re the Trunk Roads Act, 1936 (1)*, which have already been read by my Lord. The decision in that case is not binding on this court, but, in my view, these observations were correct and apply equally to the present case. I agree that this appeal should be allowed.

F TUCKER, L.J.: I also agree. With regard to para. 13 of the Minister's letter of Nov. 7, which was the decisive matter in HENN COLLINS, J.'s judgment, with all respect to him, I cannot read that paragraph, standing by itself, as indicating bias on the part of the Minister. When I say "bias" I mean lack of *bona fides*, as indicating the existence of a determination to approach this matter with a closed mind. The paragraph itself states in terms that he has carefully examined the representations made to him on this matter and that he feels justified in going forward with the establishment of a properly planned community. I need not read the other words in that paragraph. I find it quite impossible, reading it by itself, to say that it is an indication

of lack of *bona fides* on the part of the Minister. It may—and it is not for me to express any view on that point—indicate a very unfortunate decision on the merits, but that is a matter of a totally different kind. I thought it right to say that, for HENN COLLINS, J. had not before him the material which we have had on this aspect of the matter, but, judging the matter only on the material before the judge, I should have come to a different conclusion, and I may say that, subject to anything that counsel might have been going to say, I had definitely come to that conclusion before the evidence and speeches at the inquiry were read to this court. A

I think that what has happened in this case indicates the desirability, when applications of this kind are made to the court, that the notice of motion and the affidavits in support thereof should state with precision and particularity the matters which are going to be relied on as indicating bias. The notice of motion and the affidavits here make no mention whatever of para. 13 of the letter of Nov. 7, which was eventually the decisive matter in HENN COLLINS, J.'s judgment. I feel convinced—at any rate, I think it highly probable—that, if those affidavits had contained a reference to this matter, the Minister would have dealt with it in his affidavit. As it was, he did not, and that is how it came about that this court admitted the affidavits setting out the speeches at the local inquiry and the evidence in support thereof. That evidence, incidentally, had already been exhibited to an affidavit which had not been used in the court below. Thus, this court admitted those further affidavits and that further evidence in order to investigate further this matter which arose under para. 13. The evidence and the speeches having been admitted, I for myself feel confident that, if HENN COLLINS, J. had had that material before him, he would not have arrived at the decision at which he did arrive. I entirely agree with the judgments which have been delivered on the other matters. B C D

Appeal allowed.

Solicitors: *Treasury Solicitor* (for the Minister); *Sharpe, Pritchard & Co.* (for the objectors).

[Reported by C. ST. J. NICHOLSON, ESQ., *Barrister-at-Law.*]

APT (otherwise MAGNUS) v. APT. E

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), February 10, 11, 12, 13, 20, March 18, 1947.]

Divorce—Nullity—Marriage by proxy—Validity.

The celebration of marriage by proxy is a matter of the form of the ceremony or proceeding and is not an essential of the marriage, and there is no doctrine of public policy which invalidates in this country a proxy marriage celebrated in a foreign country between a person domiciled in England and a person domiciled in that country, provided that the form of the ceremony or proceeding is valid in that country and is performed strictly in accordance with the laws of that country and contains nothing abhorrent to Christian ideas. F

[AS TO HUSBAND AND WIFE AND CONFLICT OF LAWS, see HALSBURY, Hailsham Edn., vol. 6, pp. 283-324, paras. 340-379; and FOR CASES see DIGEST, vol. 11, pp. 413-421 Nos. 800-872.] G

Cases referred to:

- (1) *Berthiaume v. Dastous*, [1930] A.C. 79; 99 L.J.P.C. 66; 142 L.T. 54; Digest Supp.
- (2) *Brook v. Brook* (1861), 9 H.L. Cas. 193; 4 L.T. 93; 25 J.P. 259; 11 Digest 414, 306. H
- (3) *Baindail v. Baindail*, [1946] 1 All E.R. 342; [1946] P. 122; 115 L.J.P. 65; 174 L.T. 320.
- (4) *Oliver v. Woodroffe* (1839), 4 M. & W. 650; 7 Dowl. 166; 1 Horn. & H. 474; 8 L.J.Ex. 105; 3 J.P. 85; 28 Digest 144, 41.
- (5) *Janson v. Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484; 71 L.J.K.B. 857; 87 L.T. 372; 12 Digest 243, 1983.
- (6) *Naylor, Benzon & Co. v. Krainische Industrie Gesellschaft*, [1918] 1 K.B. 331; 118 L.T. 442; *affd.*, [1918] 2 K.B. 486; 12 Digest 242, 1976.

- (7) *Niboyet v. Niboyet* (1878), 4 P.D. 1; 48 L.J.P. 1; 39 L.T. 486; 43 J.P. 140; 11 Digest 423, 894.
- (8) *Sottomayer v. de Barros* (1879), 5 P.D. 94; 49 L.J.P. 1; 41 L.T. 281; 27 Digest 36, 127.
- (9) *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130; 35 L.J.P. & M. 57; 14 L.T. 188; 11 Digest 413, 800.
- (10) *R. v. Hammersmith Superintendent Registrar of Marriages, Ex p. Mir-Anwaruddin*, [1917] 1 K.B. 634; 86 L.J.K.B. 210; 115 L.T. 882; 81 J.P. 49; 27 Digest 54, 335.
- A (11) *Nachimson v. Nachimson*, [1930] P. 217; 99 L.J.P. 104; 143 L.T. 254; 94 J.P. 211; Digest Supp.
- (12) *Harvey v. Farnie* (1882), 8 App. Cas. 43; 52 L.J.P. 33; 48 L.T. 273; 47 J.P. 308; 11 Digest 429, 932.
- (13) *Commonwealth v. Farmers' & Shippers' Tobacco Warehouse Co.* (1899), 52 South-western Reporter 799.
- (14) *Re Lum Lin Ying* (1894), 59 Fed. Rep. 682.
- B (15) *Ex parte Suzanna* (1924), 295 Fed. Rep. 713.
- (16) *United States ex Rel. Modianos v. Tuttle* (1925), 12 Fed. Rep. (2nd series) 927.
- (17) *R. v. Millis* (1844), 10 Cl. & Fin. 534; 27 Digest 43, 222.

PETITION by wife for nullity of marriage on the ground that the ceremony of marriage having been performed by proxy in Argentina was invalid as being against public policy.

- C *John Foster* for the wife.
Colin Duncan for the King's Proctor.

Cur. adv. vult.

- Mar. 18. LORD MERRIMAN, P., read the following judgment: This is a wife's petition for nullity. On Jan. 15, 1941, while the wife was in this country, she being not only resident but domiciled, here, a ceremony of marriage was celebrated in Buenos Aires between the husband and the wife. She was represented by a person who, by power of attorney executed on Nov. 8, 1940, in London, before a notary public, she had named as her representative to contract the marriage. It is proved that the ceremony was valid and effectual by the law of the Argentine, which recognises proxy marriages, but the wife contends that it is not a marriage recognised by the law of this country. The question whether in these circumstances English law will recognise the celebration of a marriage by proxy as creating the status of marriage in this country is manifestly one of considerable public importance. There is, so far as I am aware, no English authority directly on the point. In these circumstances I invoked the assistance of the King's Proctor in the elucidation both of the facts and the law.
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- The facts are as follows. Both parties were German nationals of Jewish origin. They were acquainted with each other when they were both living in Germany, but there was at that time no suggestion of marriage. In 1936 the husband emigrated to the Argentine as a refugee from the Nazi regime. In July, 1937, the wife and other members of her family came to England for the same reason. As regards the wife, it was admitted by the King's Proctor that she was at all material times domiciled in this country. The evidence on this point seems to me to be quite clear, and I so find. As regards the husband, whose domicile of origin was unquestionably Germany, it is quite clear from the evidence of the wife that his intention was to leave Germany for good, but I have no conclusive evidence that he had acquired a domicile of choice in the Argentine.
- G
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- There is no doubt, however, that he was still resident there, not only at the time of the ceremony of marriage, but also when the wife's petition, dated Dec. 4, 1945, was served on him there. It is also clear from the wife's evidence that at the time of the celebration their mutual intention was to make the matrimonial home in the Argentine when circumstances permitted. That being so, it is conceded by counsel on both sides that for the purposes of my decision I can safely ignore any question of the husband retaining his domicile of origin and can proceed on the footing that he is domiciled in the Argentine. He has certainly lived there consistently since his flight from Germany, and he is not only described in the wife's power of attorney as domiciled in the Argentine, but he is also so described in the marriage certificate. I do not ignore the possibility that the use of the word "domiciled" in these documents may not be conclusive, but I think that there is sufficient evidence to justify me in holding, as I do, that the husband at all material times had acquired a domicile of choice in the Argentine.

In 1940 the husband wrote to the wife proposing marriage. At the time it was impossible for her to travel to the Argentine owing to wartime restrictions. Eventually, on the advice of Dr. F. M. Palacios, a doctor of laws in the Argentine, who gave evidence before me, she executed before a notary public the power of attorney dated Nov. 8, 1940. The original, of course, has been filed in the marriage registry in Buenos Aires, and no copy was kept in this country, but I have a transaction of a similar power of attorney executed four days earlier before another notary public, which for some reason (I think a misdescription of the proxy) it was impossible to use. I am assured that otherwise there is no material difference between the two documents. The power of attorney recites that before the notary public and the subscribing witness the wife, described as having been born in Berlin, on Aug. 12, 1917, of named parents, domiciled at 71, Lindsay Drive, Kenton, of full age, single, capable, and known to the notary, appeared before him and said that she was engaged to be married to the husband, described as having been born in Berlin on June 7, 1916, the son of named parents, domiciled in Buenos Aires, Argentine Republic, at Sucre Street, No. 2923, single, whom she had known for many years, and that in order to contract that marriage she gave a special power to Mrs. Senta Goldglanz, nee Gundermann, of a certain address, so that in her name and as her representative she should contract the marriage in Buenos Aires with the husband, and empowering her to sign in the wife's name the respective act of marriage and any other document that might be necessary. As the marriage certificate shows, the proxy presented this power of attorney, and it is admitted that the marriage was thereupon duly celebrated in accordance with Argentine law.

The wife gave evidence, which I accept, that she had no intention of revoking the power of attorney, that she was informed in due course of the performance of the ceremony, that she was not merely ready and willing but eager to join the husband in Buenos Aires, and that she made repeated efforts to that end during the war, but that she was not allowed to leave England in spite of the marriage. Dr. Palacios proved that the husband had obtained a permit for her to enter the Argentine, but that this permit was not effective without the consent of the Argentine ambassador in London. He told me that he himself had applied to the ambassador personally for his consent, but that permission was refused on the ground that it was not convenient to allow a wife of German origin to enter the Argentine. After the war, the wife made further attempts to join her husband, but by the autumn of 1945, as the husband was no longer replying to her letters, and took no steps, in spite of her requests, to obtain or enable her to obtain a fresh permit, as was then required, she came to the conclusion that he had ceased to wish her to join him. She suggested a meeting in the United States, but this suggestion was also ignored. In these circumstances she decided to bring this petition.

I must now deal with the Argentine law on the subject as this was elucidated by Dr. Palacios. He proved that the power of attorney used in this case was valid in Argentine law to enable the proxy to contract the marriage, and that the certificate of marriage based thereon was evidence of a valid marriage. As regards the Argentine law covering proxy marriages generally, he told me that it was permissible to insert conditions, for example, that the marriage should be celebrated within a certain time limit, and that if, as here, no such time limit is expressed, the registrar might ask for confirmation if the power of attorney was of old standing. Again, the power of attorney might contain conditions defining the town where the celebration should take place, as is the case here, or even defining the particular registry office and the day and hour at which the celebration should take place, or stipulating that certain relatives should be present. He expressed the opinion that if any such conditions were not fulfilled the registrar would be obliged to refuse to perform the ceremony, but he seemed to me to be somewhat uncertain about conditions which he described as trivial, about which he thought that the registrar would have a discretion. By this I understood him to mean that, although the registrar might decide to allow the ceremony to go on, his decision about the essentiality of a particular condition would not be final, but would be subject to review by the court. He gave some very important evidence on the subject of revocation. Here, again, there appeared at first to be some confusion in his evidence, but in the result it came to this, that the intending spouse could revoke the power of attorney at any time

before the ceremony, but that, if the power of attorney had been acted on before either the other spouse or the proxy had notice of the revocation, the marriage would be valid. If, however, the spouse giving the power of attorney had meanwhile lost the capacity to contract the marriage, for example, by an intervening marriage or by becoming of unsound mind, although the marriage certificate would be *prima facie* evidence of the ceremony having been performed, the court would declare the marriage null and void. The witness drew a clear

- A distinction between revocation by operation of law through loss of capacity to contract the marriage and revocation by the party. In the latter case he expressed, and maintained, the definite opinion that, unless either the other spouse or the proxy had notice of the revocation before the ceremony, the marriage in Argentine law would be held to be valid. He put the case of the loss or miscarriage of a letter of revocation in the following words: "If the proxy is revoked without any change of capacity and the revocation is not known to the attorney or the husband because the letter is lost in transit, a court would hold the marriage valid, but if the revocation is due to a change of capacity (for example, marriage or insanity), then the court will hold that the marriage is void." I will revert to this point later in the judgment, as it is one on which counsel for the petitioner laid great stress.

Now, as to the English law, VISCOUNT DUNEDIN in *Berthiaume v. Dastous* (1) ([1930] A.C. 83) said:

- C If there is one question better settled than any other in international law, it is that as regards marriage—putting aside the question of capacity—*locus regit actum*. If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicile of one or other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the place of the parties' domicile would be considered a good marriage. These propositions are too well fixed to need much quotation.

- D This absolves me from any examination of the authorities for this proposition, but the crux of the argument put forward by counsel for the wife is that it is vital to determine what in relation to any marriage is merely, in VISCOUNT DUNEDIN's words "proceeding or ceremony." In *Brook v. Brook* (2) the distinction between what are described as forms and essentials is fully discussed. E That was a case in which the husband, a domiciled British subject, after the death of his wife went through a ceremony of marriage with her sister, also a domiciled British subject, in Denmark, where the marriage of a man with his deceased wife's sister was valid. LORD CAMPBELL, L.C., said (9 H.L. Cas. 207):

- F There can be no doubt of the general rule, that "a foreign marriage, valid according to the law of a country where it is celebrated is good everywhere." But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. G Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicile, the marriage may be good everywhere. But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated.

- H It was held that the relationship between the spouses, being domiciled British subjects, was not a mere matter of form but was of the essence of the marriage, and that, marriage with a deceased wife's sister then being forbidden in this country, not because it was contrary to God's law, but because Parliament had declared it to be contrary to God's law—(*ibid*: see LORD CAMPBELL, L.C., at p. 215, LORD CRANWORTH at p. 226, LORD ST. LEONARDS at p. 233, and LORD WENSLEYDALE at p. 245)—the relationship between the spouses was fatal to the validity of the marriage, notwithstanding the fact that in the country where the ceremony was performed the marriage was valid. In arriving at this conclusion the noble Lords examined several examples of the distinction between form and essence. For example, in discussing Gretna Green marriages (at p. 214 and 215) LORD CAMPBELL, L.C., said of Lord Hardwicke's Act:

But I do lay very great stress on the consideration that LORD Hardwick's Act only regulated banns and licences, and the formalities by which the ceremony of marriage shall be celebrated. It does not touch the essentials of the contract or prohibit any marriage which was before lawful, or render any marriage lawful which was before prohibited. The formalities which it requires could only be observed in England, and the whole frame of it shows it was only territorial. The nullifying clauses about banns and licences can only apply to marriages celebrated in England.

Again, referring to the case of the marriage of a minor in Scotland, where the marriage was valid by the law of Scotland though declared by an Irish statute, [see Irish Statutes, 9 Geo. 2, 611] to be absolutely null and void to all intents and purposes for lack of consent, LORD CAMPBELL, L.C., in the same case (at p. 216) clearly regarded the lack of consent as being a matter of form and not of essence, but this class of case is contrasted (on p. 219) with incestuous marriages, and LORD CAMPBELL, L.C., was plainly of opinion that a marriage between a mulatto and a white woman prohibited by the law of Massachusetts, in which State the parties lived, ought to have been held to be invalid although the spouses went for the ceremony to the neighbouring province of Rhode Island, where such a marriage was valid. LORD CRANWORTH (in the same case at p. 224) put the question thus:

... that though in the case of marriages celebrated abroad the *lex loci contractus* must *quoad solemnitates* determine the validity of the contract, yet no law but our own can decide whether the contract is or is not one which the parties to it, being subjects of Her Majesty domiciled in this country, might lawfully make.

Moreover, the passage in the treatise of STORY, J., on the CONFLICT OF LAWS (8th ed., pp. 188, 189), in which he specifies the exceptions to the rule that a marriage valid where celebrated is good everywhere (*ibid.*, pp. 208 and 209) was referred to with approval: see *Brook v. Brook* (9 H.L. Cas., 208, 209). He excepts marriages involving polygamy and incest, those positively prohibited by the public law of a country from motives of policy, and those celebrated in foreign countries by subjects entitling themselves, in special circumstances, to the benefit of the laws of their own country. There was some criticism, however, of the sentence in which he lays down that in speaking of incestuous marriages care must be taken to confine the doctrine to such cases as by the general consent of all Christendom are deemed incestuous. As has already appeared, all the noble Lords took the view that they were not so much concerned with the general consent of all Christendom, but rather with the fact that Parliament had declared what God's law on the subject was deemed to be in this country, and it was suggested that the particular case would most properly fall within the exception of a positive prohibition by the public law of this country from motives of policy—in other words, not as being incestuous in fact, but as being declared to be so by Parliament.

The question therefore is: Into which category, form or essence, do proxy marriages fall? If they are to be likened to polygamous or incestuous marriages or those positively prohibited by the public law of the country from motives of policy, the recent case of *Baindail (otherwise Lawson) v. Baindail* (3) establishes that the wife may obtain relief by a decree of nullity, although polygamous marriages are not otherwise recognised. But, as neither polygamy nor incest is in question, I am driven back to the question whether proxy marriages are positively prohibited by law for motives of policy. Counsel for the wife concedes that the Marriage Acts have a territorial effect only, and that there is no express statutory provision against a domiciled British subject contracting a marriage by proxy out of this country, but he argues that, at least as concerns a British subject domiciled and actually present in this country at the time of the ceremony, there is one matter as to which public policy points in the same direction as do the Marriage Acts, that is to say, the personal presence of both parties. This, he argues, is an essential, whatever form the ceremony itself may take. The argument may be summarised as saying that the distinction between form and essence is not absolute, but that public policy requires certain essential ingredients in the ceremony or proceeding itself. Put another way, the classification of the ceremony, celebration, proceeding, or whatever word one may choose to describe the formality of the marriage contract, must be determined by the law of this country. For this he relies on the section on the problem of classification in DR. CHESHIRE'S PRIVATE INTERNATIONAL LAW

(2nd edn., pp. 24 to 45). Manifestly, he argues, there may be certain primitive tribal marriage rites which could not possibly be classified in this country as being a marriage ceremony at all, because they would offend our conception of propriety. Likewise he suggests that the question whether the presence of both parties is essential to the classification of this ceremony as a ceremony of marriage must, at any rate in the case where one at least of the parties is domiciled and resident in this country at the time of the ceremony, be determined as a matter of public policy by English law. He enumerated the respects in which a proxy marriage offended public policy under the following heads :—

First : The wife is entitled to change her mind up to the very last moment before the conclusion of the marriage contract, and, therefore, it is contrary to public policy that when the power of attorney has actually been revoked before the ceremony the parties should be compelled to conclude the contract of marriage because the accident of delay by post, telegram or telephone prevents the communication of the revocation from reaching either the other party or the proxy in time.

Secondly : If the wife can do everything necessary to effect a valid marriage in the Argentine merely by signing a document in this country, her marriage, with all the attendant changes of domicile, nationality and status generally, is, so far as concerns this country, a clandestine marriage and, therefore, contrary to public policy. This point was emphasised by pointing to the possibility that both parties, being resident in this country, might contract a marriage by proxy in some country, the law of which entitled both parties to be represented by proxy at the ceremony. It was suggested that this is the case in Mexico (see RINGROSE, MARRIAGE AND DIVORCE LAWS OF THE WORLD, p. 202) and it appears also to be the case in Portugal (p. 95). But although this appears to be so as regards the actual ceremony or celebration, I gather from the work in question that the date and place of the celebration are only fixed after certain preliminary formalities have been completed, which seem to me to involve the presence in the country of at least one of the parties. However this may be, and I have no evidence on the subject, it only affords an extreme instance of the same point.

Thirdly : Since it is well settled that in the case of a conflict of laws governing consent to the marriage of minors the question is one of form and the *lex loci contractus* is, therefore, decisive (*Brook v. Brook*, 9 H.L. Cas. 216), it would follow that minors, either or both of whom were living in England, could evade parental control by marrying by proxy in a country where either the consent of the parents is unnecessary or where the age of majority is lower. It was admitted that it is open to English minors, if they were personally present in the country in question, though with the express intention of evading English law, to effect a valid marriage, but it was suggested that it was contrary to public policy that they should be able to do so by proxy without the necessity of travelling.

Fourthly : The admission of a proxy marriage such as this would open the door much wider to the inward traffic in prostitution, since the husband in what are colloquially known as " five-pound marriages," instead of being shipped abroad go through the ceremony and bringing the wife into the country on his passport, could effect his purpose by simply signing a power of attorney here.

Fifthly : There is, in truth, no *locus contractus* in this case, seeing that the husband was present in the Argentine and the wife in England, and, therefore, that the public policy which, by the universal comity of nations, compels the recognition of a celebration valid by the *lex loci contractus*, does not apply.

Sixthly : The Marriage Acts of this country, including the Foreign Marriage Act, 1892, all require the presence of both parties at the ceremony, and, therefore, that this must be taken to be a declaration of the public policy of this country.

I will deal with the last two propositions first. Number 5 seems to me to beg the question at issue, which is whether there is or is not a valid contract of marriage. If there is not, *cadit quaestio*, but, in so far as the place where the ceremony or celebration took place is material, it is indisputable, and, indeed, it was not seriously disputed, that this was Buenos Aires. The power of attorney expressly empowers the proxy to contract a marriage in Buenos

Aires in the wife's name and as her representative, and incidentally gives the proxy power to sign in the wife's name the act of marriage and any other document that may be necessary. The marriage certificate seems to me to be conclusive as to the place of celebration. As to No. 6, I have no doubt that the Marriage Acts, in common with public Acts of parliament in general, declare the public policy of this country regarding their subject-matter, but, as is conceded, they have only territorial effect so far as concerns forms and ceremonies. The argument that such declarations of public policy operate universally seems to me to ignore the fact that public policy also demands, by virtue of the comity of nations, the recognition of marriages celebrated out of this country in accordance with forms and ceremonies in no wise conforming to those prescribed by the Marriage Acts. As regards Nos. 2, 3, and 4, I recognise the possibility that the mischiefs depicted under these headings may arise from a judicial declaration in favour of this marriage, but, if so, they are all matters which can be dealt with by the legislature. There is nothing whatever to prevent Parliament from enacting in relation to domiciled British subjects generally that proxy marriages shall not be recognised in this country wherever celebrated, or (leaving aside the point that a minor cannot give a power of attorney in this country : see *Oliver v. Woodroffe* (4)) that marriages by minors domiciled in this country, wherever celebrated, shall be invalid without the prescribed consent, or, more specifically, that the proxy marriage of a domiciled British subject, wherever celebrated, shall not be recognised for the purposes of immigration.

Before I deal with head No. 1, it will be well to deal generally with the question of public policy in relation to all these heads. It was laid down by the House of Lords in *Janson v. Driefontein Consolidated Mines, Ltd.* (5) that public policy is not a safe or trustworthy ground for legal decision. At [1902] A.C. 491, in an oft-quoted passage, the EARL OF HALSBURY, L.C., says : ". . . but I deny that any court can invent a new head of public policy . . ." This sentence was the subject of adverse comment by McCARDIE, J., in *Naylor, Benzon & Co., Ltd. v. Krainische Industrie Gesellschaft* (6) ([1918] 1 K.B. 342), but it seems to me that such force as this criticism may have depends entirely on what was intended by the words "new head" of public policy. The EARL OF HALSBURY, L.C., goes on :

. . . so a contract for marriage brokerage, the creation of a perpetuity, a contract in restraint of trade, a gaming or wagering contract, or, what is relevant here, the assisting of the King's enemies, are all undoubtedly unlawful things ; and you may say that it is because they are contrary to public policy they are unlawful ; but it is because these things have been either enacted or assumed to be by the common law unlawful, and not because a judge or court have a right to declare that such and such things are in his or their view contrary to public policy. Of course, in the application of the principles here insisted on, it is inevitable that the particular case must be decided by a judge ; he must find the facts, and he must decide whether the facts so found do or do not come within the principles which I have endeavoured to describe—that is, a principle of public policy, recognised by the law, which the suggested contract is infringing, or is supposed to infringe.

I ask myself, therefore, what principle of public policy, recognised by the law this suggested contract infringes or is supposed to infringe. It is, of course, necessary to bear in mind the distinction in the use of the word "marriage" between the contract itself and the status created by the contract : see *per* BRETT, L.J., in *Niboyet v. Niboyet* (7) (4 P.D. 11), and *per* SIR JAMES HANNEN, P., in *Sottomayer v. De Barros* (8) (5 P.D. 101). As regards the status, there can be no question, in my opinion, that what was intended to be created in this case was a Christian marriage within LORD PENZANCE'S definition in *Hyde v. Hyde and Woodmansee* (9) (L.R. 1 P. & D. 133) as being "the voluntary union for life of one man and one woman to the exclusion of all others." This definition has repeatedly received judicial approval, recent instances of which are *R. v. Hammersmith Superintendent Registrar of Marriages* (10) ([1917] 1 K.B. 640, 645, 657, 658, 660), and *Nachimson v. Nachimson* (11) ([1930] P. 224, 227, 228, 238).

What is in question here, therefore, is the form of contract. By this contract a woman domiciled in this country wished to assume the character of the wife of a foreign husband. The words of LORD SELBORNE, L.C., in *Harvey v. Farnie* (12) (8 A.C. 50, 51) :

The marriage is contracted with a view to that matrimonial domicile which results from her placing herself by contract in the relation of wife to the husband whom she marries, knowing him to be a foreigner, domiciled and contemplating permanent and settled residence abroad.

A describe this case exactly. I ask myself, therefore, what public policy is infringed by the wife adopting a form of contract lawful in that country. Had she gone to the Argentine and had there signed a power of attorney enabling her to be represented at the ceremony by proxy, the case would be covered expressly by LORD DUNEDIN's words :

... no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicile of one or other of the spouses

B in the passage from his opinion in *Berthiaume v. Dastous* (1) ([1930] A.C. 83), which I have already quoted. In her case, therefore, the issue as to public policy is reduced to the question whether or not she should be allowed to sign the power of attorney here, but it is said that, in considering whether or not the subject-matter is contrary to public policy, one must look at the problem as a whole and not allow one's self to be influenced by the fact that in individual cases no harm, or even benefit, may accrue. As a general proposition that is, no doubt, true, but I am by no means satisfied that the problem here is one and indivisible and embraces proxy marriages as a whole. It may well be that C the problem should be sub-divided into categories and the test of public policy be applied, if at all, to each category separately. For example, the converse case of the husband in the Argentine being a domiciled Englishman and intending to make the matrimonial home here, and the case of a minor domiciled in this country where the law does not permit him to give a power of attorney at all, D seems manifestly to call for separate consideration, as does the case, which I will consider shortly, of the revocation of the power of attorney before the ceremony. I do not think it is necessary to pursue this topic further than to say that I am not satisfied that a single test of public policy can be applied to all proxy marriages indiscriminately.

Undoubtedly, proxy marriages are liable to abuse, but, as I have already said, if these abuses occur or are apprehended they can be prevented or cured by legislation. The objection that clandestine marriages may be promoted E appears to me to go too far, in view of the fact that Gretna Green marriages were tolerated for years in spite of their notorious abuse for the very purpose of evading the mischief of Lord Hardwicke's Act, which was expressly directed to the preventing of clandestine marriages, and, incidentally, of evading the restrictions on the marriage of minors. It is true that after 1856 the condition of residence for 21 days was imposed by 19 and 20 Vict., c. 96 [an Act for amending the Law of Marriage in Scotland], and that, by the recent Marriage (Scotland) F Act, 1939, s. 5, irregular marriages in Scotland are abolished. So slow a process of legislation to deal with abuses not less glaring than anything that is likely to result from the recognition of a proxy marriage such as this seems to call for caution in invoking the doctrine of public policy in this connection, and emphasises the point that the matter is one to be dealt with by legislation.

G I will deal next with the suggestion that it is a matter of public policy that both parties should be present. It seems to me that it is hardly possible to base this argument on the principle that the presence of both parties at the celebration is necessary for a Christian marriage. It is not disputed that proxy marriages were recognised by the canon law. In SWINBURNE'S TREATISE OF SPOUSALS OR MATRIMONIAL CONTRACTS (1686 ed., pp. 162 and 163) the conditions of a valid proxy marriage are described. Moreover, proxy marriages are recognised, not only in the Argentine, but in other Christian countries such as Portugal H and Spain. Also, in the United States of America, where the regulation of marriage and divorce remains within the jurisdiction of individual States, the validity of proxy marriages has been recognised. As a result of the industrious researches of counsel for the wife I have had the advantage of considering many reported cases decided in various States of the Union. Most of these arise out of the immigration laws. They are none the less important for that reason, for, as LORD CAMPBELL said in *Brook v. Brook* (2) (9 H.L. Cas. 219), some very important social questions have arisen on cases raising the kindred question of the settlement of the poor. Counsel for the wife quoted the follow-

ing *dictum* of BURNHAM, J., in *Commonwealth v. Farmers' and Shippers' Tobacco Warehouse Co.* (13):

There are acts of so peculiarly personal a nature that their performance cannot be delegated. To this class of cases belong the making of wills [and] the contracting of marriages.

The immigration cases show that the generality of this *dictum* requires considerable qualification.

In *Re Lum Lin Ying* (14), decided in the District Court of Oregon, it was held that a marriage solemnised in China according to the laws and customs thereof, but while the bridegroom was in America, is not valid in America. The decision, however, appears to turn not on any dissent from the proposition that a marriage which is valid in the place where it is contracted is valid everywhere, but a doubt whether China was in fact the place of solemnisation of the marriage. Apparently, the parties had been betrothed when the bride was two years of age. In accordance with Chinese customs, the marriage was arranged by professional go-betweens with the parents and families of the respective parties. The particulars of the engagement were committed to writing on duplicate cards, and the ceremony was completed by sewing the cards together, whereupon the bride attempted to join her husband, who was all the time domiciled in the United States. The district judge expressed a doubt whether this was a China marriage. He said that it was not enough that such a marriage was valid under the laws of China, but was of opinion that it must not only be valid under such laws, but to be valid elsewhere must have been solemnised within the jurisdiction of those laws, but he made an order allowing the wife's admission on the ground that the parties had acted in good faith. I do not think that this decision, depending as it does on the question whether there could be said to be a solemnisation in China, affords much guidance in the present case.

More directly in point is *Ex parte Suzanna* (15) decided in the District Court in Massachusetts. The husband was resident in Pennsylvania. By the relevant Act it was provided that an illiterate woman over 16 years of age should not be admitted unless she was, among other things, the wife of an admissible or domiciled alien or a citizen. The wife was resident in Portugal at the time of the alleged marriage. The marriage was by proxy, and Portuguese law recognises proxy marriages. Presumably, it was the husband who was represented by proxy at the ceremony in Portugal, though this fact is not expressly stated except by inference from the statement in the last sentence of the judgment that the proxy marriage was celebrated in Portugal. On the ground that the question must be decided on the law of Pennsylvania, where it was well settled that a common law marriage was valid and that nothing in the law of Pennsylvania required the personal presence of the parties at the ceremony, the judge decided that the petitioner had the right to admission as a wife.

An even stronger case is *United States ex rel. Modianos v. Tuttle* (16). In this case, decided in the New Orleans division of the District Court of Louisiana, the husband, born a Turkish subject, but at the time of the celebration of the alleged marriage in 1922 a naturalised American citizen domiciled in the state of Louisiana and actually in New Orleans, was represented at the ceremony in Turkey by proxy, proxy marriages being valid in Turkey. The revised civil code of Louisiana (art. 109) expressly declares: "No marriage can be contracted or celebrated by procuration." The district judge held that this prohibition only applied to marriages celebrated in the State, while at the same time he held that the State legislature had the right to declare what marriages would be recognised, regardless of whether the participants were domiciled within or without the State, and that a statute invalidating proxy marriages, wherever performed, would be valid. In the absence of any such legislation, he held that the particular marriage was valid, and that the wife was entitled to admission as such, regardless of the question whether the quota of Turkish immigrants had been exhausted or not. It is interesting to note that the learned judge expressly held that there was nothing in the circumstances of this marriage conflicting with the views of Christendom, and that he was also of opinion that, if it was desired to except from the general principle that marriages celebrated in accordance with the *lex loci contractus* are valid everywhere, a marriage by proxy celebrated out of the particular State, it was for the State legislature so to enact.

The fact that it was conceded that no American case has been found conflicting with this decision, which obviously is directly in point, absolved me from the necessity of any further examination of American cases. It is clear, however, not only from the cases cited, but also from the article, *MARRIAGE BY PROXY AND THE CONFLICT OF LAWS*, by PROFESSOR E. G. LORENZEN, in 32 *HARVARD LAW REVIEW*, pp. 473-488, that the view is held in America that the common law inherited by certain States of the Union at the time of their settlement enabled a marriage to be contracted *per verba de praesenti*, or *per verba de futuro*, followed by consummation: see also the argument in *R. v. Millis* (17) (10 Cl. & F., 545). That a proxy marriage can take either form appears from SWINBURNE, at p. 164, and see ss. 10 and 11 of the same work. It has been accepted throughout the argument, and I think rightly, that this marriage was celebrated, if at all, *per verba de praesenti*, and that the question of consummation is, therefore irrelevant, but, whatever view may be held in America, I think that I am precluded by the actual decision in *R. v. Millis* (17) from holding that the common law ever recognised the validity of a marriage *per verba de praesenti* unless celebrated before an episcopally ordained priest. Nevertheless, the point seems to me to be that it is difficult to assert that a marriage ceremony expressly recognised by the common law and adopted in civilised countries with a long Christian tradition is so essentially abhorrent to Christian ideas as to take a proxy marriage out of the category of ceremony or proceeding and to classify it with incest or polygamy.

Reliance was also placed on the passage in LORD FRASER's work on *HUSBAND AND WIFE*, 2nd ed., p. 319:

Suppose an offer of marriage is sent through the post-office from Scotland, and an acceptance sent by return of post from England, it is obvious that there could be no marriage in such circumstances, because marriage cannot be entered into in England merely by a declaration of present consent. If marriage can be entered into after this fashion, the two parties must be in Scotland at the time.

But the question is not the same as is raised in this case. The wife did not purport to constitute the marriage by the power of attorney signed here. She merely authorised her proxy to constitute it on her behalf in the Argentine.

This brings me to a consideration of head No. 1. The objection based on the Argentine law regarding revocation of the power of attorney seems to me to be the most formidable argument against the validity of the marriage. In s. 13, entitled "Of Contracting Spousals either betwixt parties present or absent," SWINBURNE, in para. 22, p. 165, says:

Furthermore, it is not only necessary that the proxy be sufficient, and that the contract be made in due form, as aforesaid; but it is requisite also that the party which did constitute the proctor, do persevere and continue in the same mind and purpose, until the contract be finished; for if he repent in the meantime, or revoke his proctor (which thing is lawful for him to do though he has covenanted, yea and sworn not to revoke him) the contract is utterly void, which conclusion hath place, albeit the proctor were ignorant of the parties repentance or revocation of the proxy, seeing the perseverance and continuance of the parties consent, which did constitute, is so necessary, as without the which the contract is not of any force.

There is a passage to the same effect with regard to contracting matrimony by letter in para. 39 on p. 182. SWINBURNE died in 1623, and his book was first published posthumously in 1686. That he was an ecclesiastical lawyer of repute appears from the *DICTIONARY OF NATIONAL BIOGRAPHY*, vol. LV, pp. 228 and 229.

Now, manifestly, in the case of the revocation of a power of attorney like the present, the communication of which for whatever reason has miscarried, it would not be true to say that the party giving it still continued in the same mind without alteration until the time of the other's consent. That is to say, the Argentine law differs from the canon law, as expressed by SWINBURNE, in this respect. The question as I see it is whether this objection applies to the validity of proxy marriages in general or only to the validity of those which are actually affected by the Argentine law regarding revocation. No such question arises, as has already been said, in this case. Supposing, however, that had been the situation in this case, I incline to the opinion that the marriage would not be a Christian marriage as defined by LORD PENZANCE in *Hyde v. Hyde and Woodmansee* (9), which I have already quoted. The case might be

put as follows. The wife was a domiciled British subject when she gave the power of attorney. This is not expressed to be irrevocable. Although her intention at the time she gave it was to contract a Christian marriage and to acquire the husband's domicile when the marriage was celebrated, she changed her mind and revoked the power of attorney before the celebration, while she was still a British subject. The marriage ceremony, therefore, did not effect a "voluntary" union, but only a union which is deemed to be voluntary by the law of a country to which she was not subject at the time of the revocation of the power of attorney. That being so, the effect of the revocation should be decided according to English law. I do not think that it is necessary or desirable for me to decide that point. Suffice it to say that the manifest distinction between that case and the present points strongly against there being one test of public policy with regard to all proxy marriages alike and towards the propriety of the definition by Parliament of the conditions in which proxy marriages shall or shall not be recognised.

My conclusions, therefore, are (i) that the contract of marriage in this case was celebrated in Buenos Aires; (ii) that the ceremony was performed strictly in accordance with the law of that country; (iii) that the celebration of marriage by proxy is a matter of the form of the ceremony or proceeding and not an essential of the marriage; (iv) that there is nothing abhorrent to Christian ideas in the adoption of that form; and (v) that, in the absence of legislation to the contrary, there is no doctrine of public policy which entitles me to hold that the ceremony, valid where it was performed, is not effective in this country to constitute a valid marriage. For these reasons, whatever may be the petitioner's remedies as a wife, I am obliged to hold that this petition must be dismissed.

Petition dismissed.

Solicitors: *Hardman, Phillips & Mann* (for the wife); *Treasury Solicitor* (for the King's Proctor).

[*Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.*]

GARDNER v. GARDNER

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hudson, J.), March 10, 11, 12, 17, 1947.]

Divorce—Cruelty—Wife's unnatural sexual relations with other women—Neglect of marital home and duties—Husband no willing party to sexual irregularities.

In proceedings for divorce on the ground of cruelty, the husband's case was that the wife's conduct, persisted in throughout the marriage and consisting of unnatural relations with other women and neglect of her marital home and duties, had so affected him as to break down his health. The wife's propensities were known to the husband before the marriage, but, though the husband had exhibited meekness and patience, it was found, as a fact, that he was never a willing party to the wife's sexual irregularities and did what he could to prevent them:—

HELD: the husband had proved a course of conduct which not only injured his health, but also caused reasonable apprehension of future injury, and he was, therefore, entitled to a decree.

[**EDITORIAL NOTE.** This case affords a new instance of what may amount to cruelty within the accepted definition—conduct causing danger to bodily or mental health or giving rise to a reasonable apprehension of such danger. It is interesting to observe that in the *Laws of England* (Hailsham edn.), p. 653, para. 960, it is stated that: "Unnatural or pervert practices by a wife with another woman do not entitle the husband to a decree of divorce, but it is submitted that they could be taken into account as part of a course of conduct amounting to legal cruelty." The present case can now be taken as authority for the submission advanced in the *Laws of England*.

As to CRUELTY ON PART OF WIFE, see HALSBURY, *Hailsham Edn.*, Vol. 10, pp. 650, 653, paras. 955, 960; and FOR CASES, see DIGEST, Vol. 27, pp. 290, 291, Nos. 2649-2661.]

PETITION by the husband for divorce on the ground of his wife's cruelty. The facts appear in the judgment.

Bush James, K.C., and Lord Meston for the husband.
Marston Garsia for the wife.

Cur. adv. vult.

Mar. 17. HODSON, J., read the following judgment. This petition is presented on the ground of cruelty. The husband's case is that his wife, by a course of conduct persisted in throughout the marriage, has injured his health. In substance, the conduct alleged consists of the wife's unnatural sexual relations with other women and neglect of her marital home and duties which so affected the husband as to break down his health. The whole of the allegations are denied.

The marriage took place on Aug. 27, 1938, the husband being a bachelor of 29 and the wife a spinster of 24. Before marriage she had been living with another woman, H., and the husband's case was that the relationship between the two women was admitted by the wife to be an unnatural one and was objectionable to him. That the wife's attitude to sex, at any rate as regards her husband, was one of repulsion, is shown by a letter written, as she says, several months before the marriage, in which the following passage occurs:

Although you seem to pride yourself that you know me, you obviously don't know me well enough to see the danger signal. I wrote you a long letter from Cornwall I think, about sleeping with you. Couldn't you read between the lines and realise that I wanted no sexual contact with you. I hate being pawed about—I loathe to have the abhorrent fact that I am a woman accentuated. That's enough to set my teeth on edge—and yet your psychology is rather put aside by your instincts on occasions. I can usually by understanding how you feel be pleasant about it at the time, and it is only when you behave like this that I seethe with rage about it and everything . . . I'm sorry for this outburst, but God knows I've tried every other way with no success.

Before the marriage, to which she somewhat reluctantly assented, she made arrangements to return after the ceremony to live with the woman H. She says this was due to the husband's failure to provide a home and took place with his concurrence. He, on the other hand, says that the question of accommodation had nothing to do with it, and that his wife's return to H. was against his wishes, and that he only let her go in the hope that this association might die with lapse of time under the influence of his affection. The husband's version is confirmed by a letter written by the wife from Paris about Nov., 1938, in which she said:

I should certainly be prepared to talk to Jimmy, but I do want you to understand that nothing can make me change my views at the moment. You have tried for over a year, so have other people, but I go on just the same. Therefore, if you are coming over to persuade me to return, or to leave—in fairness to you and to prevent you making an abortive journey and spending large sums of money unnecessarily, I must say—don't.

While the wife was in Paris she was visited by the husband from time to time and he tried unsuccessfully to persuade her to leave this woman and to join him as his wife. On the occasions of these visits the conversation of the two women in his presence made plain to him, he says, that unnatural sexual relations were taking place between them. For example, the woman said she had only had an orgasm after living with the wife for several weeks, and the wife regretted she had taken so long to fulfil her purpose. Such language, if used, was calculated to cause great pain and distress to him. The wife denies that any such language was used.

In the summer of 1939 the wife returned to England and said, according to the husband, that the affair with H. had run its course and she was ready to live with him. In June the parties went for a week-end to Paris and stayed at the Quai Voltaire Hotel where the husband, going unexpectedly into his wife's bedroom, said that he found her sitting on the knee of another woman who had her hand under her skirt. This again was flatly denied by the wife. The parties then went to live under the same roof at Sunbury Court Island, occupying separate rooms, and the husband said he had again to complain of his wife's unnatural conduct observed by him while she was dancing with another woman and similar trouble with her and the same woman some days later in a motor car. The wife then returned to France against the husband's wishes with the expressed intention of going to stay with the woman concerned

in the incident at the Quai Voltaire Hotel. She returned at the outbreak of war, bringing with her a man and woman, husband and wife, who came to stay with the parties at Sunbury Court Island. This resulted in the husband being virtually turned out of his own home and going to sleep at the A.R.P. post where he had duties to perform. The husband did not like the wife's attitude towards the woman and told his wife these people must leave, but the wife insisted on going herself also, and when the married couple left she also left and went to live with them in London, leaving her husband. It is right to say that there is no evidence of any sexual impropriety with this woman, whose husband was called as a witness and indignantly repudiated any suggestion that his wife had ever been addicted to unnatural practices. The wife [the present respondent] told the husband, according to him, that their life was finished and that there was nothing to be done. She, in fact, remained away until August, 1942. By this time the husband's health had been affected by the worry which his wife's conduct had caused him.

In 1942 the parties met from time to time, and in August the wife returned. She then said, according to the husband, that she had been living for two years with another woman to whom she had to teach everything whereas the others knew it all. This again was denied by the wife. They lived together at an address where they had separate rooms, but intercourse took place between them on several occasions. This was the period in which, according to the husband's evidence, their marriage was consummated, no sexual intercourse having ever taken place before. The wife became pregnant and a child was born to her in October, 1943. The husband found that during her pregnancy she again became infatuated with another woman and caused him further distress by her association with and verbal references to this woman. The husband tried to keep her from this course of conduct, but without result. The wife took little interest in the child after the first few days, but eventually the parties and the child were installed in a house in London, where they lived until June, 1944, when bomb damage caused them to leave and to go into the country. The wife, however, persisted in sleeping in London during part of the week and in wearing male clothing all the time, which the husband says she did in order to ridicule his family.

The husband consulted solicitors during 1944 and in Sept. of that year a letter was written to the wife on his behalf intimating proceedings against her on the ground of cruelty. The wife was distressed at the idea of divorce and, according to him, agreed to make a new start, to cease to dress as a man and to live with him as his wife. She rejoined him and sexual intercourse took place for the last time soon afterwards. She, however, did not remain, but returned shortly to London to the bombed house, agreeing to return at the end of the year when the lease was up. She did not return, but, as the husband said, declared that she had met another woman whom she described as the most wonderful girl she had ever seen and was trying to stop herself from falling for her. She still occasionally visited her husband, but, as he said, showed no interest in either him or the child. In Feb., 1945, she ceased to visit and had by that time installed herself in another house in London with the other woman. There is no evidence of unnatural practices with this woman, but by this time the husband's health had deteriorated further, and evidence was given by his father, who is a medical practitioner and a pathologist, to the effect that the son was nervous, losing weight, unable to concentrate and suffering to an increasing extent from his stammer. He added that after the parting there was a gradual improvement in his son's condition.

The husband did not at once renew his instructions to solicitors to take proceedings on the ground of cruelty, but entered into some discreditable negotiations with the wife with a view to getting her to divorce him on terms acceptable to himself. These negotiations were abortive, and at this point the parties met and the wife made detailed statements to him and to his uncle declaring her intention of having herself changed into a man by treatment and by operation. On Oct. 9, she wrote to her husband on this subject, and on the subject of divorce:

Dear John, I did not receive any reply from you with reference to my last letter. This, in itself, does not worry me, but the thing that does worry me is that no move has as yet been made in any direction, either by you or your solicitors. As I told

you, my hands are tied in this matter until the medical report is O.K. No one has been able to give any specified time when such information as you require will become available. I wish I knew myself, as it is a continual worry to me, and at the same time the expense is not small. The hormones used cost £1 every six days, if the rhythm of treatment is to be kept up. At the same time there is an operation hanging over my head. I saw my man last evening and he told me it would not be long, but that is no comfort. In the meanwhile I have to keep going. I suppose this treatment is using up strength, at any rate I have no energy, and I have to work in order to keep
 A alive. Frankly, I do not know the legal position in this matter, and neither do my solicitors. I suppose there has been no precedent. At all events, it seems that I am entitled to a small allowance, until such time as the change-over takes place.

The petition was finally presented on Jan. 19, 1946, and at a later date the wife put in her defence denying the allegations in the petition. The husband's case depends very largely on his own evidence, but it is not unsupported by the
 B passages to which I have referred in the wife's letters, and, in particular, her sexual perversion is borne out by the letter which she wrote to her husband on the subject of her proposed change of sex, confirming the previous statements to the like effect made by her to her husband and to his uncle. These statements were admittedly made and she seeks to explain them as being a fantastic form of shock treatment administered to her husband with a view to extorting money from him. This explanation, whether true or not, does not destroy
 C the inference to be drawn from these statements. The husband was, in my view, a reliable witness. I formed the opinion that he was fair and accurate in the account which he gave of his married life and that when he and his wife are in conflict his evidence is to be preferred to hers. I have had to consider whether, in any way, he has put it out of his power to complain of his wife's conduct as being wilful and unjustifiable in relation to him by the meekness and patience which he has exhibited. He summed up his position in this way :
 D "I realise now I was far too easy and gave in too much. I was desperately fond of her. I regarded myself as being the only person in possession of the facts to try and get her back to normality and to try and keep a contact which made persuasion possible." He was never a willing party to her sexual irregularities, and did what he felt able to do to prevent them. In my judgment, the husband has proved a course of conduct consisting of wilful and unjustifiable
 E acts on the part of the wife directed towards him, which not only did injury to his health, but also caused reasonable apprehension of the same. This justifies a finding of cruelty against her, and I pronounce a decree *nisi* of divorce on that ground.

Decree nisi.

Solicitors : *Rubinstein, Nash & Co.* (for the husband) ; *Halliday, Williams & Co.* (for the wife).

[*Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.*]

Approved. CASSIDY v. MINISTRY OF HEALTH. [1951] 1 All E.R. 574.

COLLINS v. HERTFORDSHIRE COUNTY COUNCIL AND ANOTHER

[KING'S BENCH DIVISION (Hilbery, J.), March 3, 4, 5, 6, 7, 10, 11, 1947.]

Medicine and Pharmacy—Medical practitioner—Pharmacist—Negligence—Liability of hospital—Dangerous and negligent system—Injection of lethal dose of cocaine—Apportionment of damages between joint tortfeasors—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 6 (2).

While undergoing an operation, a patient in a county council hospital was killed by an injection of cocaine which was given by the operating surgeon in the mistaken belief that it was procaine. The operating surgeon had ordered procaine on the telephone, but the resident house surgeon (who was then unqualified) had mis-heard "procaine" as "cocaine," and had told the pharmacist to dispense a mixture which was, in fact, lethal. The pharmacist dispensed the mixture without making further inquiry and without requiring the written instruction of a qualified person, and the operating surgeon had given the injection without checking that

it was what he had ordered. The operating surgeon, the house surgeon, and the pharmacist were all three in the full-time or part-time employment of the council. In an action by the patient's widow against the county council and the operating surgeon alleging that the death was the result of (a) the council's negligence in the conduct of their hospital, and (b) the operating surgeon's failure to exercise reasonable care,

HELD: (i) the county council, in managing the hospital, was permitting a dangerous and negligent system to be in operation, and the operating surgeon and the house surgeon had failed to exercise reasonable skill and care.

(ii) the council were able to control the manner in which the resident medical officer performed her work and, therefore, the acts of the house surgeon done in the course of her employment were acts for which the council was responsible.

(iii) although the operating surgeon was a part-time employee on the staff of the council, the council could not control how he was to perform his duties and was not responsible for his want of care.

Gold v. Essex County Council ([1942] 2 All E.R. 237) applied.

Quaere, whether *Hillyer v. St. Bartholomew's Hospital (Governors)* ([1909] 2 K.B. 820) still a binding authority.

(iv) the county council and the surgeon were to contribute in equal proportions to the amount of damages recoverable by the plaintiff.

Limitation of Actions—Amendment of statement of claim—Action against public authority alleging negligence in the conduct of a hospital—Allegation in statement of claim that authority responsible for negligence of house surgeon and surgeon—Amendment to include responsibility for pharmacist—New particular and not new cause of action—Public Authorities Protection Act, 1893 (c. 61), s. 1—Limitation Act, 1939 (c. 21), s. 21.

At the trial of an action against a public authority alleging negligence in the conduct of a hospital, it being alleged that the authority was responsible for the negligence of the house surgeon and the operating surgeon, the plaintiff sought to amend the statement of claim by including a charge that the council was also responsible for the negligence of the pharmacist. The council contended that such an amendment would be stating a new cause of action and could not be allowed, under the Public Authorities Protection Act, 1893, s. 1 (see now Limitation Act, 1939, s. 21).

HELD: since the cause of action was the negligence of the council in the conduct of a hospital and the allegations that it was vicariously responsible for certain named persons were only by way of particulars, the amendment was not a new cause of action, but only a new particular, and could be allowed.

Marshall v. London Passenger Transport Board ([1936] 3 All E.R. 83) and *Batting v. London Passenger Transport Board* ([1941] 1 All E.R. 228) distinguished.

[AS TO LIABILITY OF HOSPITAL FOR NEGLIGENCE OF MEDICAL PRACTITIONER, see HALSBURY, Hailsham Edn., Vol. 22, p. 320, para. 605; and FOR CASES, see DIGEST, Vol. 34, p. 550, Nos. 86, 87, and Supplement.]

FOR THE LAW REFORM (MARRIED WOMEN AND TORTFEASORS) ACT, 1935, s. 6 (1) (c) AND (2), see HALSBURY'S STATUTES, Vol. 28, p. 474.

AS TO REFUSAL OF AMENDMENTS BY REASON OF THE STATUTORY BAR, see HALSBURY, Hailsham Edn., Vol. 20, pp. 784, 785, para. 1087; and FOR CASES, see DIGEST, Vol. 32, pp. 536, 537, Nos. 1891-1897, and Supplement.]

Cases referred to:

- (1) *Gold v. Essex County Council*, [1942] 2 All E.R. 237; [1942] 2 K.B. 293; 112 L.J.K.B. 1; 167 L.T. 166; 106 J.P. 242; Digest Supp.
- (2) *Hillyer v. St. Bartholomew's Hospital (Governors)*, [1909] 2 K.B. 820; 78 L.J.K.B. 958; sub. nom. *Hillyer v. London Corp., etc. (Governors of St. Bartholomew's Hospital)*; 101 L.T. 368; 73 J.P. 501; 34 Digest 550, 87.
- (3) *Simmons v. Heath Laundry Co.*, [1910] 1 K.B. 543; 79 L.J.K.B. 395; 102 L.T. 210; 3 B.W.C.C. 200; 34 Digest 21, 15.
- (4) *Yewens v. Noakes* (1880), 6 Q.B.D. 530; 50 L.J.Q.B. 132; 44 L.T. 128; 45 J.P. 8, 468; 34 Digest 21, 14.
- (5) *Mersey Docks & Harbour Board v. Coggins & Griffiths (Liverpool), Ltd.*, [1946] 2 All E.R. 345; [1947] A.C. 1; 115 L.J.K.B. 465; 175 L.T. 270.

- (6) *Mersey Docks Trustees v. Gibbs*, *Mersey Docks Trustees v. Penhallow* (1866), L.R. 1 H.L. 93; 11 H.L. Cas. 686; 35 L.J.Ex. 225; 14 L.T. 677; 30 J.P. 467; 34 Digest 157, 1231.
- (7) *Marshall v. London Passenger Transport Board*, [1936] 3 All E.R. 83; Digest Supp.
- (8) *Batting v. London Passenger Transport Board*, [1941] 1 All E.R. 228; Digest Supp.

ACTION for damages for negligence.

- A A patient in a county council hospital was killed by an injection of cocaine given in mistake for procaine. His widow claimed damages (i) against the council, on the ground of their negligence in and about the conduct of their hospital, and (ii) against the surgeon for failure to exercise reasonable care. The facts appear in the judgment.

R. T. Paget for the plaintiff.

- B *Berryman, K.C.*, and *R. Marven Everett* for the first defendants.
Havers, K.C., and *H. C. Dickens* for the second defendant.

- HILBERY, J. : Pursuant to the powers given to them by the Public Health Act, pt. VI, s. 181, the first defendants, the Hertfordshire County Council, own and manage the hospital known as the Wellhouse Hospital, at Barnet, in the county of Herts. In 1945 they had a resident house surgeon, a Miss Knight, who was a last-year student, not a qualified medical practitioner, although she had already at the time of the happening of the matters which are under discussion in this action, passed some parts of her final examination, and, what is, perhaps, most important, the pharmacological part. The defendant county council had at the same hospital, as an operating surgeon, the second defendant, Mr. Alan Henderson Hunt, a surgeon holding the highest possible qualifications in surgery, and not only holding them, but, from all that I have heard in this case, obviously meriting them. On Apr. 20, 1945, one James William Henry Collins, whose widow brings this action, was a patient in this hospital, having been received by the defendant county council for treatment. He had a fairly extensive growth of the jaw which required a very serious operation. That operation was undertaken by Mr. Hunt. On that day, Apr. 20, Mr. Collins, while on the operating table for the purpose of that operation, and while that operation was being carried out, was killed by the injection into him of 80 cc. of 1 per cent. cocaine mixed with 1-20,000th of adrenaline. That injection was given by the surgeon in the belief that he was injecting a perfectly proper and harmless local anaesthetic, a mixture of 1 per cent. procaine with 1-20,000th of adrenaline.

- The widow of James Collins claims in this action damages against, first, the Hertfordshire County Council, as the proprietors and managers of the hospital, alleging that the death of her husband was the result of their negligence in and about the conduct of their hospital, and against, secondly, Mr. Hunt, alleging that this injection was partly the result of a failure on his part to exercise reasonable care so as to see that he did not inject what was, in fact, injected. The circumstances that led to this deplorable event are extraordinary and I cannot believe likely ever to occur again. They began with an event of the evening of Apr. 19, and the chain of causation led, unfortunately, onwards until the time came when the injection was made.

- G On the evening of Apr. 19, Miss Knight, acting as the resident surgical officer at the hospital, rang up the surgeon, Mr. Hunt (as was usual) to know his orders for the next day, when he would be operating at the hospital, performing those operations which were assigned to him. It was arranged that Collins's operation would come first, as it was likely to take a considerable time. Mr. Hunt gave his directions for what would be his requirements for the operation. At the other end of the telephone Miss Knight had her notebook in front of her, and took down what she thought were the directions given by Mr. Hunt. The first two articles which she had entered in her book were intended obviously to be used for injection as a local anaesthetic. I am satisfied beyond any question that what Mr. Hunt ordered was 1 per cent. procaine with 1-20,000th adrenaline. Miss Knight acted in perfect good faith, but she mis-heard it. Over the telephone some sounds are notoriously distorted. At any rate, "procaine" came to Miss Knight's hearing as "cocaine," and she wrote down in her book "100 cc. 1 per cent. cocaine," and she added to that "adrenaline." Nobody has ever

heard of injecting anything like 100 cc. of 1 per cent. cocaine into anybody. A lethal dose would be 20 cc. Indeed, that is, probably, more than a lethal dose. Moreover, I am satisfied by the evidence that at this time throughout the surgical and medical profession cocaine had ceased to be used for injection as a local anaesthetic because it had been found to be far too dangerous a poison. Miss Knight knew what a lethal dose of cocaine, if injected, was. She admits that she knew that whatever Mr. Hunt was then ordering was for injection. But she says :

Although I knew that, and although I knew that 100 cc. of cocaine would be five times a lethal dose, none the less I did not know how much of the 100 cc. of 1 per cent. cocaine Mr. Hunt intended to inject.

She was receiving an order for something which, if she had heard it aright, was a local anaesthetic which she, in her experience of Mr. Hunt, of this hospital, and of the work in the theatres of this hospital, knew had never been used before either by him or in hospital. She says that she repeated what Mr. Hunt said to her, but even if the repetition got through to him, it may have been so pronounced that he mis-heard it. I think the misunderstanding had its origin in this fact, that in the theatre at the hospital down to that time the old name for this drug, "novocaine," was still used.

Miss Knight thereupon went, with her book, to the pharmacist at the hospital. She did not give the pharmacist any written prescription or order to dispense this mixture. She told him by word of mouth to make up this 1 per cent. cocaine, and she asked him what was the usual quantity of adrenaline. He told her that it was 1 in 20,000. So it came to be made up of 1 in 20,000 adrenaline and 1 per cent. cocaine. In my view, there is no doubt that she told him that it was wanted for Mr. Hunt's operation the next day, and there is equally no doubt that he knew that it was for use on a particular patient in a particular operation, because the evidence before me shows that he sent it up as a sterile solution for injection and in an open flask only plugged with cotton wool at the top because it was for immediate use and not as a stock preparation to be kept in the theatre. Miss Knight then gave the theatre sister a list of Mr. Hunt's requirements for the operation. When the sister was getting together those requirements, she checked the flask against the list given her by Miss Knight and saw that it was, as Miss Knight's list said it should be, 100 cc. of 1 per cent. cocaine and adrenaline in solution. The sister placed the flask with other bottles on the shelf above the sink or basin where the surgeon would do his scrubbing before beginning his operation, and there it remained until, in the course of the operation, the surgeon called for the local anaesthetic, having arrived at that stage in the operation where it was needed. Sister Rockhill thereupon pointed out to the nurse the flask which stood on the shelf and watched to see that the nurse took down the right flask and poured it into the appropriate sterilised bowl on the trolley. Then Sister Rockhill filled the sterile syringe with the solution and handed it to Mr. Hunt. There then emerges a controversy as to what actually took place. Mr. Hunt says that he asked : "Is this the 1 per cent. procaine ?" and that Sister Rockhill said : "Yes." Sister Rockhill says that Mr. Hunt did not ask her : "Is this 1 per cent. procaine ?" She gave to me her statement in a way which carried to me the complete conviction of truth. The importance of that is this. It is conceded that every surgeon takes responsibility for what he injects into a patient as a local anaesthetic and that he should take some step reasonably to make sure before he injects it that he is injecting that which he ordered. Mr. Hunt's case here is : "I accept that obligation, that measure of duty, and I did make a check, because before I injected I asked the sister : 'Is this 1 per cent. procaine ?'" I am satisfied that Mr. Hunt is a man of honour, who has only told me what he profoundly believes to be the fact, and it may be that he did say at some stage : "Is this 1 per cent. procaine ?" But, if that was said, I am certain that it was not, at the moment at which it was said, intended as a test whether he had got the right mixture, but was directed to whether he was filling his syringe from the right bowl. Those are two quite different things. I think all the circumstances show that it was an occasion on which a surgeon who was habitually careful might omit one step which must appear to him in the circumstances to be of comparatively minor importance. From his point of view, the local anaesthetic that he expected to have handed to him was routine and he had

not the slightest reason to suppose that it would be anything other than routine. At the moment he was involved in an operation which required the greatest skill, delicacy of touch, and concentration, and, expecting to get the anaesthetic he always had had, he just omitted to check. There ought not to have been any necessity for him to check. If the system which was in operation at the hospital had not been as utterly defective and dangerous as I think it was, the anaesthetic which was presented to him could not have been presented to him.

A If Miss Knight had used reasonable care and skill in the performance of her duties, it could not have got to him. If the pharmacist had used reasonable care and skill in the performance of his duties, it could not have got to him. If either Miss Knight or the pharmacist had called any qualified person's attention to it, that qualified person must at once have rung up Mr. Hunt and said: "Did you ever order such a thing as this?" Nobody had ever heard of such an order for injection.

B Those are the circumstances. In the first place, what do they indicate on the evidence? It is clear to my mind, in the first place, that the hospital was permitting to be in operation a dangerous and negligent system. Miss Knight, an unqualified person, was enabled to take an order for a dangerous drug in a phenomenal quantity to the pharmacist to be dispensed, and to get it dispensed without it being ordered on a prescription in writing or any prescription or order signed by a qualified person. She tells me she did that as a matter of course and that she had done it in respect of other dangerous drugs such as morphia. The system which was being operated at the hospital was such that the pharmacist accepted that order and dispensed the drug in sterile form for an injection, knowing that it was for a patient who was to be operated on and sent it up, and he did that without having any qualified person's signature. There were regulations which were, apparently, hidden from Miss Knight—not wilfully hidden, but which, according to her, had never been discovered. The regulations which should have been in operation at the hospital and which are, therefore, useful as indicating what the hospital authorities state should be the system, include, among other things, these provisions:

C 8. Every order for a dangerous drug (including dangerous hypnotics and sedatives) *i.e.*, chloral, paraldehyde, sulphonal, etc., must be dated and the drug and dosage clearly written, and the time to be given stated and the entry initialled by the medical officer. . . . 9. Verbal instructions as to treatment and ordering of drugs and medicines are not allowed. All instructions as to treatment, drugs and medicines must be clearly stated in writing under "Treatment" column.

E Therefore, this order for this drug for this injection into this patient ought to have been entered on the patient's case sheet, written, and signed by the medical officer. If by "medical officer" is meant "fully qualified medical officer," as I expect it is (because at the time when the regulation was drawn I suppose F that nobody had heard of a medical officer other than a fully qualified one), it is perfectly plain that Miss Knight had no right to make an entry on the patient's sheet and sign it. There was a green book, entitled "Routine Procedures" for the hospital, which was on the table in the room which Miss Knight and the other resident medical officer used, although she had never had her attention specially directed to it or been told to read it. In that book it is G stated:

All prescriptions for dangerous drugs and preparations containing them must be initialled by a medical officer and the number of doses specified.

No doubt, that is primarily intended to refer to medicines given in the course of treatment in a medical case, but it is, at any rate, a warning that the hospital recognises that dangerous drugs and preparations containing them ought to be H initialled by a medical officer. On the evidence before me I am satisfied that the hospital negligently failed to bring to the mind and attention of Miss Knight when they appointed her the regulations that they regarded as necessary for the management of the hospital, they did not bring to her attention the requirements of their routine procedures or the fact that she was bound to adopt them, and they were permitting a state of affairs where a dangerous drug in an extraordinary quantity was made up in a solution with a very high fraction of another drug. If they had had a proper system in operation, this solution could not have arrived at the theatre, let alone at the body of the unfortunate patient.

It is alleged in the statement of claim that the hospital has a vicarious responsibility for the alleged negligence of Miss Knight. I think that it is clear that Miss Knight did not use reasonable skill and care in her office which she was performing under a contract of whole-time service as a resident medical officer for the defendant county council. She admits that she knew that this solution was for injection, she admits that it was 1 per cent. cocaine, she knew what a fatal dose of cocaine was, and she knew that cocaine had never been used in that hospital or by Mr. Hunt as a local anaesthetic, but, faced with all that, she did not immediately query to Mr. Hunt what he had ordered. Her mind might not have jumped sufficiently quickly with many other things to think of at that moment, but she had taken it down and, on reading it over, apparently, it still did not strike her, although she had passed her final examination in pharmacology, that there must have been some mistake. In addition, if she knew the contents of the green book, and she says she had seen it, she must have known that she ought to have the initials of a qualified person to this order, but she took no steps to get any qualified person to initial it. I am sure that no qualified person would have initialled it without referring to Mr. Hunt. Lastly, Miss Knight, with her training, should have known, and I am satisfied did know, that a pronounced symptom of acute cocaine poisoning was convulsions such as the patient here developed very quickly after these injections. Even then Miss Knight's mind did not turn to the fact that she had ordered 1 per cent. cocaine for injection into him. That was the last moment at which there was any hope of saving the patient's life, and up to the last moment Miss Knight remained as one who in the circumstances failed to exercise reasonable skill and care.

As regards Miss Knight's situation, the question whether the hospital is vicariously responsible for her want of care in addition to its own responsibility for its own negligent system involves a point of law about which the situation seems at present to be highly uncertain. Recently, in *Gold v. Essex County Council* (1) observations have been made on the situation of a hospital with regard to various persons ordinarily to be found employed by such an institution that it may fulfil its functions. Before *Gold v. Essex County Council* (1) it was generally accepted, after the decision in *Hillyer v. St. Bartholomew's Hospital* (2)—though exactly what was decided in *Hillyer's* case (2) has been the subject of much discussion and some difference of opinion—that the test to be applied was whether the officer for whose negligence it was sought to make the hospital vicariously responsible was performing his duties under, on the one hand, a contract for services, or, on the other hand, a contract of service. If, on the facts, the right view was that the officer was doing the duties in question in performance of a contract of service, the hospital was vicariously liable. If, on the other hand, he was doing the duties in pursuance of a contract for services as a professional man, there was no responsibility on the part of the hospital authorities.

Counsel for the hospital has called my attention to a very useful decision in *Simmons v. Heath Laundry Co.* (3), where the Court of Appeal had in the neatest possible form to decide whether certain services rendered by the appellant were rendered pursuant to a contract of service or to a contract for services. The appellant there, being employed by the laundry company as a machine hand, received injuries in the course of and arising out of her employment. In addition to doing that work, the appellant gave lessons in pianoforte playing to a neighbour's children for which she received 3s. a week. As she was entitled to do if the 3s. a week were earnings which came from a contract of service, she claimed to have them taken into consideration in assessing her earnings so as to arrive at the figure of compensation under the Workmen's Compensation Act. The short effect of the decision was that in a contract for services the master can order or require what is to be done, while in the other case he can not only order or require what is to be done but direct how it shall be done. BUCKLEY, L.J., cited with approval ([1910] 1 K.B. 552) the statement of BRAMWELL, L.J., in *Yewens v. Noakes* (4) (6 Q.B.D. 530) that :

A servant is a person subject to the command of his master as to the manner in which he shall do his work:

I think that the words "as to the manner in which he shall do his work" is only the same thing as saying what I have just said, "subject to the master's

orders as to how it shall be done."

A I think that is consistent with the recent decision in the House of Lords in *Mersey Docks and Harbour Board v. Coggins & Griffiths (Liverpool), Ltd.* (5), although there the matter had to be considered from a different angle and in different circumstances. The House of Lords had to decide the test to apply to find out whether, in what a man was doing which resulted in injury to a third party, he was to be held in law to be the servant of one or other of two persons or of both. The decision that had to be made was where the responsibility rested for what the crane driver did in that case—which of two parties was the superior to the driver so as to make him not responsible in law. They held, as LORD UTHWATT put it ([1946] 2 All E.R. 355)—and I think he is only saying exactly what VISCOUNT SIMON put in another way:

The proper test is whether or not the hirer had authority to control the manner of execution of the act in question.

B In this case, Miss Knight was employed as a whole-time resident medical officer on the terms of an appointment form used for this purpose both in her case and, I am sorry to say, in the case of Mr. Hunt, because I am satisfied that in his case it is an inappropriate form to use. It is a notification to the clerk of the council of the appointment of an employee to the staff of the county council assistance department, Barnet area. The material part is:

C Dear Sir, the undermentioned has been appointed to the staff of this department, and the following are the full particulars of appointment.

D That is signed by the medical superintendent at the hospital, Dr. Segar, and says that Ellen Mary Knight is employed in the capacity of a junior house surgeon (student) from Mar. 4, 1945, that the employment is temporary and full-time employment, and that the remuneration is an annual basic cash salary, or basic weekly wage at the date of appointment, of £50 per annum, and the particulars of emoluments, if any, are described as "Resident annual value, £100." I am not sure that much help is to be derived from the use of that form. It was not intended to be a written contract between the parties. At the end of the form, all that Miss Knight did (just as Mr. Hunt did) was to sign a certificate that:

E The particulars of my previous service with local authorities set forth above are complete and correct to the best of my knowledge and belief.

Therefore, I derive from that document very little help towards solving the conundrum whether there is vicarious responsibility on the part of the county council here for the omission and negligence of Miss Knight.

F But when I turn to *Gold v. Essex County Council* (1), it appears to me, if I am not misinterpreting what LORD GREENE, M.R., said and what the effect of that decision is, first, that *Hillyer's* case (2) is no longer a binding authority, and, secondly, that the judgment of LORD GREENE, M.R., passes on the basis that in such a case the first thing one has to do is to ascertain what the obligation is which the one party is assuming towards the other. What is the obligation that the hospital authorities assume towards the patient who comes to them for admission and treatment? LORD GREENE, M.R., said ([1942] 2 All E.R. 242):

G Apart from any express term governing the relationship of the parties, the extent of the obligation which one person assumes towards another is to be inferred from the circumstances of the case. This is true whether the relationship be contractual (as in the case of a nursing home conducted for profit) or non-contractual (as in the case of a hospital which gives free treatment).

H I pause there to say that, while I have no evidence in this case, I cannot blind myself to the fact that this patient was earning £571 a year and the almoner of such a hospital would take that into account and would make out a charge on the conclusion of the treatment and the county council would have power under the Public Health Act, 1936, s. 184, to recover the costs of the treatment which they may have given to him. LORD GREENE, M.R., then said (*ibid*):

In the former case there is, of course, a remedy in contract, in the latter the only remedy is in tort; but in each case the first task is to discover the extent of the obligation assumed by the person whom it is sought to make liable. Once this is discovered, it follows of necessity that the person accused of a breach of the obligation cannot escape liability because he has employed another person, whether a servant

or agent, to discharge it on his behalf; and this is equally true whether or not the obligation involves the use of skill. It is also true that, if the obligation is undertaken by a corporation, or a body of trustees or governors, they cannot escape liability for its breach, any more than an individual can; and it is no answer to say that the obligation is one which on the face of it they could never perform themselves. Nor can it make any difference that the obligation is assumed gratuitously by a person, body or corporation which does not act for profit: *Mersey Docks Trustees v. Gibbs* (6). Once the extent of the obligation is determined the ordinary principles of liability for the acts of servants or agents must be applied. The question which presents itself in the present case may therefore be formulated as follows. When a patient seeking free advice and treatment such as that given to the infant appellant knocks at the door of the respondent's hospital, what is he entitled to expect? He will find an organisation which comprises consulting physicians and surgeons, presumably also house physicians and surgeons, a staff of nurses, equipment for administering Grenz-ray treatment and a radiographer, Mead, employed to give that treatment. So far as consulting physicians and surgeons are concerned, clearly the nature of their work and the relationship in which they stand to the respondents precludes the drawing of an inference that the respondents undertake responsibility for their negligent acts. The same may be true of the house physicians and surgeons, but their case is not relevant to the present inquiry and I say nothing about it.

Therefore, the position of Miss Knight as a resident house surgeon is one that is still expressly left open by that case for decision. *MACKINNON, L.J.*, dealt with the case, it seems to me, on the same broad principle, *qui facit per alium facit per se*, and he gives certain examples of the legal principles to be followed. It is, however, when one comes to the judgment of *GODDARD, L.J.*, that one finds a return by him to the test of whether the services which are negligently rendered are pursuant to a contract of service or a contract for services. I think that the opinions of *LORD GREENE, M.R.*, and *MACKINNON, L.J.*, go to show that, if a county council exercising its powers under the Public Health Act, 1936, manages and controls a hospital, undertaking the obligation of affording to patients who resort to the hospital nursing, accommodation and treatment, the fact that they employ a professional person to perform some of those obligations does not divest them of their responsibility in law. If a professional person so employed by them is negligent, the observations of *LORD GREENE, M.R.*, which I have quoted seem to me to support that proposition. Here, as a part of the amenities of the hospital offered to a person resorting to it for treatment and accommodation, was the presence at all times on the premises of a resident medical officer, and his acts, done in the course of treatment of the patient, are, in my view, acts for which the hospital is responsible. In arriving at that conclusion, I am following what I think was the *ratio decidendi* in *Gold v. Essex County Council* (1).

Gold v. Essex County Council (1) expressly stated (although it is not decided by that case and the statements made on the topic may be said to be *obiter dicta*), that a consulting surgeon coming to a hospital is in another category. Mr. Hunt was not in precisely the same situation with regard to this hospital as is a consulting surgeon who is on the staff of one of the teaching hospitals, or, indeed, on the staff of an ordinary hospital. One knows that a consulting surgeon goes to hospitals where he is on the staff to perform operations, voluntarily giving services to the hospital. He can refuse to perform an operation, and he can come as often as he likes or as seldom as he likes, although, of course, for the convenience of running a hospital he has his days for operating to which he adheres. But he does not do any of that contractually; he does it as a matter of arrangement to which he honourably adheres. It may be that the situation of such a surgeon can be distinguished from the situation of qualified persons employed to fulfil the obligation undertaken by the hospital to give the necessary treatment to a patient. As *MACKINNON, L.J.*, pointed out ([1942] 2 All E.R. 244) in *Gold v. Essex County Council* (1), a shipowner none the less remains liable for the negligent navigation of one of his ships, notwithstanding that the navigation was performed by a fully qualified master mariner.

My difficulty in this case is that Mr. Hunt signed a form similar to the one which Miss Knight signed, a form which spoke of the capacity in which he was employed as a temporary part-time employee on the staff of the county council, undertaking specifically to attend on Tuesday for three hours and on Friday for four hours, and to be on call on Tuesdays, Thursdays and alternate Fridays and week-ends, at an annual basic cash salary of £500 per annum. I am in

considerable doubt whether that should represent the written terms of a contract between them. I am sure there was no intention on Mr. Hunt's part that it should be so. None the less, from his own answers to interrogatories I think it is clear that those were the terms of an employment, and I am very doubtful whether the hospital is not in the circumstances also vicariously responsible for what Mr. Hunt may have omitted in the way of reasonable care.

A On the whole, however, I think that Mr. Hunt's position was such that, if he the test to be applied is whether the authorities could in any way control how he was to perform his duties, they certainly could not do so. I do not think they could even say what he should or should not do. I think he had only to say: "I will not do this operation," for them to have to put up with it. I do not think they could order him to do an operation. I do not think they could say what he was to do, and I am certain that they could not say how he should do it. The same is not true of Miss Knight. I think that to a very great extent B the hospital authorities could say how she should perform her work, as, indeed, they did under the regulations which they, at any rate, intended should be binding on her, though those regulations had not, in fact, been brought to her attention in a way which would make them binding. In the circumstances, while I think that the hospital was vicariously responsible for Miss Knight's acts of negligence or negligent omissions in the course of the performance of her duties, the same does not apply to Mr. Hunt.

C It is said that the pharmacist was negligent. He certainly and most clearly was. It has been called to my attention in the course of the evidence not only that this was a dangerous drug for which any pharmacist should, and would, expect a prescription in writing from a fully-qualified medical officer, but it has also been called to my attention that in the BRITISH PHARMACOPOEIA every dispenser is warned that when an order is received (i.e., even in writing signed D by a qualified medical officer) requiring him to dispense an unusually large quantity of a dangerous or poisonous drug, before doing so he should take steps to verify that there is no mistake about what is being ordered. This pharmacist took an order by word of mouth for an unheard of dose of cocaine and adrenaline and made it up. He knew that it was for an operation, and he knew that it was for injection. He took no step whatever to insist on a qualified person E initialling the order, he made no check, and he did not even send up the flask, when made up, with a note calling special attention to it or asking that Mr. Hunt's attention should be specially called to it. He disregarded every sort of plain and ordinary safeguard for the making up of dangerous drugs.

At a very early stage in this case counsel for the plaintiff asked for leave to amend his statement of claim by including a charge that the hospital was also responsible for the negligence of the pharmacist. Counsel for the county F council objected to the amendment being made so late, and he indicated that, if such an amendment were made, he would say that the answer was the Public Authorities Protection Act, 1893, [see now Limitation Act, 1939, s. 21] because it would be alleging a new cause of action. I said that I would allow the amendment, giving any adjournment that counsel for the county council might require so that he could meet the situation, but he intimated that he did not require any adjournment and so the matter went on. I confess that I had not then G present to my mind what the Court of Appeal had said in *Marshall v. London Passenger Transport Board* (7), which was a clear case of an amendment which imported a completely different and new cause of action. So also was *Batting v. London Passenger Transport Board* (8). In each of those cases a transport authority in the original action was alleged negligently to have managed and controlled a vehicle so that the plaintiff was injured. The amendment that was sought to be made was not to allege that there was, in addition to the negligence H that had already been alleged on the part of one servant, negligence of another servant which contributed to bring about the mishap of which the plaintiff complained, but that in addition to the negligent management the transport authority had been guilty of a breach of a statutory obligation and duty, a totally different thing. In the present case the cause of action relied on by the plaintiff on the writ is that the death of her husband was the result of the negligence of the defendants in and about the conduct of a hospital. Particulars of that negligence are given, the persons for whom it is alleged that the hospital was vicariously responsible being named. In addition, it is alleged that there

was a defective and negligent system. The allegations of Miss Knight's and Mr. Hunt's negligence are only particulars of the cause of action, which is negligence in the management and control of the hospital. The allegation that the hospital was responsible for the negligence of the pharmacist is not a new cause of action. It is merely a new particular. Therefore, I think that I should have allowed the amendment even although the argument about the applicability of the Limitation Act had been pressed, and I think that the hospital has no answer to the outstanding negligence of the pharmacist.

In these circumstances, there must be judgment for the plaintiff against each of the defendants. Each of the defendants is responsible, because each was guilty of what the law calls negligence, that is to say, a failure to exercise reasonable skill and care in the treatment of the patient, with the result that he died.

[HIS LORDSHIP then assessed the damages at £2,500, and counsel addressed HIS LORDSHIP on the question of apportionment].

HILBERY, J. : I have the greatest difficulty, as I have said before, in arriving at a conclusion as to what the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (c) and (2) really intends shall be the guiding principle in arriving at what the court has to find as between two tortfeasors in proceedings between them for contribution. Section 6 (2) says that in those proceedings for contribution :

... the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage ; . . .

If the wording of that section had stopped at the word "equitable" and the semicolon had occurred there, I should have thought that what was plainly intended was that the court was to have the fullest discretion to distribute the damages between persons whose several acts had brought about the damage according as the court thought they had degrees of culpability, but the words "just and equitable," are immediately followed by governing words, i.e., "having regard to the extent of that person's responsibility for the damage." Once before my attention has been called to this difficulty, and I expressed the view that it seemed to me that, whereas it would be comparatively easy to distribute the damages according to the relative degrees of negligence, it was quite a different matter if these qualifying words were to be given their full effect and the court had to decide to what extent the negligence of the one party or the other was causal in bringing about the damage. The words "having regard to the extent of that person's responsibility for the damage," certainly seem to be an indication that the extent of the responsibility for the damage is to be the guiding principle, and, if that is so, it is difficult to conceive how anything other than causal acts can be in any sense acts resulting in the damage or, in other words, responsibility for the damage.

In this case, difficult as it is, I think that right up to the very moment of the injection (because that was the moment which, on Mr. Hunt's own evidence, he regarded as the appropriate time to make the test) and even after that moment there was negligence on the part of the hospital, as I have indicated. At the same time, Mr. Hunt has accepted the view that he had the responsibility of checking to see whether what was injected was what he had ordered. On his own showing he had selected a late moment, but none the less a moment which would have been perfectly effective, to make the necessary enquiry, if, in fact, I had been able to find that he had then made it. I feel quite unable, however, to do otherwise than direct that the hospital and Mr. Hunt should share equally the responsibility which was there up to the last moment. I think the contribution ought to be half and half, and I have made that order on both parties' applications.

Judgment for plaintiff against defendants with costs.

Solicitors : E. W. Parkes (for plaintiff) ; Berrymans (for first defendants) ; Hempsons (for second defendant).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

**Re CRAWSHAY, HORE-RUTHVEN AND ANOTHER v.
DIRTIO TRUSTEE AND OTHERS**

CRAWSHAY, *Re*. ([1947] 1 All

E.R. 643; 177 L.T. 275).

Affirmed. C.A. . . . [1948] 1 All E.R. 107

ary 28, March 3, 13, 1947.]

*Power of appointment among nephews
of a nephew—Agreement by appointee*

A By his will a testator settled a legacy on trust for his daughter R. for life with remainder to her issue, but should there be no child of R. who should attain 21, then on trust for such issue of her brothers and sister as she should by will appoint, and, in default of appointment, to be divided equally between all the children of her brothers and sister as should be living at her death. By a codicil the testator excluded the issue of his daughter R. by W. (whom she was about to marry) from taking any benefit under his will. The testator died in 1879 and R. died in 1943, having been married once only, *i.e.*, to W., by whom she had two children who had attained 21. At the time of R.'s death, four of her nephews and nieces were alive, one whom was J.C., a son of R.'s brother, W.T.C. By his will, W.T.C. (who died in 1918) gave certain property to J.C. on condition that he assigned for the benefit of R.'s issue any interest to which he might become entitled in the settled legacy under the testator's will or the exercise of the power of appointment. This direction to assign was complied with by J.C., and R. by her will appointed the whole legacy to J.C., with the object of benefiting her own children:—

B **C** **D** **E** **F** **G** **H** **I** **J** **K** **L** **M** **N** **O** **P** **Q** **R** **S** **T** **U** **V** **W** **X** **Y** **Z** **AA** **AB** **AC** **AD** **AE** **AF** **AG** **AH** **AI** **AJ** **AK** **AL** **AM** **AN** **AO** **AP** **AQ** **AR** **AS** **AT** **AU** **AV** **AW** **AX** **AY** **AZ** **BA** **BB** **BC** **BD** **BE** **BF** **BG** **BH** **BI** **BJ** **BK** **BL** **BM** **BN** **BO** **BP** **BQ** **BR** **BS** **BT** **BU** **BV** **BW** **BX** **BY** **BZ** **CA** **CB** **CC** **CD** **CE** **CF** **CG** **CH** **CI** **CJ** **CK** **CL** **CM** **CN** **CO** **CP** **CQ** **CR** **CS** **CT** **CU** **CV** **CW** **CX** **CY** **CZ** **DA** **DB** **DC** **DD** **DE** **DF** **DG** **DH** **DI** **DJ** **DK** **DL** **DM** **DN** **DO** **DP** **DQ** **DR** **DS** **DT** **DU** **DV** **DW** **DX** **DY** **DZ** **EA** **EB** **EC** **ED** **EE** **EF** **EG** **EH** **EI** **EJ** **EK** **EL** **EM** **EN** **EO** **EP** **EQ** **ER** **ES** **ET** **EU** **EV** **EW** **EX** **EY** **EZ** **FA** **FB** **FC** **FD** **FE** **FF** **FG** **FH** **FI** **FJ** **FK** **FL** **FM** **FN** **FO** **FP** **FQ** **FR** **FS** **FT** **FU** **FV** **FW** **FX** **FY** **FZ** **GA** **GB** **GC** **GD** **GE** **GF** **GG** **GH** **GI** **GJ** **GK** **GL** **GM** **GN** **GO** **GP** **GQ** **GR** **GS** **GT** **GU** **GV** **GW** **GX** **GY** **GZ** **HA** **HB** **HC** **HD** **HE** **HF** **HG** **HH** **HI** **HJ** **HK** **HL** **HM** **HN** **HO** **HP** **HQ** **HR** **HS** **HT** **HU** **HV** **HW** **HX** **HY** **HZ** **IA** **IB** **IC** **ID** **IE** **IF** **IG** **IH** **II** **IJ** **IK** **IL** **IM** **IN** **IO** **IP** **IQ** **IR** **IS** **IT** **IU** **IV** **IW** **IX** **IY** **IZ** **JA** **JB** **JC** **JD** **JE** **JF** **JG** **JH** **JI** **JJ** **JK** **JL** **JM** **JN** **JO** **JP** **JQ** **JR** **JS** **JT** **JU** **JV** **JW** **JX** **JY** **JZ** **KA** **KB** **KC** **KD** **KE** **KF** **KG** **KH** **KI** **KJ** **KK** **KL** **KM** **KN** **KO** **KP** **KQ** **KR** **KS** **KT** **KU** **KV** **KW** **KX** **KY** **KZ** **LA** **LB** **LC** **LD** **LE** **LF** **LG** **LH** **LI** **LJ** **LK** **LL** **LM** **LN** **LO** **LP** **LQ** **LR** **LS** **LT** **LU** **LV** **LW** **LX** **LY** **LZ** **MA** **MB** **MC** **MD** **ME** **MF** **MG** **MH** **MI** **MJ** **MK** **ML** **MM** **MN** **MO** **MP** **MQ** **MR** **MS** **MT** **MU** **MV** **MW** **MX** **MY** **MZ** **NA** **NB** **NC** **ND** **NE** **NF** **NG** **NH** **NI** **NJ** **NK** **NL** **NM** **NN** **NO** **NP** **NQ** **NR** **NS** **NT** **NU** **NV** **NW** **NX** **NY** **NZ** **OA** **OB** **OC** **OD** **OE** **OF** **OG** **OH** **OI** **OJ** **OK** **OL** **OM** **ON** **OO** **OP** **OQ** **OR** **OS** **OT** **OU** **OV** **OW** **OX** **OY** **OZ** **PA** **PB** **PC** **PD** **PE** **PF** **PG** **PH** **PI** **PJ** **PK** **PL** **PM** **PN** **PO** **PP** **PQ** **PR** **PS** **PT** **PU** **PV** **PW** **PX** **PY** **PZ** **QA** **QB** **QC** **QD** **QE** **QF** **QG** **QH** **QI** **QJ** **QK** **QL** **QM** **QN** **QO** **QP** **QQ** **QR** **QS** **QT** **QU** **QV** **QW** **QX** **QY** **QZ** **RA** **RB** **RC** **RD** **RE** **RF** **RG** **RH** **RI** **RJ** **RK** **RL** **RM** **RN** **RO** **RP** **RQ** **RR** **RS** **RT** **RU** **RV** **RW** **RX** **RY** **RZ** **SA** **SB** **SC** **SD** **SE** **SF** **SG** **SH** **SI** **SJ** **SK** **SL** **SM** **SN** **SO** **SP** **SQ** **SR** **SS** **ST** **SU** **SV** **SW** **SX** **SY** **SZ** **TA** **TB** **TC** **TD** **TE** **TF** **TG** **TH** **TI** **TJ** **TK** **TL** **TM** **TN** **TO** **TP** **TQ** **TR** **TS** **TT** **TU** **TV** **TW** **TX** **TY** **TZ** **UA** **UB** **UC** **UD** **UE** **UF** **UG** **UH** **UI** **UJ** **UK** **UL** **UM** **UN** **UO** **UP** **UQ** **UR** **US** **UT** **UU** **UV** **UW** **UX** **UY** **UZ** **VA** **VB** **VC** **VD** **VE** **VF** **VG** **VH** **VI** **VJ** **VK** **VL** **VM** **VN** **VO** **VP** **VQ** **VR** **VS** **VT** **VU** **VV** **VW** **VX** **VY** **VZ** **WA** **WB** **WC** **WD** **WE** **WF** **WG** **WH** **WI** **WJ** **WK** **WL** **WM** **WN** **WO** **WP** **WQ** **WR** **WS** **WT** **WU** **WV** **WW** **WX** **WY** **WZ** **XA** **XB** **XC** **XD** **XE** **XF** **YG** **YH** **YI** **YJ** **YK** **YL** **YM** **YN** **YO** **YP** **YQ** **YR** **YS** **YT** **YU** **YV** **YW** **YX** **YY** **YZ** **ZA** **ZB** **ZC** **ZD** **ZE** **ZF** **ZG** **ZH** **ZI** **ZJ** **ZK** **ZL** **ZM** **ZN** **ZO** **ZP** **ZQ** **ZR** **ZS** **ZT** **ZU** **ZV** **ZW** **ZX** **ZY** **ZZ**

HELD: the nephews and nieces who survived R. took vested interests in the settled legacy and R.'s power to divest such interest by appointment was conferred on her by the testator in order that she might, fiduciarily, select one or more of them as recipients of his bounty to the exclusion or partial exclusion of the other or others on a due consideration of their merits and needs, and, since R. had exercised the power, not for this purpose, but to benefit her own children, the appointment in favour of J.C. failed, as being a fraud on the power.

Re Wright, Hegan v. Bloor ([1920] 1 Ch. 108) applied.

Re Crawshay, Crawshay v. Crawshay (43 Ch. D. 615) criticised and distinguished.

[AS TO FRAUDULENT APPOINTMENTS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 581-585, paras. 1033-1035; and FOR CASES, see DIGEST, Vol. 37, pp. 504-515, Nos. 972-1066.]

Cases referred to:

- (1) *Re Brooks' Settlement Trusts, Lloyds Bank, Ltd. v. Tillard*, [1939] 3 All E.R. 920; [1939] Ch. 993; 109 L.J. Ch. 28; 161 L.T. 158; Digest Supp.
- (2) *Re Crawshay, Crawshay v. Crawshay* (1890), 43 Ch.D. 615; 59 L.J. Ch. 395; 62 L.T. 489; 37 Digest 514, 1056.
- (3) *Vatcher v. Parull*, [1915] A.C. 372; 84 L.J.P.C. 86; 112 L.T. 737; 37 Digest 492, 865.
- (4) *Portland (Duke) v. Topham (Lady)* (1864), 11 H.L. Cas. 32; *sub. nom. Portland (Duke) v. Topham (Lady), Bentinck (Lady) v. Topham (Lady), Bentinck (Lord) v. Topham (Lady)*, 34 L.J. Ch. 113; 10 L.T. 355; 37 Digest 503, 963.
- (5) *Re Marsden's Trust* (1859), 4 Drew. 594; 28 L.J. Ch. 906; 33 L.T.O.S. 217; 37 Digest 513, 1048.
- (6) *Wellesley (Lady) v. Mornington (Earl)* (1855), 2 K. and J. 143; 37 Digest 505, 983.
- (7) *Re Wright, Hegan v. Bloor*, [1920] 1 Ch. 108; 88 L.J. Ch. 452; 121 L.T. 549; 37 Digest 453, 555.

ADJOURNED SUMMONS to determine whether a power of appointment given to Mrs. Rose Williams under the will of her father, the testator, Robert Thompson Crawshay, had been validly exercised by her by her will.

By his will made on June 24, 1877, the testator directed his trustees to hold a sum of £100,000 invested in consols on trust for his daughter, Rose, for life, and after her death on trust for all or any of her issue in such manner as she should appoint, and in default of appointment in trust for all her children who should attain 21, but, should there be no child of the daughter, Rose, who should live to attain 21, on trust for the benefit of all or any of the children or issue who

might be living at the time of her decease of her brothers and sister and in such parts, shares and proportions, and subject to such conditions and provisions, as she should by will appoint, but, in the event of her not exercising this last power, then the fund was to be divided equally between all the children of her brothers and sister as should be living at her decease. The testator gave his residuary estate to his three sons. By a codicil made on Nov. 14, 1877, the testator, after reciting that his daughter, Rose, was engaged to be married to a Mr. Williams and that he disapproved of the marriage, declared that none of her children or issue by Mr. Williams should take any interest whatsoever under his will, but that his will should read in all respects as if all and every the child, children and issue of the intended marriage of Rose with Mr. Williams had been expressly excluded by his will from all benefits, interest, or right of participation in the trust funds or any part thereof respectively thereby given, or by the exercise of any of the powers or provisions therein contained empowered to be given to the children or issue of his daughter, Rose, but so that nothing therein contained should in anywise affect the right title or interest in or to the trust funds of any children or issue of Rose by any other husband than Mr. Williams. The daughter, Rose, who died on Sept. 16, 1943, was married once only (*i.e.*, to Mr. Williams) and had two children who had attained 21. On July 9, 1946, VAISEY, J., held that, on the true construction of the testator's will and codicil and in the events which had happened, the trust funds became on her death held on the trusts declared by the will to take effect on failure of the trusts thereby declared in favour of her issue, and did not fall into the testator's residue. By her will, made on June 13, 1934, Mrs. Rose Williams appointed the whole of the trust funds to her nephew Jack Crawshay. The facts appear in the judgment.

A. H. Droop for the plaintiffs.

J. Neville Gray, K.C., and *A. L. Ungood-Thomas*; *L. F. Mumford*; *G. A. Rink*; *C. D. Myles* and *Geoffrey Cross* for the defendants.

Cur. ad. vult.

Mar. 13. VAISEY, J., read the following judgment: I have already decided that the funds representing the legacy of £100,000 consols settled by the will of Robert Thompson Crawshay the elder (I will refer to him as the first testator), who died on May 10, 1879, on his daughter Rose (afterwards Mrs. Williams) for life did not at her death fall into the first testator's residue. That is to say, I held that those funds became subject to the trusts declared by such will to take effect on failure of the trusts thereby declared in favour of her issue (not being issue of her marriage to Mr. Williams), *viz.*, on such trusts for the benefit of all or any of the children who might be living at the time of her death of her brothers and sisters and in such proportions and subject to such conditions and provisions as she, Mrs. Williams, should by will appoint, but, in the event of her not exercising such power, then the funds were to be divided equally between all such children of her brothers and sisters as should be living at her decease.

Mrs. Williams, by her will dated June 13, 1934, exercised, or purported to exercise, the before-mentioned power by appointing the whole of the funds to her nephew, the defendant Jack William Leslie Crawshay (whom I will call Mr. Jack Crawshay), a son of one of her brothers. She died on Sept. 16, 1943, and her will was proved on May 12, 1944. At the time of her death only four of her nephews and nieces were living and, accordingly, were objects of the power, namely, Mr. Jack Crawshay himself; the plaintiff, Robert Oakes Crawshay and the defendant, Mrs. Greener, son and daughter of another of her brothers, and the defendant, Mrs. Spiller, a daughter of her sister. Consequently, if the appointment is valid—and that is the question which I have to decide—the whole of the funds go to Mr. Jack Crawshay. If it is not valid, they are divisible in equal fourth shares between him and the three other persons whom I have named.

The exact circumstances in which it is alleged that the appointment was fraudulent must be presently narrated, but the underlying fact, undoubtedly, is and has been the resentment felt, and naturally felt, by Mrs. Williams against the provision in a codicil to the will of her father, the first testator, excluding her issue by Mr. Williams from taking any benefit under that will. It is clear that other members of the family sympathised with and shared that resentment and that she and they regarded such exclusion as an injustice which deserved or

required to be remedied. That object would have been completely and satisfactorily achieved if my decision of the point of construction had been the other way, for by a deed dated June 23, 1887, which I will call the 1887 deed, Mrs. Williams' three brothers, who were together absolutely entitled to the first testator's residue, assigned to the then trustees of the first testator's will all the share or shares to which as such residuary legatees they then were, or they or their representatives might thereafter become, entitled expectant on the death of their sister, Mrs. Williams, in the said settled legacy or the funds representing the same on trusts for the benefit of the issue of Mr. and Mrs. Williams which it is unnecessary for me to state more particularly.

The execution of the 1887 deed was the first step in what I may call, I hope not unfairly, a family conspiracy or scheme to defeat the express wishes of the first testator and to redress the grievance occasioned by the discrimination made against the children and other issue of Mr. and Mrs. Williams, a discrimination which applied also to the trusts of another fund settled by his will, a fact to which I refer merely to emphasise the great care which the first testator took to exclude such issue from any kind of participation in any part of his estate. Let me say at once that the conspiracy was meritorious enough and in no way exceptionable so far as it was, or could be, implemented by the conspirators out of, and by means of, their own property, but the difficulty of making a proper use of any special (*i.e.*, any fiduciary) power of appointment to further or bring about any such end or purpose is at once apparent.

The next matter to be mentioned is the will of William Thompson Crawshay, one of those three brothers of Mrs. Williams who have been already referred to. I will call him the second testator. His will is dated July 11, 1907, and by cl. 10 he devised certain real estates to the following uses (so far as material), *i.e.*, to the use of trustees for a term of 1,000 years to commence from his death, and, subject thereto, to the use of Mr. Jack Crawshay in fee simple. By cl. 13 the trusts of the said term of 1,000 years were declared. These included a trust that, if the 1887 deed should for any reason fail to take effect (as, in fact, having regard to my decision on the construction, it has), the trustees should immediately after the death of the survivor of the persons therein named, that is to say (in the events which happened), of Mrs. Williams herself, raise by mortgage of the said premises or any part thereof such a sum as should be equivalent to the value at such death of the investments representing the said settled legacy, less such share or interest therein as should have been previously assigned to the trustees of the 1887 deed by Mr. Jack Crawshay, pursuant to the provisions thereafter contained, with interest from the death of Mrs. Williams as therein mentioned, and should stand possessed of the said sum and interest on the trusts which would have been subsisting under the 1887 deed with respect to the said funds if the 1887 deed had taken effect. By cl. 15 the second testator, in effect and so far as material, declared that Mr. Jack Crawshay should within six calendar months from his coming of age, or the second testator's subsequent death, assign to the satisfaction of the trustees of such will any share or interest to which he might be, or become, entitled in the said settled legacy under the will of the first testator or the exercise of any power of appointment therein contained to the trustees of the 1887 deed on the trusts of the 1887 deed as though the same were effectual, with a further provision that, in case Mr. Jack Crawshay should refuse or neglect to execute such assignment, his estate in the devised premises should determine and become void.

The second testator died on Sept. 25, 1918, and his will with certain codicils thereto was proved on Feb. 18, 1919. Mr. Jack Crawshay was born on Sept. 10, 1894, and, therefore, attained his majority on the corresponding date in 1915. By a deed dated Feb. 3, 1919 (*i.e.*, within the prescribed period of six months after the death of the second testator), and made between Mr. Jack Crawshay, of the first part, the trustees of the second testator's will, of the second part, and the trustees of the 1887 deed, of the third part, Mr. Jack Crawshay assigned to the parties thereto of the third part all the share or interest, whether vested or contingent, to which he then was or might thereafter become entitled, of and in the said settled legacy and investments under the first testator's will or the exercise of any power of appointment therein contained, on the trusts and subject to the powers and provisions which under the 1887 deed, or any exercise of any powers therein contained, would then be subsisting or capable of taking effect.

with respect to the same if the assignment made by the 1887 deed had been effectual. I will call this deed the 1919 deed.

It is in evidence that the property subject to the said term of 1,000 years created by the will of the second testator is sufficient to provide the value at the death of Mrs. Williams of three-fourths of the investments then representing the said settled legacy, but I am not told, and I do not know, whether it is sufficient to provide the value of the whole of such investments. I am also not told, and do not know, whether Mrs. Williams was ever informed or knew at any material time whether or to what extent the property comprised in the term of 1,000 years would suffice to provide the amount of the settled legacy or any part of such amount. If the appointment of the funds to Mr. Jack Crawshay is ineffective, the fourth share taken by him in default of appointment has been effectively assigned by the 1919 deed and is available to provide the remaining one-fourth of such value. On the other hand, any interest taken by him under an appointment by Mrs. Williams (being a mere expectancy) would not have been effectively assigned by the 1919 deed: see *Re Brooks' Settlement Trusts* (1), with the somewhat strange consequence that, if she had left the fund to go in default of appointment, the position of the issue of her marriage to Mr. Williams would have been more secure than she could possibly have made it even by a valid exercise of her power. I do not, however, suppose that Mr. Jack Crawshay would wish to dispute that the 1919 deed operated to assign the expectancy to the trustees of the 1887 deed according to the tenour of the 1919 deed.

The facts are that Mrs. Williams, by a series of testamentary instruments beginning with a codicil dated May 1, 1907, to a then existing will and ending with her last will, dated June 13, 1924, appointed the whole of the settled funds to Mr. Jack Crawshay absolutely, using appropriate and practically identical expressions throughout the whole of the series. The draft of the codicil of May 1, 1907, is before me. It indicates some vacillation on the part of Mrs. Williams whether the appointee should be Mr. Jack Crawshay or Mrs. Greener (who was then unmarried) and there is, in the margin of the draft, a somewhat cryptic note by the conveyancing counsel who settled it that it would be better to select a nephew rather than a niece, since the funds might, in the case of a niece, be caught by a covenant in her marriage settlement to settle after-acquired property. In the end, the appointment to Mr. Jack Crawshay was made, and it was repeated in all the lady's subsequent testaments. At this date Mr. Jack Crawshay was under 13 years of age, and it appears that there were several older nephews and nieces of Mrs. Williams who were considerably older than that, but were for that reason presumably less likely to survive her. The draft of the codicil was settled on Mar. 18, 1907, and on the same day counsel wrote an opinion dealing first with the point of construction (which he regarded as "doubtful") and then saying this:

I think that an appointment by Mrs. Williams in favour of one of her nephews and nieces would not be a fraud on the power provided there is no antecedent arrangement or bargain between Mrs. Williams and the appointee as to the manner in which the appointed fund is to be dealt with: *Re Crawshay* (2). The expression of Mrs. Williams' wishes might be contained in the codicil itself (see the last-cited case) or in a separate paper. I think it would be better if it were contained in a separate paper to be opened after Mrs. Williams' death and no communication on the subject should be made to the appointee during Mrs. Williams' lifetime.

I am told that this advice was almost certainly communicated to Mrs. Williams.

The next of Mrs. Williams' wills was dated Jan. 8, 1910, and on Jan. 16 she wrote a letter to Mr. Jack Crawshay, now 15 years of age. The original intention that it should be handed to Mr. Jack Crawshay after the writer's death may well have been abandoned, but it, in fact, survived, as did also a draft of it put away with other papers of little importance. This is what it says:

My dear Jack, You will not, I am sure, misunderstand what I have done with regard to the disposition of money in my will. It is scarcely to be imagined that any question will arise that would possibly deprive your cousins, Eliot and Leslie [the writer's sons by her marriage to Mr. Williams], of their just inheritance, and I have only exercised my power of appointment under your grandfather's will in case by any possibility any difficulty should arise and must in that event trust to your honour that reparation should be made. In case you may not know, it was decided by your father and uncles' lawyers that in consequence of the codicil to your grandfather's

will the £100,000 he left to me came to them at my death, and they were honourable, kind and just enough to give up all right to it so that there can hardly be any question of claim on the part of anyone in the matter except the rightful inheritors, Eliot and Leslie. I have not as yet, dear Jack, seen very much of you. Before this letter reaches you we may be better acquainted. In any case, I trust the transaction may not cause you any trouble or bother and that these few words from one then no longer here may not impose a very painful duty and that you will not regard unkindly Your affectionate aunt, Rose H. T. Williams.

A This letter really speaks for itself, and it certainly has a very material bearing on the case. I will refer to the question of its admissibility later.

The next will of Mrs. Williams was signed on Nov. 2, 1911, as to which I have no comment to make. That will remained unrevoked until after the death of the second testator, and the probate of his will. I cannot doubt that the substance of such will (so far as it affected her family) must have been known to Mrs. Williams. Indeed, the matter is placed beyond any doubt by a letter written to Mrs. Williams by her solicitor on Apr. 10, 1919, the material part of which is as follows :

I am preparing a draft of a new will for you . . . You will remember that there has always been a question whether it was competent for your three brothers to secure the consols legacy under your father's will to your sons after your death, although they did all they could for the purpose by signing a settlement in 1887. Mr. William Crawshay in his will has arranged for the money being provided out of his estate . . . should the settlement of 1887 prove to be ineffectual and his will further provides that Mr. Jack Crawshay (who would be one of those to benefit if the deed of 1887 is not effectual) should as a condition of taking any interest under his will confirm the settlement of 1887 so far as he is concerned. This Mr. Jack Crawshay has done. It will, however, still be necessary to retain in your new will the provisions on the subject which were inserted in your present will.

D The final sentence in that letter certainly raises some extremely puzzling questions. By "the provisions" which were to be retained, the appointment to Mr. Jack Crawshay was obviously meant, but in what possible sense was she being told that its retention was "necessary"? I have failed to find any other explanation of it than this: "Your brothers did what they could, and now Mr. Jack Crawshay has done what he could, to secure the Consols legacy to your sons, and now you must for that purpose continue to make the appointment to Mr. Jack Crawshay as in your present will." At that time the number of nephews and nieces, who would, by surviving Mrs. Williams, constitute the class entitled to the funds in default of appointment, was more than four, so that Mr. Jack Crawshay's share might have been less than one fourth, as, of course, it might also have been more. It is difficult to see in what respect the exercise of this fiduciary power in favour of a particular object can properly have been described as "necessary," except for the purpose of implementing the conspiracy, or perhaps of fulfilling some promise or obligation made by Mrs. Williams to the second testator, or possibly to all her brothers. Having regard to the second testator's will and the 1919 deed, I should have thought that it might have been more appropriate to tell her that it had now become unnecessary for her to appoint the funds to Mr. Jack Crawshay, though open to her to do so, either in order to compensate him for what the second testator was obliging him to lose or part with for the benefit of her family, or for any other reason. But the matter was represented to her as one of necessity, that is, presumably, one in which she had for some reason or other no free choice. Although, as shown by the letter, Mrs. Williams was intending to make a new will in April, 1919, she did not, in fact, do so until Aug. 11, 1920. Further wills were made on Oct. 19, 1922, and Dec. 14, 1928, and then the final and last will on June 13, 1934.

H Paragraph 2 of the originating summons suggests that, if the appointment was fraudulent, it was so by reason of Mr. Jack Crawshay having before the date of the will assigned any interest which he might take by appointment on trusts for persons who were not objects of the power. In my judgment, the reasons for its invalidity ought to be stated somewhat differently. It seems to me that the nephews and nieces who survived Mrs. Williams took vested interests in the settled legacy, and that her power to divest such interests by appointment was conferred on her by the first testator in order that she might, fiduciarily, select one or more of them as recipients of the first testator's bounty to the

exclusion, or partial exclusion, of the others or other of them, on a due consideration of their merits or needs. She was, of course, dealing with his property, and not with her own. That Mrs. Williams ever considered the matter in that light I find no hint at all. I am satisfied that from first to last she was thinking exclusively of her own children and their rights or wrongs. To use or attempt to use the power for their benefit, and so to defeat the plain wishes of the donor of the power, was certainly a most cynical act, though I am very willing to believe that Mrs. Williams was not in the least degree conscious of any such impropriety, particularly, if it were, as I understand the case, that the first testator was reconciled to her marriage before his death.

Mr. Jack Crawshay has sworn that to the best of his recollection and belief he did not, nor did any person acting for him, have any discussions with Mrs. Williams or her solicitors either before or after he executed the 1919 deed with regard to the execution or proposed execution thereof. This I readily accept, but he goes on to say that she did not at any time give him to understand that (either in view of the said deed or otherwise) she had made or would make any appointment in his favour in respect of the settled legacy. While accepting this as representing the present recollection and belief of Mr. Jack Crawshay, it is very strange that, when instructions (evidently on behalf of Mr. Jack Crawshay) were given to the conveyancing counsel before mentioned to settle the draft of the 1919 deed, he was supplied with copies of (i) the 1887 deed, (ii) the instructions of Mar. 15, 1907, and his opinion, (iii) Mrs. Williams' will dated Nov. 2, 1911, and (iv) the will and codicils of the second testator, and he was at the same time asked to consider whether any alteration in Mrs. Williams' will was desirable in the then present circumstances. His opinion, dated Jan. 28, 1919, was as follows :

In my opinion no alteration in Mrs. Williams' will is necessary, but if she has, as suggested in my opinion of Mar. 18, 1907, expressed any wish as regards the fund appointed by her to Mr. Jack Crawshay in a separate paper, such paper should now be destroyed.

The discrepancy is obvious, and it is not easy to believe that Mr. Jack Crawshay was not fully aware of the existence and purport of the documents, including Mrs. Williams' will, which were being put before counsel on his behalf. I think that his memory must be somewhat at fault. I am told that the purport of the last-mentioned opinion was almost certainly conveyed to Mrs. Williams though she appears to have disregarded the recommendation that she should destroy the letter. I should add that the solicitors acting for Mr. Jack Crawshay in 1919 were the same as those who acted at all material times for Mrs. Williams and many other members of the Crawshay family.

As to the general principles which govern the question of fraudulent appointment, there are so many judicial pronouncements of high authority that it is difficult to make a choice, but I may refer to a short passage from the judgment of LORD PARKER OF WADDINGTON in *Vatcher v. Paull* (3), where he said ([1915] A.C. 378) :

The term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power. Perhaps the most common instance of this is where the exercise is due to some bargain between the appointor and appointee, whereby the appointor, or some other person not an object of the power, is to derive a benefit. But such a bargain is not essential. It is enough that the appointor's purpose and intention is to secure a benefit for himself, or some other person not an object of the power. In such a case the appointment is invalid . . .

I would further, for the sake of completeness, read the well-known passage from the speech of LORD WESTBURY, L.C. (11 H.L. Cas. 54) in *Portland v. Topham* (4) :

Without farther dwelling on the matter, inasmuch as your Lordships concur in this opinion, I think we must all feel that the settled principles of the law upon this subject must be upheld, namely, that the donee, the appointor under the power, shall, at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the

purpose and intent of the power) which he may desire to effect in the exercise of the power. I think it would be endangering the whole of the established principles of our law upon this subject if we were to permit a transaction of this kind to stand, or to hold that it is a transaction which can be reconciled with the faithful, sincere, just, and honest exercise of the power committed to the appointor, and which he is to exercise as a trustee.

But I ought, having regard to those last words, to add the following observation from FARWELL ON POWERS (3rd ed., pp. 458, 459):

A It will be observed that the essential notion is disposition beyond the scope of the power, not breach of trust by the donee, though it is not unusual to speak of the donee of a limited power as being in a fiduciary position. His position is referable to the terms, express and implied, of the instrument creating the power and the implied obligation not to appoint for an ulterior purpose, and is not in truth founded, like the position of a trustee, upon a state of conscience imputed to him by courts of equity.

B But there is a strong analogy between the obligation imposed on the donee by the terms of the instrument creating the power and that imposed upon a trustee by the terms of the instrument creating the trust.

C As regards other authorities, those who seek to support the appointment have relied chiefly on *Re Crawshaw* (2), referred to in counsel's opinion of Mar. 18, 1907. I am unable to regard that case as a satisfactory one, for it seems to me to be somewhat opposed to the general trend of the decisions on the subject. In any case, it does not seem to me to be really applicable to the facts of the present case. The headnote reads as follows:

D Under a settlement, made in 1828, a testator had power to appoint by will to and among his children a sum of £35,000. By his will, made in 1865, he bequeathed £150,000 to his daughter Jessy, and directed that this legacy should be paid to four trustees named in the will, and should be held by them upon trust for her during her life, with remainder for her issue. The will then recited the power of appointment contained in the settlement, and by virtue of that power the testator appointed £10,000, part of the £35,000, to the same daughter; but his will was that the same should be paid to the trustees thereinbefore named with reference to the legacy of £150,000, and should be held by them upon the trusts thereinbefore declared thereof. The testator then appointed two sums of £10,000 and £7,000 respectively in favour of two other daughters, and he appointed the residue of the £35,000 to his son Robert absolutely. And, in case he had exceeded his power in not appointing the £10,000 to his daughter Jessy unconditionally, but in directing the settlement thereof, and

E in case his said daughter, or her husband, or others having any right or power to object to the settlement thereof as aforesaid, should so object, or should not confirm such settlement, if required so to do, then he appointed that the said sum of £10,000 should go and belong to his son Robert, "but who will I am assured settle the same voluntarily in the manner in which I have attempted to settle the same as aforesaid so as thereby to carry out my wishes." After the testator's death the son Robert executed a declaration of trust of the £10,000 to carry out his father's wishes. There

F was no evidence (other than the will itself) of any bargain between the son and the testator that the former would settle the £10,000: *Held*, that the appointment of the £10,000 in favour of the daughter Jessy was invalid; that the £10,000 did not pass to the son under the appointment of the residue to him; but that, under the last appointment to him, there being only an expression of the testator's wish, and no evidence of any bargain by the son that the fund should be settled, it passed to him absolutely, free from any obligation to settle it, and was, therefore, validly appointed. *Re Marsden's Trust* (5) commented on and explained.

G In *Re Marsden's Trust* (5), the objects of the power were the children of the marriage, and the donee (the wife) desired to benefit her husband. To effectuate this, she appointed to her eldest daughter, unconditionally on the face of it, but under an arrangement between the appointor and her husband that on the appointor's death the daughter should be informed by her father of the intention with which the appointment was made and so be induced to

H carry out that intention. KINDERSLEY, V.C., said (4 Drew. 601):

... it is not necessary that the appointee should be privy to the transaction, because the design to defeat the purpose for which the power was created will stand just the same, whether the appointee was aware of it or not; and the case of *Wellesley v. Mornington* (6) shows that it is not necessary, in order to bring the case within the scope of the jurisdiction on which this court acts, that the appointee should be aware of the intentions of the appointment, or of its being actually made.

In FARWELL ON POWERS (3rd ed., pp. 478, 479), *Re Marsden* (5) is referred to in the words just used by me, and then *Re Crawshaw* (2) is mentioned

without comment. I say that *Re Crawshaw* (2) differs from the present case because there the appointor merely believed that the appointee would, in fact, utilise the appointed property in a particular way. No pressure or solicitation was applied, and it was certainly never represented that any other person than the appointee was the rightful inheritor of the appointed property. Surer guidance can, in my judgment, be obtained from *Re Wright* (7), from which I derive the following relevant propositions: (i) that an intention to benefit a non-object may vitiate an appointment whether the intention is successfully achieved or not; (ii) that it is not necessary to establish any bargain; (iii) that, if there were originally a corrupt intention, the onus is shifted and rests on those who seek to show it was abandoned, and (iv) that the letter and other documents to which I have referred are properly admissible as evidence in this case. The whole of that part of the judgment of P.O. LAWRENCE, J., which deals with the question of fraud ([1920] 1 Ch. 117) is relevant.

On the question of the onus of proof, I have come to the conclusion that the letter of Jan. 16, 1910, is plainly indicative of a corrupt motive and a corrupt intention on the part of Mrs. Williams, and I can find no proof that such motive and intention were ever altered or abandoned by her. She regarded her two sons as the rightful inheritors, and nothing was further from her thoughts, hopes or wishes than that any nephew or niece of hers should take any benefit under the appointment. From first to last she was thinking, not of them, but of her own family. In fact, it seems to me that Mrs. Williams misunderstood the nature of her rights and duties in regard to this power of appointment, and that she regarded the funds as though they were her own property or, in any case, attempted to use them to further ends and objects quite outside the scope of the power. In my judgment, the case is typically and characteristically one of fraud (in the technical sense) and I must so decide. I would only add that I have never heard of a case before this one in which the persons sought to be benefited are not merely negatively non-objects of the power, but are the very persons whom the donor of the power has positively and affirmatively pointed out as disqualified from becoming participants of his bounty, and has deliberately and in the clearest terms excluded from the ambit of his beneficence.

An order must now be drawn up containing the declaration on the point of construction, and a declaration that the appointment has failed as being a fraud on the power. The costs of all parties taxed as between solicitor and client must be raised out of the settled funds.

Declaration accordingly.

Solicitors: *Lawrence, Graham & Co.* (for the plaintiffs); *Farrer & Co.*; *Gilbert Samuel & Co.*; *Wellington Taylor & Sons* (for the defendants).

[Reported by R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

GARDNER, MOUNTAIN AND D'AMBRUMENIL, LTD. v. INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Viscount Simon, Lord Wright, Lord Porter, Lord Simonds and Lord Normand), February 6, 10, 20, 21, 24, 25, April 1, 1947.]

Revenue—National defence contribution—Computation of profits—Chargeable accounting period—Underwriting agents—Commission not ascertainable and not payable until 2 years after underwriting of risk—When earned—Finance Act, 1937, (c. 54), ss. 19, 20; sched. IV, para. 1.

The appellant company was employed as underwriter's agents at Lloyd's, its function being to carry on the whole of the underwriting business on behalf of the group or syndicate for whom it acted, and it was paid a commission on the profits of the business. Under its agreements of employment and in accordance with the usual practice of Lloyd's, its underwriting accounts were drawn up by reference to the year in which the risks were underwritten, but were kept open until the end of the second year after the year in which the risk had been underwritten, to allow for the adjustments required in order to ascertain the eventual

profits. Commission, therefore, was not calculated and paid until 2 years after a risk had been underwritten. It was provided, however, that the account for each year should be treated as a separate account for ascertaining the commission and that one year should not be affected by another. Either party could terminate the agency at the end of any year on giving 6 months' notice, and, where the company was paid a fixed salary as well as commission, the salary was to cease at the termination of the agency, although the account had not yet been wound up. The company was entitled, on the termination of the agency, to wind up the underwriting and accounts, and, if it did so, it was to be paid a special remuneration for its services in that connection. It was contended by the Crown that, for the purpose of computing the company's liability for national defence contribution under the Finance Act, 1937, pt. III, ss. 19, 20, the profits of the company on transactions underwritten in the year ending Mar. 31, 1939, arose in that year (1938-39), although they were not actually paid until Mar., 1941 :—

HELD : (i) on the true construction of the agreements, commission arising from underwriting in 1938-39, though calculated partly on future outcome and paid 2 years later (*i.e.*, in Mar., 1941), was remuneration for work done, and completely done, in the year ending Mar. 31, 1939.

(ii) the sum paid to the company in Mar., 1941, for underwriting in 1938-39, was rightly assessed, for the purpose of national defence contribution, as profits arising in the chargeable accounting period Apr. 1, 1938 to Mar. 31, 1939, the principle being to refer back to the year in which it was earned, so far as possible, remuneration subsequently received, even though it could only be precisely calculated afterwards.

Inland Revenue Comrs. v. Newcastle Breweries, Ltd. (1924) 12 Tax Cas. 768) applied.

Harrison v. Cronk & Sons, Ltd., [1936] 3 All E.R. 747) distinguished. *Dailuaine-Talisker Distilleries, Ltd. v. Inland Revenue* (1930 S.C. 878), doubted.

[AS TO NATIONAL DEFENCE CONTRIBUTION, see HALSBURY'S STATUTES, Vol. 30, pp. 356-361, and pp. 362-365.]

Cases referred to :

- (1) *Holden (Isaac) & Sons, Ltd. v. Inland Revenue Comrs.* (1924), 12 Tax Cas. 768 ; Digest Supp.
- (2) *Inland Revenue Comrs. v. Newcastle Breweries, Ltd.* (1927), 12 Tax Cas. 927 ; Digest Supp.
- (3) *English Dairies, Ltd. v. Phillips, English Dairies, Ltd. v. Inland Revenue Comrs.* (1927), 11 Tax Cas. 597 ; Digest Supp.
- (4) *Harrison v. Cronk & Sons, Ltd.*, [1936] 3 All E.R. 747 ; [1937] A.C. 185 ; 106 L.J.K.B. 70 ; 156 L.T. 20 ; *sub nom. Cronk & Sons, Ltd. v. Harrison*, 20 Tax Cas. 612 ; Digest Supp.
- (5) *Dailuaine-Talisker Distilleries v. Inland Revenue*, 1930 S.C. 878 ; 15 Tax Cas. 613 ; Digest Supp.
- (6) *Absalom v. Talbot*, [1944] 1 All E.R. 642 ; [1944] A.C. 204 ; 113 L.J.K.B. 369 ; 171 L.T. 53 ; 26 Tax Cas. 166 ; Digest Supp.
- (7) *Collins (Edward) & Sons, Ltd. v. Inland Revenue Comrs.*, 1925 S.C. 151 ; 12 Tax Cas. 773 ; Digest Supp.

APPEAL by the taxpayer from an order of the Court of Appeal (LORD GREENE, M.R., MACKINNON and TUCKER, L.J.J.), dated Nov. 28, 1945, allowing an appeal by the Crown from an order of MACNAGHTEN, J., on a Case Stated by the Special Commissioners of Income Tax.

The appellant company carried on the business of underwriter's agents at Lloyd's. Under its agreements of employment, its accounts were drawn up by reference to the year in which risks were underwritten, but were kept open for 2 years in order to ascertain the actual profits, so that commission on risks underwritten in 1938-39 was not paid until Mar., 1941. The Court of Appeal held that commission paid in Mar., 1941, on risks underwritten in 1938-39 was earned in 1938-39, and was to be assessed for the purpose of national defence contribution, under the Finance Act, 1937, as profits arising in the chargeable accounting period Apr. 1, 1938 to Mar. 31, 1939. The facts and the relevant clauses of the agreement appear in the opinions of their Lordships.

Willink, K.C., and *Scrimgeour, K.C.*, for the appellant company.
D. L. Jenkins, K.C., and *Reginald P. Hills* for the Crown.

The House took time for consideration.

Apr. 1. VISCOUNT SIMON: My Lords, this is an appeal from an order of the Court of Appeal (LORD GREENE, M.R., MACKINNON and TUCKER, L.JJ.) whereby an appeal by the respondents against an order made by MACNAGHTEN, J., was allowed. The matter arose on a Case Stated by the Special Commissioners, who had decided against the Crown, and the judge had taken the same view. The problem to be solved is: In what year is remuneration by way of commission, arising under agreements for the appellant company's employment in the business of underwriter's agent at Lloyd's, to be brought in for the calculation of their profits chargeable under national defence contribution?

National defence contribution was imposed by the Finance Act, 1937, s. 19, the charge (of 5 per cent. in the case of a company and of 4 per cent. in other cases) being on profits arising in each chargeable accounting period falling within the five years beginning on Apr. 1, 1937. By s. 20 of the Act these profits were to be separately computed, but were to be computed "on income tax principles" as adapted by sched. IV, to that Act, and one of these adaptations was that the profits were to be taken to be the actual profits arising in the chargeable accounting period and were not to be computed by reference to any other period [see sched. IV, para. 1]—whereas profits computed for income tax under sched. D are arrived at by reference to the figures of the previous year.

The appellant company's profit and loss account for the year ending Mar. 31, 1939, brought in on the receipts side a figure of £1,728, being the amount of commission actually paid to it in that year. The similar account for the year ending Mar. 31, 1941, brought in a corresponding figure of £21,995. The question is whether this latter and larger figure, though paid two years later, is properly to be regarded as entering into the calculation of the appellant company's profits in the earlier year. An additional assessment was made on the appellant company in the sum of £18,678 (the adjusted difference between the two sums above) for the chargeable accounting period Apr. 1, 1938, to Mar. 31, 1939, in respect of profits alleged to have arisen in that year, and this additional assessment is challenged by the appellant company.

The first thing to be decided is the proper construction of the written agreement between the appellant company and its employer, who is one of the "names" in an underwriting syndicate making insurances at Lloyd's. A specimen agreement, which is annexed to the Case, recites that the underwriter "is desirous that the company should act as his agent for the purpose of underwriting business" and in cl. 1 binds the company:

... to act ... as the underwriter's agent for the purpose of underwriting at Lloyd's all such policies of insurance ... as the company in their discretion think fit and to carry on the ordinary business of underwriter there in his name and on his account.

Clause 2 stipulates that:

... the company shall have the sole control and management of the underwriting and all risks shall be taken and all claims settled by them at their sole discretion in the name of and on account of the underwriter and the company shall be at liberty to reinsure the whole or a portion of any risk ... whenever they think fit.

The clauses next following deal with the keeping of accounts, and then in cl. 8 the remuneration of the company is provided for as follows:

8. The underwriter shall pay to the company as remuneration for its services in conducting the agency a fixed salary at the rate of £— per annum and £— expenses for — share [*i.e.*, the fractional share of the contracting "name" in the syndicate's underwriting business conducted by the company] and a commission of — per cent. on the net profits on each year's underwriting...

In another specimen agreement also annexed to the Case the element of remuneration by fixed salary is omitted, but this is immaterial, for the question to be decided is the proper treatment of commission.

Clause 10 of the agreement provides how the commission is to be arrived at, and when it is to be paid. It runs thus:

10. An account shall be kept for the period ending Dec. 31, 19—, and for each

subsequent year of the agency and all premiums salvages reinsurance recoveries and other receipts and all losses averages returns of premium and other payments and outgoings including cost of reinsurance if any of outstanding liability in respect of the underwriting carried on during each such period or year shall be carried to the account for such period or year and each such account shall be made up and balanced at the end of the second clear year from the expiration of the period or year to which it relates and the amount then remaining to the credit of the account shall be taken to represent the amount of the net profit of the period or year to which it relates and the commission payable to the company shall be calculated and paid thereon Provided always that for the purpose of ascertaining the commission payable to the company the account for each period or year shall be treated as a separate account and the profits of any one period or year shall not be affected by the result of the underwriting done in any other period or year.

A The agreement manifestly contemplates (and this is the ordinary practice at Lloyd's) that, in the normal course, the employment created by it will last over a number of years, though cl. 14 provides for a termination of the agency by either side by six months' notice ending at Dec. 31. The appellant company does not discharge all its duties in reference to a given transaction of insurance by merely underwriting the risk and receiving the premium. It has to follow the transaction through to the end, which may involve modifications of premium and reinsurance of risk, as well as possible questions of average and payment of losses—matters which, it is contemplated, may occupy the attention of the agent for as much as two years after the year in which the risk was underwritten. (I can omit reference to cl. 12 which provides for what is to be done if anything is left outstanding after the two years have expired). Hence the net profits resulting from a year's underwriting are not ascertained, and cannot be ascertained, till two years later. It is only then that the figure of profit for the year is known, and only then that the commission on that profit is calculated and paid.

D So far, as I understand, there is no dispute. But the difficult question remains—for what service is this commission paid? If we assume that five successive years are denoted by 1, 2, 3, 4 and 5, is the commission, which is calculated and paid at the end of the year 5, paid as remuneration for the agent's services in underwriting risks in the year 3 together with his services in looking after the outcome of those risks in the years 3, 4 and 5 (as the appellants contend), or is it paid for the total services of the agent in year 3, which consist of underwriting in that year and of looking after the outcome of risks already underwritten in the years 1 and 2 (as the respondents contend)? If the former is the correct view, the services which earn the commission will not be completely performed in the year 3 and, as the Crown is not suggesting any apportionment, the appellant company will succeed in this appeal. If, however, the commission, though calculated in part on future outcome and payable later, is remuneration for services completely performed in year 3, the respondents' claim that the additional assessment in respect of the year 3 is justified, as the appellant company, on this view, has at the end of the year 3 done everything it has to do to earn it. The agreement has been acutely analysed from both sides, with special reference to the complications arising under cl. 9 and 12, if and when the agreement is terminated. I will not detail these arguments, but will content myself with saying that I agree with the rest of your Lordships, to whose opinions I would refer, and with LORD GREENE, M.R., that the better view is that the commission, though ascertained by reference to profits arising from underwriting in the year 1938-39 and its subsequent outcome, and paid two years later, *e.g.*, in Mar., 1941, is remuneration for work done, and completely done, in the year ending Mar. 31, 1939.

H All that remains is to apply the law correctly to the situation thus established. For the purpose of national defence contribution, the appellant company's profits arising in the chargeable accounting period Apr. 1, 1938, to Mar. 31, 1939, are to be calculated "on income tax principles," but they are to be taken to be the actual profits arising within that period. In calculating the taxable profit of a business on income tax principles (and the same point has been constantly illustrated in calculating excess profits duty—Tax Cases, Vol. 12, contains a number of examples), services completely rendered or goods supplied which are not to be paid for till a subsequent year cannot,

generally speaking, be dealt with by treating the taxpayer's outlay as pure loss in the year in which it was incurred and bringing in the remuneration as pure profit in the subsequent year in which it is paid, or is due to be paid. In making an assessment to income tax under sched. D, the net result of the transaction, setting expense on the one side and a figure for remuneration on the other side, ought to appear, (as it would appear in a proper system of accountancy) in the same year's profit and loss account, and that year will be the year when the service was rendered or the goods delivered. (I am not speaking of the proper treatment of "work in progress" where the whole subject-matter has to be spread over more than one year: compare the Finance Act, 1937, sched. IV, para. 14). This may involve, in some instances, an estimate of what the future remuneration will amount to (and in theory, though not usually in practice, a discounting of the amount to be paid in the future), but in the present case the amount of the commission due to be paid on Mar. 31, 1941, as part of the remuneration for services rendered two years before was already known before the additional assessment was made. The Crown is right in treating this additional sum as earned in the chargeable accounting period Apr. 1, 1938, to Mar. 31, 1939. If the accounts for this last-mentioned period were made up before the amount of the commission was ascertained, a provisional estimate of what the amount would be might be inserted in the first place, and could be corrected when the precise figure was known, by additional assessment or by a return of any excess within six years of the original assessment. A B C

This, as it seems to me, is the result of applying the well-known decision in the *Woolcombers* case [*Holden & Sons, Ltd. v. Inland Revenue Comrs.* (1)], where the taxpayer had been engaged in combing wool on commission for the government in the year 1917-18 and the commission was by a subsequent arrangement increased and paid to the taxpayer after the end of the trading year. ROWLATT, J., held that the total amount of commission must be included in arriving at the profits of the taxpayer for the year 1917-18. In other words, the taxpayer was treated as earning, by his work in that year, all the profits arising from the business of the year, even though there was no legal right to part of them until the agreement was afterwards made. It will be observed that the Crown's contention in the present case does not go so far as the contention which prevailed in the *Woolcombers* case (1), for in the latter there was no legal right, at the time when the work was done, to receive the amount which was ultimately paid. Here the appellant company had a legal right to be paid *in futuro*. The same principle is involved in the decision of this House in *Inland Revenue Comrs. v. Newcastle Breweries, Ltd.* (2). Another illustration of the same principle may be found in the *English Dairies* case [*English Dairies, Ltd. v. Phillips* (3)]. The principle is to refer back to the year in which it was earned, so far as possible, remuneration subsequently received, even though it can only be precisely calculated afterwards. D E F

The decision of this House in *Harrison v. Cronk & Sons, Ltd.* (4), was referred to as though it qualified, or provided some exception to, the above principle. This can hardly be so, for the line of cases to which I have referred above does not seem to have been referred to at all. The case arose on very special and complicated facts and in substance confirmed the view of the Court of Appeal (LORD HANWORTH, M.R., ROMER and MAUGHAM, L.J.J.) that sums which were not received by the taxpayer in the year for which his profits were being calculated should, none the less, be brought in at a valuation as trading receipts for that year. So far, this is in strict accordance with the ordinary principle, but in the House of Lords doubt was expressed as to whether a proper valuation could be made and the order of the House was that, if it could not, the sums, whatever they turned out to be, must be left to be taxed in the year when they were received. I may add that I think that the use of the phrase "actuarial" valuation in that case was a slip, derived from the terms of the Case Stated. At any rate, *Cronk's* case (4), does not assist the appellant company, for here the actual amount of the commission was known before the additional assessment was made. Even if its ascertainment was not yet possible, it seems to me that a provisional or estimated figure for the commission could be inserted which would be subject to correction G H

either way when the figures were precisely known. I move that this appeal be dismissed, with costs.

LORD WRIGHT: My Lords, I have considered in print the opinion which has just been delivered by my noble and learned friend, VISCOUNT SIMON. I agree with it and shall merely state briefly in my own words my reasons for doing so.

A The appellant company conducts (*inter alia*) the business of agent for the members of various syndicates of underwriters at Lloyd's. Its remuneration consists of a commission on the profits of the particular underwriter on whose behalf the risk is effected along with, in some cases, a fixed yearly salary during the agency. In computing under the Finance Act, 1937, pt. III, its liability for national defence contribution under that Act, it is necessary to determine in what year the commission is earned, or, in the language of the Act, in what year the appellant's profits arose. The particular problem B has arisen in respect of an additional assessment for national defence contribution made on the appellant company for the accounting period ending on Mar. 31, 1939. The original assessment had been on the basis of the appellant's commission in respect of profits from policies underwritten in 1936: the additional assessment was on a larger sum representing the appellant's commission on profit from policies underwritten in 1938.

C It is necessary, to explain this, to state briefly the position of the appellant as underwriter's agent. Its function is, on behalf of the group or syndicate of "names" as principals for whom it acts, to accept risks, issue policies, collect premiums, settle claims, adjust returns of premium or extra premiums, effect reinsurances where necessary, and, in short, to conduct the entirety of the underwriting business. The practice of Lloyd's is for underwriting D accounts to be drawn up by reference to the calendar year in which the risks are underwritten, but for the accounts to be kept open for a certain time (generally three years) from the acceptance of the risk, to allow for the adjustments required in order to ascertain the eventual profits. The delay is necessary in order to close the accounts. There must be an interval of time for ascertaining and settling losses, and winding up the financial results of each risk which will depend on how the risk has worked out. Accordingly, E accounts are made up in general practice at the end of the second year after the year in which the risk has been underwritten. That period is generally sufficient to ascertain the final results of the venture and to complete the accounts. The dispute in this particular case is whether the profits are to be taken on the basis of the risks underwritten in 1938, the account of which would be drawn up in 1938, or in respect of the risks underwritten in 1936 F which was the accounting period. The respondents contend that the former is the correct basis because they say the commission was earned in that year, though its amount was not ascertainable until the end of the three-year period. The appellant contends that the latter is the true basis because, it says, nothing was ascertainable, demandable or payable until the latter date.

I accept that the law on the point is as stated by my noble and learned friend in his judgment. He sums it up in this way:

G The principle is to refer back to the year in which it was earned, so far as possible, remuneration subsequently received, even though it can only be precisely calculated afterwards.

I agree also with his comments on the decision of the House in *Harrison v. Cronk* (4), and his view that that case did not qualify the rules laid down in the earlier cases to which he refers. With this principle in mind, I turn to consider if the profits from the commissions in question on which the H respondents claim to assess the appellant company were those arising from risks effected in 1938 or in 1936, and for that purpose I must consider the form of agreement in use in the particular transactions in question.

Your Lordships have been supplied with copies of two skeleton agreements. I shall take first the form applicable to the names of F. G. Hall and G. Harrisons Syndicate. Under that skeleton agreement the appellant company was vested with full discretion to carry on the ordinary business of underwriters at Lloyd's in the name and on account of a particular member of the syndicate, with full control and management of the underwriting, and with full power to take

risks and settle claims and to reinsure the whole or any portion of any risk or outstanding liability. The appellant was to keep proper accounts and keep a separate banking account and all moneys received were to be held on trust. Clause 8 dealt with remuneration. The appellant company was to be paid as remuneration for conducting the agency a fixed salary at the rate of £— per annum, and expenses, and a commission of — per cent. on the net profits on each year's underwriting, and also certain further contributions to outgoings. Clause 9 is particularly significant. It provided that the fixed salary and expenses should cease at the termination of the agency, but after such termination (whether by death of the underwriter or otherwise) the appellant company should be entitled to wind up the underwriting and the account in connection therewith, and should be paid for its services in connection therewith a remuneration of not less than one hundred guineas. Clause 10 provided for the 3 years method of accounting and stipulated that the account for each year should be treated as a separate account for ascertaining the commission and one year should not be affected by another. The accounts for each year were to be made up and balanced at the end of the second clear year after the expiration of the period or year to which it related. Clause 12 contained provisions for dealing with matters left outstanding when the account for the year has been made up and balanced. Clause 13 provided for what was to happen on the death of one member of the syndicate and for his account being taken over or reinsured by the surviving members. Clause 14 gave an option to either party to terminate the agency at the end of any year on giving six months' notice. Clause 15 provided that nothing in the agreement should be taken to constitute a partnership.

It is on the provisions of the contract that it must be decided, as a question of construction, and, therefore, of law, when the commission was earned. What I think is the crucial provision is that in cl. 9, which deals with what is to happen when the agency is terminated. It expressly stipulates that the fixed salary is to cease. The appellant company, however, is to have the option to wind up the underwriting and accounts and, if it exercises that option, it is to be entitled to a special remuneration for that work. This is in place of the stipulated annual salary, which ceases with the termination of the agency. But it is not bound to exercise that option, though it may for various reasons suit it to do so. What then is the position if it does not? The agency is a yearly employment while it lasts. The yearly salary naturally ceases with the agency, but the question of commission is not mentioned. I agree with the Court of Appeal in thinking that the necessary conclusion from that must be that the right to the commission is treated as a vested right which has accrued at the time when the risk was underwritten. It has then been earned, though the profits resulting from the insurance cannot be then ascertained and, in practice, are not ascertained until the end of two years beyond the date of underwriting. The right is vested though its valuation is postponed—and is not merely postponed but depends on all the contingencies which are inevitable in any insurance risk, losses which may or may not happen, returns of premium, premiums to be arranged for additional risks, reinsurance and the whole catalogue of uncertain future factors. All these have to be brought into account according to ordinary commercial practice and understanding. But the delays and difficulties which there may be in any particular case, however they may affect the profit, do not affect the right for what it eventually proves to be worth. The right itself in a case like this does not depend on whether the appellant company has discharged all its duties as underwriting agent. It is clear that these duties are not limited to the simple but decisive act of taking the risk for its principal. The future working out of the insurance may involve, so long as the agency and the authority to act for the same continues, the exercise of discretions, such as settling claims, effecting reinsurances and many other matters almost as vital as the original taking of the risk. But all these duties are covered, while the agency continues, by the agreed commission, together with the yearly salary, in addition, where that is stipulated for by the agreement. The appellant has contended strenuously that the various duties ancillary and subsequent to the writing of the risk are conditions precedent to the earning of the commission. As I have already explained, this view would destroy the right to commission altogether in the event of the agency being terminated, whenever that happens before the under-

writing and accounts are wound up. The company then is no longer agent and its authority to act for the underwriter has ceased. Suppose a risk is written in a particular year of the agency, say year 1, and the agency is terminated in year 2 or year 3, *i.e.*, in either of the succeeding years of the 3 years' cycle: the underwriter on that basis would get no commission at all for writing the risks of year 1, because he would not have completed the duties which are said to be conditions precedent to earning the commission, and could not do so because his authority to act for the same would have ceased. That cannot, in my opinion, be regarded as a possible agreement between business men. The only alternative which I can see is to accept the view already stated that the commission is not referred to specifically in cl. 9, 10, 12, 13 or 14, because it was meant to be treated as something fixed and established and unaffected by the termination of the agency. That will be so, not only in the case of the skeleton agreements which I have been so far discussing (*viz.*, those providing for a fixed yearly salary), but equally in the case of the other type of agreement, that in which no fixed salary is agreed, but the only remuneration provided for the agent is the fixed commission. This conclusion is more in harmony not only with the true construction of the contract, but also with the business exigencies of the matter and with the general trend of authority embodying the legal principle which has been stated by my noble and learned friend, VISCOUNT SIMON. It may, of course, happen sometimes that a particular risk cannot be closed or wound up at, or before the end of, the three years' period, but such a case can be dealt with as it is dealt with in the agreement by a subsequent re-opening and adjustment of the accounts. Nor is it an objection to this view that in these cases the act of accepting the risk does not exhaust the functions of the agent. That aspect, which is not generally present in the cases cited, is, perhaps, easier to work into the scheme in the type of contract in which there is, besides the commission, a fixed annual salary, which may be taken to cover in conjunction with the commission the general duty of conducting the business. But in the other type of contract, where there is no such fixed annual salary, still the commission must be taken to include a payment for the subsequent activities which the agent has to perform.

I may observe in concluding that no question is raised in the case as to apportionment under the Finance Act, 1937, sched. IV, para. 14. Indeed, such an idea would not square with the contentions of either party. Nor have I found much help in what is called the distinction between the legal and the conventional basis. I should dismiss the appeal.

LORD PORTER [read by LORD SIMONDS]: My Lords, this case raises a question as to the year in respect of which commission earned by underwriting agents at Lloyd's is subject to charge for the purposes of national defence contribution. The charge was imposed by the Finance Act, 1937, and the operative sections are 19 and 20:

19. (1) There shall be charged, on the profits arising in each chargeable accounting period falling within the 5 years beginning on April 1, 1937, from any trade or business to which this section applies, a tax (to be called the "national defence contribution") of an amount equal to 5 per cent. of those profits in a case where the trade or business is carried on by a body corporate and 4 per cent. of those profits in any other case.

20 (1) For the purpose of the national defence contribution, the profits arising from a trade or business in each chargeable accounting period shall be separately computed and shall be so computed on income tax principles as adapted in accordance with the provisions of sched. IV to this Act. . . (2) For the purpose of the national defence contribution, the accounting periods of a trade or business shall be determined as follows: (a) in a case where the accounts of the trade or business are made up for successive periods of 12 months, each of those periods shall be an accounting period . . . (c) and the expression "chargeable accounting period" means (i) any accounting period determined as aforesaid which falls wholly within the 5 years beginning on April 1, 1937. . . Admittedly the appellants' business is one to which s. 19 applies.

The period with which your Lordships are concerned is that beginning on April 1, 1938, and ending on Mar. 31, 1939, and the appellants are accustomed to make up their accounts for successive periods of 12 months beginning on Apr. 1 and ending on Mar. 31, in each year. They, in fact, carry on two separate businesses, *viz.*, that of insurance brokers and that of underwriting agents, but the question at issue is solely concerned with their profits in the latter capacity and their activities as brokers are not in issue. The appellants act

as agents for more than one syndicate and, in accordance with the ordinary practice of Lloyd's, have a separate agreement in identical terms with the various members of each syndicate, but it does not follow that the contracts are the same in the case of one syndicate as they are in the case of another. Indeed, two separate forms of agreement have been exhibited to the Case Stated by the Special Commissioners upon which your Lordships have to pronounce. In substance, the terms of each are similar but there are some differences in detail. To become a "name" in a syndicate, the individual concerned must become an underwriting member of Lloyd's and for that purpose he must, in conjunction with his fellow "names" and the underwriting agent, enter into an indenture called a trust deed, under the terms of which all premiums received by the syndicate are to be retained by trustees for the payment of losses and other outgoings, including expenses, and, subject thereto, as profits of the business. The "name" must also, as a condition of his admission as an underwriting member of Lloyd's, sign an undertaking as to his method of carrying on business, and this undertaking contains an obligation similar to that found in the trust deed whereby all premiums are to be placed in the hands of trustees for the purposes aforesaid. The universal practice of Lloyd's is for the underwriting accounts of risks written in any particular year to be separated from those of any other year and to be kept open for a certain time (usually three years) in order that losses and expenses may be calculated and profits ascertained.

Ultimately, the decision of the dispute which your Lordships have to determine depends on the true construction of the agreements between the appellants and their "names" and for that purpose those agreements must be analytically examined, but for the moment it is sufficient to say that they provide (*inter alia*) for the payment of a commission on the profits of the business by the "names" to the appellants. Inasmuch as it is impossible to find out what losses will occur, what settlements may be made, what increase or return of premiums may be necessary and what reinsurances and other expenses may be involved, the amount of profits upon which the commission is calculated is not, and cannot be, known until at least the three years during which the accounts are kept open have come to an end. The result is that the amount of commission due on risks underwritten in the year (say) 1938 is only discoverable three years later *i.e.*, profits on risks written in the year April 1, 1938, to Mar. 31, 1939, are only ascertained at Mar. 31, 1941. In these conditions the appellants claim that, under the terms of the agreement between them and their "names", the commission is not earned until the last-mentioned date, whereas the respondents maintain that it is earned in the chargeable accountancy period Apr. 1, 1938 to Mar. 31, 1939.

There is no dispute as to one of the considerations to be applied. Each of the parties accepts the view that the material period is that in which the commission is earned, but disagrees as to what that period is. The commissioners say that it was earned in the year in which the risks were underwritten, whereas the company assert that it was not finally earned until Apr., 1941, and give two reasons in support of their contention, *viz.*, (i) that the work which they had to do in order to earn their commission was not completed until the last-mentioned date, and (ii) that, even if their task was completed by April, 1939, still, in consequence of certain authorities decided by and binding upon your Lordships' House, such emoluments could not be said to be earned in law as were unascertained and unascertainable in the sense that no evaluation of them could be made at the end of the chargeable accounting period and any figure inserted in respect of them into the syndicate's accounts would at best be no more than a guess since they might amount to anything between a substantial sum and nothing.

In the Case stating the facts on which the present dispute has to be determined, the Special Commissioners have found that it is impossible to ascertain in the initial year what commission would accrue to an agent with regard to risks underwritten in that year, that in the case of disputed claims there was normally as much to do in the second and third years after the risks were underwritten as in the first, and that there was a considerable amount of expert business to be performed by the agent in the latter period in respect of risks written in the earlier year. Further, they found that the underwriters' profits, on which the

commission was calculated, depended on events, some of which would happen after the end of the year in which the risk was written. In these circumstances it was contended on behalf of the appellants that the contracts into which they entered were executory contracts under which their services were not completed nor the commission earned until the relevant account was made up. The profit in the form of commission, they said, was not ascertainable or earned and did not arise until that time. It was contended on behalf of the Crown that, under the terms of the agreements entered into by the company, their commissions were earned in the respective years in which the policies were underwritten, and that it was immaterial in law that the amounts of the commissions were not ascertained until two years later. The additional assessment to national defence contribution for the year 1938-39 had been correctly made in accordance with the law and should be confirmed.

A On these findings the commissioners who heard the appeal gave their decision in the following terms :

B 1. The underwriter's profit, on which the agent's commission depends, does not normally emerge for a considerable time. For this reason Lloyd's underwriters have adopted the method of accounting, known as "the conventional basis," under which results are brought to profit and loss account in the second year after the end of the first year—i.e., that in which the policy is underwritten. The appellant company, in common with other agents, has adopted and consistently employed the same method. Thus it brought into its account for the year to Mar. 31, 1939, the commissions on underwriters' profits, ascertained in Dec., 1938, from policies underwritten in 1936.

C 2. The present case raised the question what is the proper basis of liability to national defence contribution in the case of the underwriter's agent, and we are concerned with that question alone. The answer is not necessarily the same as in the case of the underwriter, if only because the agent's reward (salary, etc., and commission) is not related in the same way to the undertaking of a risk in the first year, but is earned by agency services over an indefinite period.

D 3. That period normally extends well beyond the end of the first year, and in the circumstances we do not think the Crown is right in its contention that the part of the agent's reward which takes the form of commission is earned in the first year and, when received, should be related back to that year.

E 4. The only alternative put to us was "the conventional basis" indicated in para. 1 above. The agent's services under his contract may extend to the end of the second year there referred to, or may be completed at some earlier date. In this respect, therefore, "the conventional basis" does not seem equally appropriate to every case, even though the commission may not be known till the end of the underwriters' second year. However it is obviously convenient and has the support of accountancy evidence. We see no good reason for rejecting it and accordingly allow the appeal, and discharge the additional assessment before us.

F On these findings one matter may, I think, be disposed of at once. I understand that the statement, in findings (3) and (4), that no other basis of claim was put forward before the commissioners except the "conventional basis", on the one hand, and the Crown's contention, on the other, was made in order to dispose of any argument founded upon sched. IV, para. 14, to the Act of 1937 which is in the following terms :

G Where the performance of a contract extends beyond the chargeable accounting period, there shall (unless the Commissioners of Inland Revenue owing to any special circumstances otherwise direct) be attributed to that period such proportion of the entire profit or loss which has resulted, or which it is estimated will result, from the complete performance of the contract as is properly attributable to that period, having regard to the extent to which the contract was performed in that period.

H Under these provisions it might have been possible for the respondents to maintain that, if they were wrong on the main theses and if the commission was earned by work done in each of the three years during which the accounts of the underwriting year were kept open, it would then be proper to apportion the commission over each of those years in accordance with the terms of this paragraph, but they have expressly declined to put forward any such contention and the appellants have equally refrained from relying upon such a claim. In these circumstances your Lordships, like the commissioners, have to determine whether the commission was earned in 1938 or at a later date.

The question is a matter of importance. Even in the present case it would add some £18,000 to the profits subject to tax, and I have no doubt that there are a large number of accounts which will be similarly affected. My Lords, I

am conscious of the regard which must be paid to the findings of the commissioners, which I accept fully, as, indeed, your Lordships' House is bound to do. Moreover, in matters of business and the keeping of business accounts, the practice followed in the particular occupation is always a matter for the most careful thought and cannot lightly be disregarded. Nevertheless, these considerations do not absolve your Lordships from a scrutiny of the exact terms of the agreement between the agent and the "names", and from deciding the date at which the commission is earned under its terms.

In substance, the appellants contend that, just as the underwriting done in each year is kept separate from that done in all those preceding or succeeding it, so the work in respect of each must also be kept in a watertight compartment, and, consequently, the commission in respect of each underwriting period is earned by undertaking the risks and following them through until all of them are finally disposed of, subject to some slight overlap (not material to a decision of this case) where an uncompleted transaction may be carried forward into a fourth or even later year. In other words, the work which earns the commission is done, not in one year, but in three, and is not completed until the third year has elapsed. If this is the true construction of the contract, admittedly the appellants must succeed. The respondents, on the other hand, while they agree that the underwriters' profits are to be ascertained by such a separation of one year from another and that the *quantum* of commission is to be calculated upon a percentage of those profits, yet say that this is merely a conventional method of discovering what the commission is to be and in no way determinative of the work by which it is earned. For the latter purpose one must look at the terms of the agreement itself.

The clauses in the agency agreement on which stress was laid in the discussion before the House were cl. 8, 9, 10, 12 and 14 and those clauses do, I think, contain substantially all the provisions on which your Lordships' decision must depend. As I have endeavoured to indicate, the Crown say that the commission is earned, not by the work done in respect of a particular year's underwriting, but for all the work done in a particular year, whether in respect of underwriting done in that year or in the previous two years or indeed in any previous year, whereas the company say that the work done in respect of the risks undertaken in a particular year is to be kept entirely separate from that in respect of the risks undertaken in any other year, and that the commission in respect of any individual year is earned by writing the risks in that year and following up the work incidental thereto. In their submission, until that task is fulfilled, which will not be until the end of the third year, the work for which they are being paid commission is not completed nor is the commission earned.

Bearing in mind these two contentions I turn to the material clauses. To my mind cl. 8 stipulates in terms the task for which commission is paid. It is "for its" (*i.e.*, the agent's) "services in conducting the agency," not for its services in writing a particular year's risk and dealing with the various matters necessary for disposing of them. Moreover, under the terms of that clause, the payment of the fixed year's salary is to be made for exactly the same work and, undoubtedly, the latter remuneration is for the whole of the work done in that year, not the proportion of it attributable to a particular year's underwriting. It is true that in the case of one of the appellants' syndicates there is no fixed salary payable, but in that case also the commission is for the company's services in conducting the agency and without any stipulation that the payment should be for the work done in respect of a particular year's underwriting and that only. No doubt, cl. 10 does provide for the separation of the accounts respecting the risks undertaken in one year from those respecting the risks undertaken in any other year, and for separating the profit accruing to the "names" in respect of any one year's business from the profits accruing in respect of any other year's underwriting, and further provides that commission shall be paid on the profits so ascertained. But it does not follow that the work by which the commission is earned is that done in respect of the risks underwritten in a particular year. The clause is merely a method of finding out the profits to which the "name" is entitled. "It shall be taken to represent the amount of the net profit of the period or year to which it relates," are the words of the clause (the italics are mine):

"and," it goes on, "the commission payable to the company shall be calculated and paid thereon." This phraseology means, I think, that a conventional sum so calculated shall be regarded as the commission which the agent shall be deemed to have earned in respect of the work which he has done in an individual year. It is, as the proviso says, "for the purpose of ascertaining the commission payable to the company," and for that purpose the account for each period or year is to be treated as a separate account.

A The commission is calculated on, but not earned by doing, that portion of the year's work.

The appellants, however, say that so to construe the agreement is to confine the attention to part only of its provisions and indicate certain difficulties in administering the business if such a construction is adopted. They point out that cl. 14 provides for the termination of the agreement by either party at Dec. 31, in any year and that cl. 9 contemplates such a termination either

B under cl. 14 or by reason of the death of the "name." How, they ask, is the outstanding business to be dealt with in such an event? Clause 9, they agree, entitles, but does not compel, the appellants to wind up the business and settle the uncompleted risks. But, it is said, suppose they do not elect to do so.

In that event the "name", instead of having the work completed by them, must find some other agent, or, if alive and willing to do so, himself wind up the venture although, as they contend, on the respondents' construction he will

C have to pay for that very work out of the commission due at the end of the third year. They admit that cl. 9 speaks of the termination of the agency and that that expression might in another collocation mean that notice or death would finally bring the relationship between agent and "names" to an immediate end, but say that in its association in the agreement "termination" means that, though the mandate to write further risks is ended, yet the obligation

D to wind up the business is not, but continues until the further two years have elapsed. How else, they add, could outstanding matters be efficiently dealt with. The company, it is urged, are under an obligation to complete the work entailed by writing the previous one or two years' risks for the "names" who remain, unless the agents themselves go out of business, and the natural assumption and convenience of all parties involve their finishing the work for the retired or deceased "name" as well as for those whose membership

E continues. Moreover, the terms of cl. 12 must be considered. That clause provides for the carrying over of an uncompleted account even to the fourth year and the proviso, in saying that "in the event of the termination of this agreement the account may at the discretion of the company remain open until all the risks have run off and the business shall have been completely wound up," by implication says and means that it will normally remain open until the usual two years period has elapsed.

F My Lords, I hope I have not misstated the argument. I am conscious that I have found it elusive. The answer is, I think, that so to construe the agreement is to give its phraseology a meaning which the words used do not naturally bear. To my mind "termination of the agency" or "termination of the agreement" mean the same thing, *viz.*, the cessation of all the mutual obligations of either party forthwith. Moreover, the whole method of expression used in

G cl. 9, *i.e.*, the cessation of the right to fixed salary and expenses, the option to wind up the underwriting—not, it is to be noted, to cease future underwriting—and the right to be paid for winding it up all suggest that "termination" means termination of all future rights and obligations between the parties, except the right on the part of the "name" to receive his profits when ascertained and that of the agent to receive his commission on those profits, subject always to the fact that the agent may elect to wind up the affairs of

H the "name" and be paid for doing so. If the obligation to finish all the work consequent on previous underwriting remains, I do not see why the company should be paid for the winding up.

It was sought to overcome this last difficulty by suggesting that winding up in cl. 9 refers to any winding up necessitated by carrying over the accounts beyond the two years and, as I understood the argument, the provisions of cl. 12, under which uncompleted accounts were to be carried over and included in the next year's account and the phrase "completely wound up" in that clause were relied on as indicating that the agency did not terminate until

after the whole of the work consequent on underwriting done had been fully disposed of and its results ascertained after two years' interval. I do not myself think that the wording used implies any such result. Those provisions were required for dealing with a continuing agency, they have no necessary application to an agency which has been terminated.

A further argument, however, was strongly relied on on behalf of the appellants. It was pointed out that on the respondents' construction the agent is not remunerated for a similar amount of work in respect of each year. If, as the case finds, a year's underwriting involves an equal amount of work in each of the three years during which its accounts remain open and if the "name" is to pay the full commission in respect of the work done in each year, whatever it may be, then when a new "name" joins a syndicate, he will pay full commission for the first year though the agent would only have done one third of the work which would be required after the account had reached its third year and in the second only two thirds of that sum. Consequently, if the agency was terminated after ten years, the agent would have completed a volume of work equivalent only to nine times the work necessary in a full year's working, *i.e.*, eight full years work, one year involving two-thirds of one full year's work and one involving only one-third. No doubt, this is, in a sense, an anomaly, but it is, in my opinion, what the agreement says, and the anomaly does not justify a construction inconsistent with its terms.

If I am right in my view as to the true construction of the agreement, it only remains to consider the second contention put forward by the appellants. That contention was modified in the course of the argument before your Lordships. Originally it was said that, though remuneration earned in a particular year is, in general, part of that year's taxable profits, even if not ascertained or payable until a later date, nevertheless there is an exception to this rule in a case where that remuneration is not only unascertained but unascertainable. In such a case it was maintained that the remuneration was chargeable to tax in the year in which its existence and amount was first ascertained. By a later modification the view was accepted that, in some cases, profits payable at a date outside and beyond the year in which they were earned, and even though unascertainable in that year, are chargeable to tax as profits of the earlier year, but not in all. Where, it was said, some remuneration is certain, but its *quantum* is not and cannot be ascertained, still it must be regarded as profits of the year in which it was earned, but, where it is uncertain whether there will be any profits at all, then, if any profit is eventually discovered to have been earned, it must be charged to the year in which it is ascertained or paid. No sum, it is contended, could be inserted in the earlier year's accounts in such a case. To credit any sum would not be to make an estimate, but to hazard a guess, not only as to its *quantum*, but even as to its existence, and, where one can only guess, the sum eventually found to have been earned must be attributed to the year of payment. In support of this contention three cases were called in aid, *viz.*, *Dailuaine-Talisker Distilleries v. Inland Revenue* (5), *Harrison v. Cronk* (4), and *Absalom v. Talbot* (6).

The first case is not binding on your Lordships, and I am not prepared to accept the view that it would necessarily have been decided in the way in which it was, had it been brought before this House. Some of the observations, at any rate, of the members of the Court of Session cannot, I think, be supported. For instance, the LORD PRESIDENT (LORD CLYDE), quoting from an earlier decision of his own [in *Collins & Sons v. Inland Revenue* (7)] said (1930 S.C. 884):

Those elements of profit or gain, and those only, enter into the computation which are earned or ascertained in the year to which the inquiry refers . . .

LORD SANDS also appears to take the view that, though remuneration unascertained at the end of the chargeable period may yet be profits of that period, nevertheless, if it is then unascertainable, it cannot be regarded as an element in those profits. LORD BLACKBURN goes, I think, further and holds that, if the remuneration is not payable until a date beyond the period of charge, it is not be reckoned as profits of that period. But the decision itself can be supported in principle. The Lord President said (*ibid.*, 884):

Thus, if goods have been sold or delivered to a customer within the year, the sum due

by the customer is credited to the business and debited to the customer and enters the profit and loss account at the end of the year, whether payment in cash (or otherwise) has been received within the year or not. But this elementary principle does not necessarily apply to the price of a contract made during the year (or in a previous year) but not completed within the year.

If this means that, where the contract is an entire one, the remuneration is not earned until the whole task is completed, I think it accurately expresses the true principle, and it has the support of LORD MORISON who dissented.

A Indeed, it may well be that the only difference between the members of the Court of Session consisted in a divergence of opinion between them as to when the work for which payment was to be made was completed, the majority taking the view that the appellants had undertaken to store whisky for their customers for a period of time and that their charges were not earned, nor the work they had to do completed, until the whisky was finally removed, though
B the sum due was calculated on a weekly basis, LORD MORISON, on the other hand, thinking that it was earned week by week. If this be the difference of opinion, there is no divergence in principle, merely two separate views as to the construction of a particular document.

Harrison v. Cronk (4), does, undoubtedly, give rise to more difficulty and was strongly relied on by the appellants. The principle for which it was cited
C said ([1936] 3 All E.R. 751) :

I have serious doubt as to whether the valuation ordered by the Court of Appeal is practicable in any proper sense ; the commissioners, after hearing evidence, have expressed the view that an actuarial valuation is not possible, and it may well be that no proper valuation is possible. I propose, therefore, that the order of the Court of Appeal should be varied by adding that in the event of the commissioners finding such valuation to be impracticable, the sums deposited with the building society under the circumstances described in the Case Stated should not be treated as receipts of the company's trade except in so far as such sums, or any part thereof, were released to the company during the trading periods in question.

These observations, in the submission of the appellants, constituted a ruling that in any case where a sum earned *in presenti* and payable *in futuro* is incapable of any computation except by a guess and may, in fact, have no value, it must be chargeable to tax, not in the year in which the work
E necessary to earn it is performed, but in the year in which it is received.

My Lords, I do not think the case lays down any such general proposition. The facts were peculiar. The material parties were a building company which constructed houses for clients, a building society which advanced money to enable the clients to purchase their houses, and the clients themselves. To take the illustration apparently given in the Case Stated, which represented
F a typical transaction : A house is built and sold for £575 ; the society nominally advances the whole sum, but actually the builders receive only £501 13s. 4d., leaving £73 6s. 8d., which is called a deposit, in the hands of the society, and which earns interest so long as it is retained. In addition, in case of the client's default, the builders are liable to the society for a sum not exceeding £76 13s. 4d., i.e., their total liability amounts to £150 in case of default. In these exceptional circumstances it may well be said that a new
G relationship has been established between the society and the company under which, indeed, if it can be fairly estimated that some sum is due to the latter by the former, the remuneration is regarded as earned though its payment is postponed, but, if no estimate can be made, the contract between the parties must be regarded as leaving no debt due on one side or the other, but only a position in which there are mutual obligations which may as well show a credit to the one party as to the other.

H If I may be permitted to quote from my own speech in *Absalom v. Talbot* (6) I said ([1944] 1 All E.R. 651) :

In it [i.e., *Cronk's* case (4)] no debt remained due from the purchaser to the owner, the full price was paid to the latter by the building society. But lest the society should not be repaid by the purchaser in full, the owner deposited a sum of money with it and guaranteed payment of an additional sum beyond the deposit. In these circumstances there were contingent liabilities on each side—in the case of the society to return the deposit or some part of it, if the money which was recovered from the purchaser enabled this to be done : on the side of the owner to implement his guarantee if the pur-

chaser failed to pay even so much as with the deposit made up the full price In such a case there was no debt either present or future due to the appellant. It might eventually happen that something would be found to be due to him, but, on the other hand, so far from receiving, he might have to pay.

It is true that in *Absalom v. Talbot* (6) my opinion differed from that of the majority of your Lordships who sat to hear the matter, but the difference was only as to the *quantum* of the sum to be charged, not as to the year to which its gain was to be attributed. All the members of the House who were present were of opinion that the sums agreed to be paid should be assessed to tax in the year in which the house which had been sold was transferred to the purchaser, but the majority thought they should be assessed at a reduced figure, whereas the minority thought the full sum should be the basis of assessment. The decision therefore, is antagonistic to the appellants' argument here and the case itself did not exhibit those exceptional and peculiar features which are to be found in *Cronk's* case (4). In my view, the cases cited do not establish the principle sought to be deduced from them and, for that reason, as well as because I think the sum in dispute in the present case was wholly earned in the year in which the risks were underwritten, I would dismiss the appeal.

LORD SIMONDS : My Lords, this is, I think, a very plain case and it is only in deference to the prolonged and vigorous argument of counsel for the appellants that I make a few observations on it. Two questions are involved, the first a question of construction of certain agreements made by the appellants with members of certain syndicates of underwriters at Lloyd's, the second a question of the application of the correct principle of income tax law to the case. The impost actually in dispute is the national defence contribution which was imposed by the Finance Act, 1937, but it is common ground that the point at issue is governed by the principles on which the profits and gains of a trade are determined for income tax purposes.

The appellants, a limited company incorporated in 1902, carry on (*inter alia*) the business of underwriting agents, *i.e.*, they act as agents for underwriters at Lloyd's, who form themselves into syndicates, the members of which (known as "names") are insurers of various types of risks. As such agents on behalf of their principals they accept risks, issue policies, collect premiums and settle claims and do all the other work which appertains to the business of underwriting. For this purpose the appellants enter into a separate agreement with each member of a syndicate. The agreements with every member of a syndicate are identical, but in the case of one of the three syndicates with whose members the appellants entered into agreements, *viz.*, the Carisbrooke Syndicate, the appellants' remuneration was by way of commission and expenses only, whereas in the other two cases a fixed annual salary also was provided. The universal practice of Lloyd's is for underwriting accounts to be drawn up by reference to the calendar year, but for the accounts to be kept open for a certain time (usually three years) to allow the necessary adjustments to be ascertained and made. This fact, which is dictated by the nature of the business, is reflected in the agreements to which I have referred and is the cause of the difficulty that has arisen.

I will refer briefly to the salient features of a typical agreement. By cl. 1 it provides that the company (as, in this recital, I will call the appellants) agrees and is retained and authorised to act as the underwriter's agent for the purpose of underwriting at Lloyd's all such policies of insurance as the company thinks fit and to carry on the ordinary business of underwriter there in his name and on his account. Clause 2 elaborates the functions and duties of the company. Clause 8 is the vital clause which provides for the company's remuneration. Under it the underwriter is to pay to the company (except in the case of members of the Carisbrooke Syndicate) a fixed annual salary, a fixed sum for expenses, and "a commission of — per cent. on the net profits on each year's underwriting," and it is also to make certain other contributions for the benefit of the company. In the agreements with members of the Carisbrooke Syndicate there is no provision for an annual salary, and the provision in regard to expenses is somewhat different, but there is a similar provision in regard to commission.

My Lords, I pause for a moment at this point, for it is the crucial one, to state the question which arises. It is whether, on the true construction of this clause,

the company earns, not only the annual salary, where it is paid, but also the commission on the "net profits on each year's underwriting" in the year in which the risks are written, or whether that commission is only earned over a period comprising the year of writing and the ensuing years which elapse before the "profits on the year's underwriting" are conventionally ascertained. This clause must, no doubt, be read in its context, but it must first be read by itself, and, if it is so read, the question I have asked admits of only one answer. The

A clause provides for annual remuneration for annual service. That remuneration so far as it consists of commission, is not the less earned by the year's service because it cannot be ascertained until a later date.

I read on, prepared to find in the following clauses provisions which may confirm, or be irreconcilable with, the *prima facie* meaning of cl. 8. Clause 9 provides that the fixed salary and expenses shall cease at the termination of the agency, but after such termination (whether by death of the underwriter or otherwise) the company shall be entitled to wind up the underwriting and the accounts in connection therewith and shall be paid for its services in connection therewith a remuneration of not less than one hundred guineas. This clause looks forward to cl. 14 which provides that either of the parties may terminate the agency on Dec. 31, 19— or on Dec. 31 in any succeeding year by giving to the other party six months' previous notice in writing. There was some controversy whether the date of termination should be the year of the agreement or a later year. I do not think that it matters.

B

C

Clauses 9 and 14 appear to me strongly to confirm the natural meaning of cl. 8. I will adopt the convenient method that was used in argument. Let year 1 be the year in which risks are first written. Then, at the end of year 3, the profit in respect of those risks, *i.e.*, "the net profits on the underwriting of year 1," is ascertained. During year 1 the company's duties will necessarily be confined to performing its covenanted service under the agreement in respect of risks written in that year. In year 2 further risks are written and in that year the company's duties will cover the risks written in that year and in year 1. So in year 3 its duties will cover the risks written in year 3 and the two previous years. What then happens, if the agency is terminated at the end of any year? Something must be done, for, if nothing is done, risks that have not run off are left in the air. Accordingly, it is provided by cl. 9 that, if the agency is determined,

E the company shall be entitled to wind up the underwriting and the accounts in connection therewith. It may not write any risks, but it "may," not "must" wind up the underwriting. And if it does so, it is to be paid a remuneration of 100 guineas, *i.e.*, 100 guineas for a "name," a substantial reward. This is so clearly inconsistent with the view put forward by the company that it did not earn its commission on the net profits of the underwriting of year 1 until the accounts had been made up at the end of year 3, that counsel for the appellants

F was driven to an extravagant argument on cl. 9. He urged on the House that the company, notwithstanding the termination of the agency, was yet bound to carry out all the duties which the agreement imposed on it in relation to outstanding risks, that the agency could only be "terminated" in the sense that the company was no longer authorised to write new risks, and that the expression "to wind up the underwriting and the accounts in connection therewith"

G meant something else than the performance of those duties, such as settling claims, etc., in regard to outstanding risks, which were the necessary prelude to making up accounts and ascertaining profits. What else those plain words meant was not clear to me.

My Lords, I see no reason whatever for doubting that the words "terminate the agency" in cll. 9 and 14 mean the same as "terminate the agreement" or, if you like, "terminate the agency agreement," and that nothing else is contemplated than the conclusion of the rights and obligations of the parties to the agreement. Nor can the words "wind up the underwriting, etc." in cl. 9, have any other than their natural meaning. If so, that is an end of the appellants' case, for no reason has been suggested why the company should be paid 100 guineas "per name" for performing duties which without that reward it was bound to perform.

H

A further argument was founded on the language of cl. 10. This clause (to state it shortly) provides that the company shall keep an account for the first and each subsequent year of the agency and shall carry to the account of such

year the relative credit and debit entries and shall make up and balance such account at the end of the second year after that to which it relates and that the amount then remaining to the credit of the account shall be taken to represent the amount of the net profit of the year to which it relates and that the commission payable to the company shall be calculated and paid thereon. It was urged that it was implicit in this clause that the company was bound, notwithstanding the termination of the agency, to carry on its duties in regard to risks already written. But, it appears to me that this argument really begs the question. I should assume in the absence of some express provision to the contrary that an obligation imposed by a contract of service or agency was operative during the term of that contract and that the termination of the contract determined the obligation. I see nothing in cl. 10 which is inconsistent with this view. But, on the contrary, giving to it its natural meaning, *viz.*, that contract and contractual obligation are co-terminous, I find in cl. 9, giving to that clause also its natural meaning, exactly the provision that might be expected in order that the agency agreement might be carried to a business like conclusion.

Certain other clauses were also relied on as suggesting that the commission in respect of the profits on a year's underwriting was not earned until the end of the second year after that year, but I do not think it necessary further to examine them. It is clear to me that the commission is wholly earned in year 1 in respect of the profits of that year's underwriting. If so, I should have thought that it was not arguable that that commission did not accrue for income tax purposes in that same year, though it was not ascertainable until later. So, indeed, thought LORD GREENE, M.R., who treated the matter as one beyond dispute as soon as it was determined in what year the commission was earned. Nor would any other conclusion be consistent with a long line of authority beginning with *Holden v. Inland Revenue Comrs.* (1) and including the *Newcastle Breweries* case (2), a decision of this House which seems to me to govern the present case. Your Lordships were, however, pressed with, first, a decision of the Court of Session, *Dailuaine-Talisker Distilleries, Ltd. v. Inland Revenue* (5), and, secondly, two decisions of this House, *Harrison v. Cronk & Sons, Ltd.* (4) and *Absalom v. Talbot* (6). The Scottish case appears to me to have turned on the construction of a contract of a very peculiar nature, and the decision may, perhaps, be justified by that fact. But I must, with deference to the judges who took part in it, express a grave doubt as to its correctness. In the two cases before this House, to which I have referred, the question now under discussion was not raised. The issue in *Harrison's* case (4) was not to what year profits, which had in fact been ascertained, should for income tax purposes be ascribed, *i.e.*, when were they earned, when did they accrue or arise? On the contrary, the profits not having been ascertained, the issue was whether certain sums, which were admittedly subject to possible diminution, should be brought into charge at their face value, as the Crown contended, or, as the subject in the alternative successfully contended, should be brought into charge at their then present value. It was the latter view that prevailed in this House, though, in consideration of the possibility that no valuation was possible, the rider was added to the effect that in that event only such sums should be treated as receipts of the period in question as were actually received. I find nothing in this decision which in any way supports the plea of the appellants in the present case. In *Absalom's* case (6) somewhat similar considerations arose and again it appears to me that there is nothing in this decision which is in conflict with the authority of the *Newcastle Breweries* case (2) or assists the appellants. This appeal should, in my opinion, be dismissed.

LORD NORMAND [read by LORD WRIGHT]: My Lords, I agree with the construction which my noble and learned friend on the Woolsack and my noble and learned friend LORD PORTER have put on the agreements between the appellant company and their principals. I agree also with the exposition of the principles on which the profits, though not payable nor even receivable until a later year, are brought into the accounts for the year in which they are earned. I wish only to add that I find much in the opinion of the majority of the court in *Dailuaine-Talisker Distilleries v. Inland Revenue* (5) which is not

reconcilable with these principles and I think that the dissenting opinion of LORD MORISON should be preferred.

Appeal dismissed with costs.

Solicitors: *Simmons & Simmons* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

A

WHITLEY v. WHITLEY.

[COURT OF APPEAL (Tucker, Bucknill and Cohen, L.JJ.), March 6, 7, April 1, 1947.]

Divorce—Incurable unsoundness of mind—Care and treatment for five years—Admission of wife as temporary patient on application of husband—Detention “in pursuance of order”—No statement by visiting committee as to propriety of continuance of detention—Mental Treatment Act, 1930 (c. 23), s. 5 (9) (10) (11)—Matrimonial Causes Act, 1937, (c. 57), ss. 2 (d), 3 (a).

B

On Dec. 6, 1936, on the application of the husband, supported by the appropriate recommendation of two medical practitioners, the wife was admitted to a mental hospital as a temporary patient. At the end of 6 months, *viz.*, on June 5, 1937, the wife, at her own written request, was admitted to the same hospital as a rate-aided voluntary patient and had remained there ever since under care and treatment as a person of unsound mind. The visiting committee signed no statement to the effect that it was proper that the wife should continue to be detained, as required by the Mental Treatment Act, 1930, s. 5 (10). In a petition by the husband, under the Matrimonial Causes Act, 1937, s. 2, for dissolution of the marriage on the ground that the wife was incurably of unsound mind and had been continuously under care and treatment for the last 5 years immediately preceding the presentation of the petition:—

C

HELD: the necessary safeguards, provided by the Mental Treatment Act, 1930, s. 5 (9), (10) and (11), against abuse of the powers given under that Act had not been carried out, and, therefore, the husband had not made out, within the Matrimonial Causes Act, 1937, s. 3 (a), that the wife was detained in pursuance of an order under the Lunacy and Mental Treatment Acts, 1890 to 1930, and was not entitled to a decree.

E

Murray v. Murray ([1940] 4 All E.R. 250) *applied*.

Decision of Barnard, J., [1946] 2 All E.R. 726, *affirmed*.

[FOR THE MENTAL TREATMENT ACT, 1930, s. 5 (9), (10) and (11), see HALSBURY'S STATUTES, Vol. 23, pp. 159, 160; and for THE MATRIMONIAL CAUSES ACT, 1937, ss. 2, 3, see *ibid.*, Vol. 30, pp. 336, 337.]

F

Case referred to:

(1) *Murray v. Murray*, [1940] 4 All E.R. 250; [1941] P.1; 110 L.J.P. 1; 164 L.T. 199; 104 J.P. 447; Digest Supp.

APPEAL by the husband from a decision of BARNARD, J., dated Nov. 22, 1946, and reported [1946] 2 All E.R. 726, dismissing a petition for dissolution of marriage under the Matrimonial Causes Act, 1937, s. 2 (d). The facts appear

G

D. Tolstoy for the husband.

B. Stuart Horner for the wife.

Apr. 1. BUCKNILL, L.J., read the following judgment of the court. This is an appeal from a judgment of BARNARD, J., dismissing a petition dated Nov. 10, 1943, by a husband for dissolution of his marriage on the ground that his wife was incurably of unsound mind and had been continuously under care and treatment for the last 5 years immediately preceding the presentation of the petition.

H

The parties were married on Feb. 8, 1936. The wife gave birth to a child on July 22, 1936, and shortly afterwards showed signs of mental disorder, and on Dec. 6, 1936, was admitted to the West Riding Hospital, Wakefield, as a temporary patient. At the end of 6 months, *viz.*, on June 5, 1937, the wife, at her own written request, was admitted at the same hospital as a rate-aided voluntary patient and she has remained there ever since under care and

treatment as a person of unsound mind. The learned judge in his judgment stated that he was satisfied that the wife was incurably of unsound mind and also that she had been continuously under care and treatment for the necessary 5 years, but he dismissed the petition on the ground that the wife had not been detained "in pursuance of any order or inquisition."

For the purposes of this case the material words of s. 3 of the Matrimonial Causes Act, 1937, which created the right to a decree dissolving a valid marriage on the ground of the insanity of a spouse, are :

... a person of unsound mind shall be deemed to be under care and treatment—
(a) while he is detained in pursuance of any order or inquisition under the Lunacy and Mental Treatment Acts, 1890 to 1930...; (b) while he is receiving treatment as a voluntary patient under the Mental Treatment Act, 1930, being treatment which follows without any interval a period of such detention as aforesaid; and not otherwise.

In the present case, before the wife was admitted as a temporary patient, the husband signed a form as prescribed by the Act requesting the superintendent of the mental hospital to receive his wife as a temporary patient into the hospital. This "application," as it is described in the Act, was accompanied by the appropriate recommendation of two medical practitioners who stated that each had examined the wife on Dec. 5 and 6 respectively, and declared that she—1. Was suffering from mental illness; 2. Was likely to benefit by temporary treatment; 3. Was for the time being incapable of expressing herself as willing or unwilling to receive such treatment. They also stated that it was expedient with a view to her recovery that she should be received into the hospital for a period not exceeding 6 months. Counsel for the husband put forward as one of his points that, if a patient may be lawfully detained for 6 months without her or his consent as a person of unsound mind, it must be presumed that the detention was imposed by virtue of some legal order. This attractive proposition, however, is based on the assumption that all the safeguards provided by the Act of 1930 to ensure that the patient is properly detained are scrupulously complied with. One of these safeguards is contained in sub-s. 9 and 10 of s. 5 of the Act of 1930 which are as follows :

(9) Within one month of the reception of any person received as a temporary patient under this section he shall be visited by at least two members of the visiting committee of the institution, if he is in an institution which has a visiting committee, or if he is not in such an institution by two at least of the visitors of licensed houses appointed for the district in which he is, of which visitors one must be a registered medical practitioner: Provided that in the area within the immediate jurisdiction of the Board of Control, the duty imposed by this section on the visitors of licensed houses shall be performed by the Board of Control. (10) If the persons making the said visits are of opinion that it is proper that the patient should continue to be detained they shall sign a statement to that effect and shall leave it with the person in charge but if they are of opinion that it is not proper that he should continue to be detained, they shall, before the expiration of the second day after the day of the said visit, send to the Board of Control a report stating their said opinion, and the grounds on which it is based, together with such other observations as they think fit.

Sub-section 11 is also important :

Subject to the provisions of this section a person received as a temporary patient may be detained for a period not exceeding six months but shall not be detained as such for any longer period.

This sub-section clearly indicates that the statement or report of the visiting committee is one of the essential requisites for the lawful detention of the temporary patient for the period of not more than 6 months.

No evidence was given before BARNARD, J. as to what the visiting committee did with reference to the wife in performance of their duties under these sub-sections and BARNARD, J., therefore, did not deal with the point. During the hearing of the appeal we thought it right to ask the Official Solicitor who was representing the wife to make inquiries on this point. The result of these inquiries have been communicated to the court and also to the husband's legal advisers, who have stated that they do not wish to address the court further in the matter. It is clear to us that the provisions of the sub-sections of s. 5 to which we have referred have not been complied with in this case, in that the visiting committee signed no statement to the effect that it was proper that the wife should continue to be detained. We think, that the failure to

comply with these important provisions, which are intended to safeguard a patient against any possible abuse of the powers given under this Act, itself defeats the argument that the wife was lawfully detained under an order made under the Mental Treatment Act, 1930.

Although the facts in *Murray v. Murray* (1) were quite different from the facts in this case, the principle laid down by SIR WILFRID GREENE, M.R., in that case appears to us to apply to this case ([1940] 4 All E.R. 252) :

- A The safeguards which the legislature has laid down in those Acts [the Lunacy and Mental Treatment Acts, 1890 to 1930] in order to ensure that detention on the ground of lunacy, or something short of lunacy, shall take place only in proper cases, are strict, and, unless they are strictly observed, the detention of an alleged lunatic is illegal. Accordingly, when the legislature laid down this stringent test, which must be satisfied before a person can be said to be under care and treatment, it required that that machinery should be carried out according to the letter of the law.
- B In this case the necessary safeguards were not carried out, and, therefore, in our opinion, the husband has not made out that the wife was detained in pursuance of an order under the Lunacy and Mental Treatment Acts, 1890 to 1930. We, therefore, do not think it necessary to decide the difficult point whether a temporary patient who is lawfully detained under the Act of 1930, and in respect of whom all the provisions of the Act have been properly carried out can be held to be detained in pursuance of such an order. In our opinion,
- C the appeal should be dismissed.

Appeal dismissed.

Solicitors : A. F. Seton Pollock, Law Society Divorce Department (for the husband) ; *Official Solicitor* (for the wife).

[*Reported by C. St.J. NICHOLSON, ESQ., Barrister-at-Law.*]

D YEOVIL RURAL DISTRICT COUNCIL v. SOUTH SOMERSET AND DISTRICT ELECTRICITY CO., LTD.

[COURT OF APPEAL (Lord Oaksey, Tucker and Cohen, L.JJ.), January 28, 30, March 28, 1947.]

Rates and Rating—Assessment—Basis—Profits basis—Electricity undertaking—Calculation of profits—Deduction of excess profits tax.

- E Where the rateable value of a public undertaking is assessed on the profits basis, the whole of the sum payable by the undertaking in respect of excess profits tax should not be deducted from the gross receipts of the undertaking in estimating the rateable value of the undertaking, but the liability to pay excess profits tax is a factor which a rating authority is entitled to take into consideration with others in deciding what percentage of the net receipts should be allocated to tenants' profit when the net receipts are apportioned between hypothetical landlord, hypothetical tenant, and rating authority :
- F *per TUCKER and COHEN, L.JJ., LORD OAKSEY, L.J., dissenting.*

Port of London Authority v. Orsett Union ([1919] 1 K.B. 84) overruled.

[**EDITORIAL NOTE.** The importance of this case is that a practice which has been followed since the decision of the Divisional Court in *Port of London Authority v. Orsett Union Assessment Committee* (1), both in the post-war period of nearly 30 years ago and during the recent war, is now altered by a majority of the Court of Appeal and the decision itself is overruled. TUCKER and COHEN, L.JJ., largely base their view on the dictum in the *Orsett* case when it went to the House of Lords on another point that, in applying the profits basis for rating purposes, it is profits which are earned and not profits which are divisible that is the governing factor. Or, as LORD DUNEDIN put it on the same occasion : "Sterility in earning profits is one thing"—and would entitle the ratepayer to a deduction when the rateable value of his undertaking was being assessed—"but sterility in the disposing of profits is another. The former affects value, the latter does not." As long ago as 1851 it was decided in *R. v. Southampton Docks* (4) that, in ascertaining rateable value, no deduction can be made in respect of payments of income tax, and the position with regard to excess profits tax is now held to be the same. Indeed, COHEN, L.J., points out that an assessment authority might consider that excess profits tax, having less permanent a history as a tax than income tax, was less likely to influence the mind of the tenant. COHEN, L.J., expresses approval of the view that "the present high level of income tax is a factor which is not wholly irrelevant to the fixing of the tenant's share," and, again putting excess profits tax on the same footing as income tax, the majority of the court held that excess profits tax should also be considered when arriving at that figure.

AS TO PROFITS BASIS OF VALUATION, see HALSBURY, Hailsham Edn., Vol. 27, pp. 417-422, paras. 848-854; RYDE ON RATING, 8th Edn., pp. 428-446, paras. 391-406; and FOR CASES, see DIGEST, Vol. 38, pp. 547-554, Nos. 899-941.]

Cases referred to :

- (1) *Port of London Authority v. Orsett Union Assessment Committee*, [1919] 1 K.B. 84; 88 L.J.K.B. 797; 120 L.T. 225; 82 J.P.Jo. 501, Div. Ct.; *on appeal on another point*, [1919] 2 K.B. 1, C.A.; [1920] A.C. 273; 89 L.J.K.B. 481; 122 L.T. 722; 84 J.P. 69, H.L.; 38 Digest 563, 1017.
- (2) *Newton-on-Ayr Gas Co. Ltd. v. Ayr Assessor* (1923) (Ct. Sess.), unreported.
- (3) *London County Council v. Erith Parish (Churchwardens, etc.) and Dartford Union Assessment Committee, West Ham Parish (Churchwardens, etc.) v. London County Council, St. George's Union Assessment Committee v. London County Council*, [1893] A.C. 562; 63 L.J.M.C. 9; 69 L.T. 725; 57 J.P. 821; *sub nom. London County Council v. Erith Overseers, London County Council v. West Ham Union, London County Council v. Woolwich Union, London County Council v. St. George's Union, Ryde*, Rat. App. (1891-93) 382; 38 Digest, 429, 42.
- (4) *R. v. Southampton Docks Co.* (1851), 14 Q.B. 587; 6 Ry. & Can. Cas. 428; 4 New Sess. Cas. 460; 20 L.J.M.C. 155; 16 L.T.O.S. 460; 15 J.P.Jo. 145; 38 Digest 527, 741.
- (5) *Kingston Union v. Metropolitan Water Board*, [1926] A.C. 331; 95 L.J.K.B. 605; 134 L.T. 483; 90 J.P. 69; H.L.; *affg. S.C. sub nom. Metropolitan Water Board v. Kingston Union Assessment Committee*, [1925] 2 K.B. 509, C.A.; 38 Digest 547, 901.
- (6) *L.C. Ltd. v. G. B. Ollivant Ltd.*, [1944] 1 All E.R. 510; Digest Supp.
- (7) *Vulcan Motor and Engineering Co. (1906) Ltd. v. Hampson*, [1921] 3 K.B. 597; 90 L.J.K.B. 1366; 125 L.T. 717; 9 Digest 545, 3595.
- (8) *Inland Revenue Comrs. v. Blott, Inland Revenue Comrs. v. Greenwood*, [1921] 2 A.C. 171; 90 L.J.K.B. 1028; 125 L.T. 497; 8 Tax Cas. 101; 28 Digest 107, 663.
- (9) *Barking Rating Authority v. Central Electricity Board*, [1940] 3 All E.R. 477; [1940] 2 K.B. 493; 109 L.J.K.B. 778; 163 L.T. 214; 104 J.P. 363; Digest Supp.
- (10) *R. v. Shoreditch Assessment Committee, Ex p. Morgan*, [1910] 2 K.B. 859; 80 L.J.K.B. 185; 103 L.T. 262; 74 J.P. 361; Konst & W. Rat. App. 203; 38 Digest 564, 1028.
- (11) *Mersey Docks v. Liverpool Overseers* (1873), L.R. 9 Q.B. 84; 43 L.J.M.C. 33; 29 L.T. 454; 38 J.P. 21; 38 Digest 563, 1016.
- (12) *Mersey Docks & Harbour Board v. Birkenhead Assessment Committee*, [1901] A.C. 175; 70 L.J.K.B. 584; 84 L.T. 542; 65 J.P. 579; 38 Digest 526, 735.
- (13) *Mersey Docks v. Cameron, Jones v. Mersey Docks* (1865), 11 H.L. Cas. 443; 20 C.B.N.S. 56; 6 New Rep. 378; 35 L.J.M.C. 1; 12 L.T. 643, H.L.; *on appeal from S.C. sub nom. Mersey Docks & Harbour Board v. Jones, Same v. Cameron* (1861), 30 L.J.M.C. 185, 239, Ex. Ch.; 38 Digest 466, 286.
- (14) *Patent Castings Syndicate Ltd. v. Etherington*, [1919] 2 Ch. 254; 88 L.J.Ch. 398; 9 Digest 545, 3599.

APPEAL by Yeovil Rural District Council from a decision of the Divisional Court (LORD GODDARD, C.J., HUMPHREYS and SINGLETON, JJ.) dated Apr. 30, 1946, dismissing an appeal by the council by way of Case stated by the Assessment Appeals Committee of the justices of the county of Somerset, who had held that, in estimating the rateable value of the respondent company's undertaking as a whole, a deduction should be made of the whole of the excess profits tax payable by the respondents.

Capewell, K.C., and *Squibb* for the council.

Rowe, K.C., and *Harold B. Williams* for the respondent company.

Our adv. vult.

MAR. 28. The following judgments were read.

LORD OAKSEY, L.J. : This is an appeal from a judgment of the Divisional Court dated Apr. 30, 1946, on a Case stated by the Assessment Appeals Committee of the justices of the county of Somerset on the question whether, on the facts stated in the Case, the committee were right in holding that, in estimating the rateable value of the respondent company's undertaking as a whole, a deduction should be made equivalent to the whole of the excess profits tax payable by the respondent company. The Divisional Court, following *Port of London Authority v. Orsett Union* (1) and *Newton-on-Ayr Gas Co. Ltd. v. Ayr Assessor* (2), dismissed the appeal of the district council. The argument on behalf of the council before this court is that the judgments above cited are wrong and that

no deduction ought to be made of excess profits tax, or, alternatively, not a deduction of the whole amount of the said tax. The council rely principally on the *dicta* of LORD DUNEDIN in his speech in *Port of London Authority v. Orsett Union* (1) ([1920] A.C. 299) where he quoted LORD HERSCHELL, L.C., in the *Erith* case (3) ([1893] A.C. 591) and said :

Sterility in earning profits is one thing ; sterility in the disposing of profits is another. The former affects the value—the latter does not.

- A They rely also on the fact that since 1851 income tax has not been deducted in estimating rateable value following the decision of LORD CAMPBELL, C.J., in *R. v. Southampton Docks Co.* (4) (14 Q.B. 611). The council also contended that s. 18 of the Finance (No. 2) Act, 1939, which provides that excess profits tax shall, for the purposes of income tax, be allowed to be deducted as an expense, was mere machinery for preventing double taxation and had no bearing on the question. The respondent company, on the other hand, contended that the decision of the Divisional Court in *Port of London Authority v. Orsett Union* (1) and that in the *Newton-on-Ayr* case (2) were right ; that, where rateable value is to be estimated on a profits basis, regard cannot be had to profits which the profit earner cannot touch ; and that the fact that excess profits tax is allowed as an expense in computing profits and gains for the purposes of income tax is not mere machinery and demonstrates that the amount of the tax is not really a profit at all.

- C I am of opinion that the decision of the Divisional Court in *Port of London Authority v. Orsett Union* (1) and the decision of the Divisional Court appealed from are right. It is common ground that the profits basis is to be adopted in the present case, *i.e.*, as LORD CAVE, L.C., says in *Kingston Union v. Metropolitan Water Board* (5) [1926] A.C. 339, from the gross receipts of the undertakers for the preceding year there are to be deducted working expenses, an allowance for tenant's profit, and the cost of repairs and other statutable deductions, and the balance is to be treated as the rateable value, but LORD CAVE adds (*ibid*, 342) :

- D The object of the assessing authorities must be that laid down in s. 1 of the Act of 1836—namely, to find the rent at which the hereditament to be assessed might reasonably be expected to let from year to year upon the conditions prescribed in the section. For this purpose they are entitled, as the courts have held, to regard the actual occupants—in this case the Metropolitan Water Board—as possible tenants, and to consider what rent those occupants might reasonably be expected to pay for the privilege of occupying the hereditaments, having regard to the profits to be derived from such occupation ; but in so doing they must take the hypothetical tenants as they are, and with all the limitations and restrictions which are imposed upon them by law and which they could not “reasonably be expected” to leave out of sight. If other tenants can be found who might be expected to give a higher rent, well and good ; but it can hardly be doubted that the Board, with all its limitations, would pay a better rent for the hereditaments which it occupies than any other tenants who could conceivably be found, and the basis of assessment must, therefore, be the rent which *rebus sic stantibus* the Board could and would pay.

- F It follows, in my opinion, that in the present case the actual occupants, the respondents, whose profits for the preceding year form the basis of the computation, must be regarded as possible tenants, and they must be taken as they are, with all the limitations and restrictions which are imposed on them by law and
- G which they could not reasonably be expected to leave out of sight in deciding what rent they would pay, and it appears to me impossible to assume that they would leave out of sight their standard revenue and the excess profits tax which prevented them from keeping any profits beyond their standard revenue.

LORD HERSCHELL, L.C., appears to me to say the same thing in the *Erith* case (3) ([1893] A.C. 592) :

- H There is no doubt a certain class of cases in which the amount of profit which can be earned by the occupation of a hereditament is very material in ascertaining the sum at which it should be assessed. In the case of gasworks, waterworks, and other industrial undertakings where a hereditament is enhanced in value by its connection with a profit-bearing undertaking, the profits earned and the share of those profits attributable to any particular hereditament have to be taken into account, and in such cases as these any restrictions which the law has imposed upon the profit-earning capacity of the undertaking must, of course, be considered.

It is said, of course, by the appellant council that excess profits tax is not a

limitation on the profit-earning capacity of the respondents, but on their profit-distributing capacity, but this seems to me to be a question of words and to ignore the object of adopting the profits basis, which is, as LORD CAVE says, only a basis for arriving at the rent which the hypothetical tenant might reasonably be expected to pay. In my opinion, he cannot be reasonably expected to pay a rent which may far exceed any profit he can retain. For instance, an undertaking's standard revenue may be £100,000, and its actual net earnings in the preceding year may be £500,000. Can it be that such an undertaking might be expected to pay £500,000 as rent, less an allowance for tenant's profits and interest on tenant's capital, although £400,000 is payable as excess profits tax?

In my opinion, there is no true analogy for the present purpose between income tax and excess profits tax. Income tax falls equally on all, more or less, but excess profits tax is based entirely on the profits of a particular taxpayer for the standard year. It seems to me impossible to assume that a hypothetical tenant whose rent is based on the profits of a particular taxpayer for a particular year will ignore the standard revenue of that taxpayer in deciding what rent he will offer.

The observations of LORD DUNEDIN in *Port of London Authority v. Orsett Union* (1) ([1920] A.C. 299) were not made with reference to the point now raised. The Court of Appeal and the House of Lords expressed no opinion on the question decided by the Divisional Court. What they dealt with was the question whether an allowance for tenant's profits might be made in assessing the Port of London Authority and they decided that it might. LORD DUNEDIN was there dealing with the contention that the occupation of an undertaking the profits of which are by law to be applied to certain purposes is not a beneficial occupation. Moreover, the Port of London Authority was a public corporation created by statute whose occupation of the hereditaments in question was for the benefit of the public, and the particular way in which the statute prescribed that the profits derived from the hereditament should be distributed among the public did not deprive the hereditament of the value of its beneficial occupation. In the present case the undertaking is a private undertaking for private profit, and it appears to me that excess profits tax, where the hereditament is rated on the profits basis, does deprive the hereditament of that part of its value to its occupier.

My brethren are of opinion that, though excess profits tax should not be deducted *in toto*, it may be considered in arriving at the amount of the tenant's profit to be deducted. Although this may, in the result, amount to much the same as deducting the whole tax, I do not think it is right in principle, nor do I think the practice established in 1919 ought to be altered at the present time. Moreover, in my view, it distinguishes excess profits tax from income tax, for it appears to me that a hypothetical tenant does not, in fact, pay any attention to income tax in deciding what rent he will agree to pay since rent of business premises is undoubtedly an expense to be deducted in computing the balance of profits and gains for the purposes of income tax. I do not think that the cases cited as to net profits in commercial agreements, in which it has been held that excess profits tax should be deducted, afford much assistance. I am also of opinion that s. 18 of the Finance (No. 2) Act, 1939, in enacting that excess profits tax is to be deducted as an expense in computing for the purposes of income tax the profits of the business, proceeds on the basis that it is not income because it is not of any beneficial value to the taxpayer.

For these reasons I am of opinion that the appeal should be dismissed, but, as my brethren are of a different opinion, it will be allowed to the extent indicated in their judgments and the Case be remitted to the Appeals Committee with the opinion of this court that the whole of the excess profits tax should not be deducted, but that excess profits tax is a factor which the Committee are entitled to take into account.

TUCKER, L.J. : This appeal raises the question whether, in estimating the rateable value of the respondents' undertaking on the profits basis, the sum payable by the respondents in respect of excess profits tax should be deducted from the gross receipts of the undertaking before arriving at the profits to be apportioned as between rent, rates and tenant's profit, and, if such sum is not deductible, whether quarter sessions are entitled to give any consideration

at any stage to the existence of this liability in arriving at the rateable value.

A The Assessment Appeals Committee of the Somerset Quarter Sessions decided on the authority of *Port of London Authority v. Orsett Union* (1), that such deduction should be made before arriving at the divisible profits. They were clearly bound so to decide on this authority, and the Divisional Court, on appeal, held that they were similarly bound by the same authority, which was a decision of a Divisional Court, to dismiss the appeal. This appeal, in effect, raises the question whether the decision of the Divisional Court in the *Orsett Union* case (1) was correct. That case dealt with excess profits duty, but it was agreed by both sides that, for present purposes, no distinction can be drawn between excess profits duty and excess profits tax. It was further agreed that income tax is not deductible as a working expense. This was decided as long ago as 1851 in *R. v. Southampton Docks Co.* (4) where LORD CAMPBELL, C.J., says (14 Q.B. 611):

B On the last point no reasonable doubt can be entertained; the appellants claiming a deduction of £155 for income tax in respect of the estimated profit of the tenant to whom the docks might be let. This is not a tax upon the subject-matter rated, which the tenant as such would be obliged to pay, but upon the net income of the tenant after paying the rent of the premises by which his profits are earned. The cases cited apply to local taxes which affect the subject-matter rated and operate directly in diminution of the rent.

C This authority has remained unquestioned for nearly 100 years.

In what respect is this language inapplicable to excess profits tax? In *Port of London Authority v. Orsett Union* (1) the Divisional Court held that, for rating purposes, excess profits duty was distinguishable from income tax, but the grounds for this distinction do not clearly appear from the judgments. DARLING, J., compares excess profits duty to tithe and says ([1919] 1 K.B. 93):

D In my opinion the intending tenant of a dock must equally be entitled to consider how far his profits may be reduced by his having to pay excess profits duty.

He then refers to s. 35 of the Finance (No. 2) Act, 1915, which provided that, for the purpose of income tax, excess profits duty is treated as an outgoing of the business which reduces the profits in respect of which income tax is assessable and proceeds (*ibid.*, 94):

E But if it is an outgoing of the business for the purpose of income tax, why is it not an outgoing of the business which reduces the profits for other purposes, just as the taking of tithe from the profits of a farm reduces the profits of the farm?

I think the answer to the first of these points is to be found in the language of LORD CAMPBELL, C.J., referred to above, and the answer to the second in the words of LORD WRIGHT, in *L.C. Ltd. v. G. B. Ollivant, Ltd.* (6), where he says ([1944] 1 All E.R. 519):

F Indeed the Finance Act, 1939, s. 18, expressly provides that in computing the profits and gains for the purposes of income tax the excess profits tax shall be allowed to be deducted as an expense incurred in the relevant period. I do not take that as meaning that it is actually an expense, because it is clearly not so; what is meant is that it is as much to be deducted from the earnings as if it were an expense in the strict sense.

G LORD COLERIDGE and AVORY, J.J., in the *Orsett Union* case (1) considered that excess profits duty might be deducted because it reduced the amount of profit which the tenant could retain for his own use. They do not explain how in this respect it differs from income tax. Furthermore, this approach seems to me to be erroneous in the light of the language used by LORD DUNEDIN in the same case (when it reached the House of Lords on a different point) where, after quoting LORD HERSCHELL'S speech in the *Erith* case (3) ([1893] A.C. 591), he says ([1920] A.C. 299):

H This seems to me to be the key of the whole matter. Sterility in earning profits is one thing, sterility in the disposing of profits is another. The former affects value, the latter does not.

Applying this statement to the present case, excess profits tax sterilises the disposition of a percentage of the profits, but, so far from sterilising the earnings of profits, it only takes effect if and when such profits have resulted from a condition of fertility.

I find it impossible to distinguish between income tax and excess profits tax for present purposes. I do not think it is necessary to refer in detail to the

relevant sections of the Finance (No. 2) Act, 1939. The nature of this tax has been analysed and explained by LORD MACMILLAN, in *L.C., Ltd. v. G. B. Ollivant, Ltd.* (6). In his speech he expressed a dissenting view on the construction of an agreement relating to the ascertainment of the divisible profits of a trading concern, but I can find nothing in the speeches of the majority of their Lordships to suggest any dissent from this exposition of the essential nature of this tax. He says ([1944] 1 All E.R. 517) :

I confess that I have always understood that in ordinary commercial practice the profits of a business were ascertained by setting its receipts against its outgoings. I agree with SCRUTTON, L.J., when he said that "profits mean profits after deducting the expense of earning them" (*Vulcan Motor and Engineering Co. Ltd. v. Hampson* (7), [1921] 3 K.B. 606), though I entirely disagree with his view that excess profits duty (the tax with which he was concerned) was an expense of earning the receipts. It is indeed a commonplace in tax law that in ascertaining what deductions are permissible in computing the amount of the taxpayer's profits or gains the question is whether the deduction claimed represents an outlay in order to earn profits or is a disbursement of profits earned. It seems to me unintelligible that the payment of a tax levied on profits after they have been earned should be construed to be a payment made in order to earn these profits. I need not examine the complicated details of the legislation relating to excess profits tax. It is enough for my purpose to emphasise that, as its name denotes, the tax is a tax on profits, namely, the profits earned in excess of a fixed standard and that for the purpose of computing it the profits are, subject to certain special provisions, to "include all such income arising from the trade or business as is chargeable to income tax under case I of schedule D" : see the Finance (No. 2) Act 1939, sched. VII, para. 7. It is in short a super income tax. For its purposes the profits arising from a trade or business are to be "computed on income tax principles" with certain adaptations (1939 Act, s. 14 (1)).

For these reasons, I am of opinion that the decision of the Divisional Court in *Port of London Authority v. Orsett Union* (1) was wrong and should be overruled, and that we should not follow the decision of the Court of Session in the unreported case of *Neutown-on-Ayr Gas Co., Ltd.* (2) in 1923 which followed the *Orsett Union* case (1). It is to be observed that in the *Newton-on-Ayr* case (2) LORD HUNTER was undoubtedly influenced by his view that a company paying income tax does so as agent on behalf of the individual shareholders. This view, which prevailed for some time, and is, I think, apparent in some of the other authorities to which we were referred, has been held by the House of Lords to be erroneous : *vide per* LORD CAVE in *Inland Revenue Comrs. v. Blott* (8) ([1921] 2 A.C. 201).

The respondents to this appeal, however, submit that, even if excess profits tax is not deductible as a working expense in arriving at the profits, none the less it is open to the tribunal of fact to give some weight to the existence of this tax as one of the elements to be taken into consideration in fixing the tenant's share, whether this is arrived at on the basis of allowing a percentage on the appropriate tenant's capital, or by means of a percentage on the gross receipts. Counsel for the appellant council was, I think, disposed to concede that the present high level of income tax was a factor which was not wholly irrelevant to the fixing of the tenant's share, and I think he was right in making this concession. It must be remembered that all these mathematical calculations which have been devised for ascertaining the value for rating purposes of public utility undertakings are, after all, designed to ascertain the rent which the hypothetical tenant might be expected to pay, and such matters as current interest, rates from investments and the level of taxation are, I think, matters which may properly be taken into consideration in deciding what should be the tenant's share of the ascertained profits.

In my view, therefore, the question asked in the Case Stated should be answered by saying that quarter sessions did not come to a correct decision in deciding that the whole of the excess profits tax payable by the respondent company should be deducted in estimating the rateable value of the respondents' undertaking, but that the Case should be remitted to quarter sessions with an intimation that the existence of excess profits tax is a factor which they are entitled to take into consideration with others in arriving at the appropriate share of the profits to be allowed to the tenant.

COHEN, L.J. [read by TUCKER, L.J.] : The main point raised on this appeal is whether, in estimating the rateable value of the respondent company's under-

taking as a whole, a deduction should be made equivalent to the excess profits tax payable by the respondent company.

- A It is common ground that (1) the proper basis for assessing the rateable value of the undertaking is what is known as "the profits basis," as explained by LORD CAVE, L.C., in *Kingston Union v. Metropolitan Water Board* (5); (2) the relevant year is the year 1943, that being the latest period before the date of the rate as to which profits had been ascertained: see *Barking Rating Authority v. Central Electricity Board* (9) ([1940] 2 K.B. 497); (3) the excess profits tax payable by the respondent company in respect of the year 1943 was £8,155; (4) if, in calculating the sum divisible between the hypothetical landlord, the hypothetical tenant, and the rating authority, no deduction ought to be made from gross receipts in respect of this payment of excess profits tax, the rateable value of the respondents' undertaking as a whole is £15,642, and the portion thereof apportionable to the hereditament lying within the area of the appellant council is £3,540. The Assessment Appeals Committee held that a deduction should be made of the whole of the excess profits tax, but at the request of the appellants stated a Case for the determination of the court. This Case Stated came before the Divisional Court on Apr. 30, 1946. The appellant council contended that no deduction whatsoever should be made in respect of excess profits tax. Alternatively, they argued that (i) if a deduction was to be made, it should not be of the full amount actually paid, but only of a sum of £5,000 calculated as shewn in the third schedule to the Case, and (ii) in any event, regard should be had (a) to the post-war credit of 20 per cent. under s. 28 of the Finance Act, 1941, and (b) to the reduced liability of the respondents to income tax by reason of the payment of excess profits tax. The Divisional Court held that on the main question they were bound by the decision of a Divisional Court in *Port of London Authority v. Orsett Union Assessment Committee* (1) to hold that the full amount of excess profits tax actually paid was deductible, since there was no material difference on this point between the law in relation to excess profits duty imposed during the first world war and the law relating to excess profits tax. Under the Act imposing excess profits duty, however, there was no provision for post-war credit. On this subsidiary point LORD GODDARD, C.J. (with whose judgment the other members of the court agreed) said:
- E When it is repaid it will become an asset, or a profit, whatever one likes to call it, of the business, and, no doubt, will have to be taken into account, or may have to be taken into account, hereafter, but from the *Kingston* case (5) it is quite clear that the House of Lords thought that when you are assessing rateable value upon a profits basis you have to take the profits *rebus sic stantibus*. You have to take the profits for the preceding year and proceed on those profits. Therefore, I think we cannot interfere in any way with the fact that quarter sessions did disregard the fact of a hypothetical or problematical chance that 20 per cent. will be received at some time hereafter.
- F Accordingly, the Divisional Court dismissed the appeal from the Assessment Appeals Committee. From this decision the appellant council now appeals to this court.

- G The argument of counsel for the council, so far as the main point is concerned, was (i) that there is no distinction in principle between excess profits tax and income tax; (ii) that it has been long established that no deduction ought to be made in respect of the payments of income tax (see *R. v. Southampton Docks Co.* (4), and that, accordingly, no deduction should be made in respect of payment of excess profits tax; (iii) that, although there was no appeal from the decision of the Divisional Court in the *Orsett* case (1) so far as the excess profits duty point was concerned, that case had gone to the House of Lords on another point and it was plain from the observations of the learned Lords that the decision of the Divisional Court on the excess profits duty point was wrong; (iv) that, in any event, the decision of the Divisional Court was wrong and does not bind this court. Counsel for the respondent company, on the other hand, contended that the case was concluded in his favour by the decision of the Divisional Court in the *Orsett* case (1) which was followed in Scotland by the Court of Session in the unreported case of *Newton-on-Ayr Gas Co., Ltd.* (2).
- H

In the *Orsett* case (1) the Divisional Court held, as stated in the headnote ([1919] 1 K.B. 84):

A rating authority when assessing the rateable value of a hereditament capable of

earning profits, such as a dock, is entitled to take into consideration the liability of the occupiers to pay excess profits duty.

Moreover, it is clear from the observations of the learned judges that in the view, at any rate, of DARLING, J., and LORD COLERIDGE, J., the proper method of taking it into consideration was by deduction from the gross receipts. Thus DARLING, J., says (*ibid.*, 93):

There appear to be a good many decisions that he is not entitled to consider the income tax which he would have to pay on the profits of the undertaking, but there are, I think, no cases which say that he may not take into consideration the liability to pay excess profits duty, nor can I see any reason why it should not be allowed as a deduction. The Act expressly provides that he may consider the tithe commutation rent charge, but what distinction in principle can be drawn between excess profits duty and tithe?

Again he cites *R. v. Shoreditch Assessment Committee* (10), where it was held that an increase in the licence duty was *prima facie* evidence of a reduction in value of a public house and says (*ibid.*, 94):

If a deduction in such a case was to be allowed because of the increase in the licence duty it ought equally to be allowed in the case of excess profits duty.

LORD COLERIDGE, J., says (*ibid.*):

If you are entitled to look at the profits in order to estimate the rent, you are surely entitled to consider the fact that the profits may be diminished by the excess profits duty.

AVORY, J., was, I think, of the same opinion, though he does not state quite so explicitly the view that a deduction of the whole amount of the excess profits duty liability is the proper method of taking it into consideration. This decision was followed by the Court of Session in the *Newton-on-Ayr Gas Co., Ltd.* case (2), where LORD HUNTER, delivering the leading judgment, said:

The question depends for its solution upon the ascertainment of the rent which a hypothetical tenant would probably pay for the subjects [*i.e.* the hereditaments to be assessed] if the subjects were let. In my opinion, such a tenant, before deciding what would be a reasonable rent to pay for the subjects, would ascertain what charges were laid upon the business. Among those charges he would, in my opinion, rightly include excess profits duty, and, in calculating the rent, he would, undoubtedly, deduct excess profits duty from revenue. Accordingly, in my opinion, in valuing premises according to the revenue principle (*i.e.*, on the profits basis) excess profits duty should be deducted from revenue.

LORD HUNTER thus clearly treated excess profits duty as an expense of the business.

From the decision of the Divisional Court in the *Orsett* case (1) on the excess profits duty point there was, as I have said, no appeal, but the Divisional Court had also held on the authority of *Mersey Docks v. Liverpool Overseers* (11), that in applying "the profits basis" no allowance should be made out of the receipts for the hypothetical tenant's profit. On this point there was an appeal, first to the Court of Appeal, who dismissed the appeal, and then to the House of Lords who held that quarter sessions were not precluded by law from making an allowance for tenant's profit. The reasoning on which the majority of the House of Lords based their opinions, has, in my opinion, a distinct bearing on the question before us and is inconsistent with the decision of the Divisional Court thereon. Thus LORD BIRKENHEAD, L.C., says ([1920] A.C. 284):

Firstly, the question of rateability does not depend on whether the occupier does, or can, make a profit by the use to which he puts the hereditament; it depends on whether the occupation is of value. Secondly, in considering what rent a tenant would pay, the rating authority must consider the owner who is in actual occupation, or indeed the only possible occupier, as a possible tenant. Thirdly, in cases such as the present where a hereditament is enhanced in value by its connection with a profit-bearing undertaking, such as docks, the profits earned, and the share of profits attributable to any particular hereditament, have to be taken into account. Fourthly, in such cases, any restriction imposed by law on the profit-earning capacity of the undertaking must be considered, for the profits to be taken into account must be such as the tenant can earn under the only conditions in which he is allowed to earn profits at all. In other words, if the law has prevented the hereditament being profitable at all, then the occupation is of no value, and if the law has restricted its profit-earning capacity, then the effect of such restriction will tend to diminish the value. This proposition does not mean, and ought not to be understood to mean, that, where profits can lawfully be earned, but such profits must be applied in a particular way or for a particular purpose, the occupation of the hereditament is valueless and therefore not rateable, or, on the

other hand, that the tenant derives no profit from the occupation, and therefore that the whole profit increases the net annual value of the land.

LORD DUNEDIN says (*ibid.*, 299) :

Sterility in earning profits is one thing, sterility in the disposing of profits is another. The former affects the value—the latter does not.

The same thing is practically said by LORD DAVEY in *Mersey Docks v. Birkenhead Assessment Committee* (12) ([1901] A.C. 185) :

A I conceive that in principle, and impliedly (as I think has been held in subsequent cases which have come before the courts), what was really decided was that, notwithstanding the restrictions upon the application of the profits resulting from carrying on that business on the hereditament, the profits so derived were a legitimate element in arriving at the value of the beneficial occupation which was to be the subject of rating.

Then, after saying that he really derives this view from *Jones v. Mersey Docks* (13), he says (*ibid.*, 186) :

B In other words, it is perfectly immaterial what becomes of the amount which is the result of carrying on the business on the hereditament after paying the expenses and other outgoings.

LORD BUCKMASTER says ([1920] A.C. 303) :

C It is quite true that the hypothetical tenant of such an undertaking as the present must, on the hypothesis, be a tenant who is subject to the restrictions which have been imposed on the carrying on of the undertaking by the legislature. This may materially affect the rateable value of the hereditament by reason of the fact that such restrictions may impose a limit upon its profit-earning capacity. But the method of application of such profits, however closely defined and regulated they may be, does not mean that they cannot be earned, and consequently that they may not be brought into consideration in determining the rateable value.

D The only point their Lordships were considering was whether, in assessing the rateable value on the profits basis, a deduction was permissible for tenant's profits. They were not considering what other deductions might be allowable, but, in my opinion, it is a necessary inference from the *ratio decidendi* on which they based their conclusion, that, in arriving at the net receipts from which a deduction must be made for tenant's profit, no deduction should be made for a liability payable only out of profits when earned.

E In *R. v. Southampton Docks Co.* (4) LORD CAMPBELL, C.J., giving the judgment of the court, refused to allow a deduction for income tax estimated to be payable in respect of the estimated profit of the hypothetical tenant, saying (14 Q.B. 611) :

This is not a tax upon the subject-matter rated, which the tenant as such would be obliged to pay, but upon the net income of the tenant after paying the rent of the premises by which his profits are earned.

F I can see no difference in principle between income tax and excess profits tax. Both are taxes on profits when earned. Any amount paid by a taxpayer for excess profits tax is, it is true, deductible as an expense when ascertaining the profits for the purposes of income tax under the express provisions of s. 18 of the Finance (No. 2) Act, 1939, but the very fact that this express provision was necessary seems to me to support the conclusion I should have reached in its absence that excess profits tax cannot properly be described as an expense

G incurred in earning profit, but is really an application of profit when earned. I would add that some confusion appears to have existed in the minds of the members of the Divisional Court in the *Orsett* case (1). DARLING, J., treated tithe in the case of a farmer and licence duty in the case of a publican as on a par with excess profits duty. He ignored what seems to me the essential difference, which is that tithe or licence duty are payable irrespective of whether any profits are earned or not, whereas excess profits duty was, and excess profits

H tax is, only payable out of the profits earned when ascertained.

Counsel for the respondents relied on a number of decisions of which *Patent Castings Syndicate, Ltd. v. Etherington* (14) is typical. In that case it was held that, in ascertaining net profits for the purposes of a commercial agreement, payments of excess profits duty should be deducted, but I do not derive any assistance from these cases. It seems to me that quite different considerations may arise when the court has to consider commercial documents from that with which we are faced. It may well be that in the case of commercial documents, the expression "net profits" on its true meaning means profits available

for distribution among the shareholders and that, therefore, payments of excess profits duty ought to be deducted, but it is plain from the observations of the House of Lords in the *Orsett* case (1), that, in applying the "profits basis" for rating purposes, it is profits earned and not divisible profits that is the governing factor. The importance of the distinction is well illustrated by the observations of VISCOUNT SIMON, L.C., in *L.C., Ltd. v. G. B. Ollivant, Ltd.* (6). where he said ([1944] 1 All E.R. 513):

The word "divisible" or "distributable" does not occur in the agreement from beginning to end, and, to my mind, the profits of a trading company when ascertained in accordance with ordinary commercial practice are the profits before, and not after, deducting the direct taxation which has to be paid in respect of them.

LORD SIMON was one of a dissentient minority. but the difference of opinion was whether "profits" meant upon the true construction of the agreement then in question "divisible profits" and not as to what the position would be if this were not the right construction.

For these reasons, in my opinion, neither the sum of £8,155 nor any lesser sum is a proper deduction in ascertaining the net receipts which have to be apportioned as between hypothetical landlord, hypothetical tenant and the rating authority.

Counsel for the respondent company contended that, if we were against him on the main point, the liability to excess profits tax was a factor which the assessment committee should take into account in deciding what percentage of the net receipts should be allocated to tenant's profit when the net receipts were apportioned between hypothetical landlord, hypothetical tenant and rating authority. The 10 per cent. of net receipts usually allocated to tenant's profit was, he said, not fixed as immutably as the law of the Medes and Persians. The existence of liability to excess profits tax was a factor which might influence the mind of the tenant in deciding what return he would require for his risk, before he would take the hereditaments. Here again I can see no distinction in principle between excess profits tax and income tax, and counsel for the appellant council conceded that the fact of liability to income tax was a factor which must be present to the mind of the hypothetical tenant. He was, I think, bound to make this concession. The amount of the deduction for tenant's profit is certainly a question of fact. The methods adopted in calculating the tenant's share are, as pointed out in *RYDE ON RATING*, 8th ed., p. 448:

... but means to an end, namely, the proper answer to the question, what allowance for tenant's profits would be sufficient to induce the hypothetical tenant to take the hereditaments at the supposed rent?

Liability to income tax and excess profits tax must surely be factors which would influence his mind. I think, however, that in this connection the principle applicable in calculating the net receipts, *viz.*, that the profits basis has to be calculated, not on what may happen in the future, but on the profits ascertained down to the latest period before the date of the rate: see the *Barking* case (9) ([1940] 2 K.B. 497) is not binding. The liability is merely one of the factors influencing the tenant's mind and there is no reason for giving more weight to the actual amount paid for excess profits tax than to the amount payable for income tax. Indeed, from some points of view, the assessment authority might consider that excess profits tax, having less permanent a history as a tax than income tax, is less likely to influence the mind of the hypothetical tenant. Be that as it may, I think we can safely leave it to quarter sessions in the light of their previous experience to estimate what weight, if any, to give to the factor of liability to excess profits tax. In view of the conclusion to which I have come on the main questions, the subsidiary questions argued by counsel for the appellant council do not arise. I would, therefore, allow the appeal and remit the matter to quarter sessions, and I agree with the order proposed by TUCKER, L.J.

Appeal allowed with costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Harold King*, County Hall, Taunton (for the appellants); *Evelyn Jones & Co.*, agents for *Jackson & Sons*, Ringwood, Hants (for the respondents).

[Reported by R. L. ZIAR, Esq., Barrister-at-Law.]

ENGLISH SEWING COTTON CO., LTD. v. INLAND REVENUE COMMISSIONERS

[COURT OF APPEAL (Lord Greene, M.R., Morton and Asquith, L.JJ.),
March 12, 13, 1947.]

Revenue—Excess profits tax—Principal company beneficial owner of stock in American subsidiary company—Stock compulsorily made security for loan by U.S.A. Government to H.M. Government—Treasury statutory mandatory to carry out terms of agreement—Whether principal company's beneficial interest lost.

Statutes—Taxing Act—Construction—Machinery provision read as reference to charge of tax—"Assessment"—Finance Act, 1940 (c. 29), sched. V, pt. 1.

The taxpayers, as beneficial owners of certain shares in an American company, acquired the status, for the purposes of excess profits tax, of a principal company in relation to a subsidiary. On July 21, 1941, on the occasion of a loan by the government of the United States to H.M. Government, an agreement was entered into between the American Reconstruction Finance Corporation (as representative of the U.S.A. government) and H.M. Government, under which securities owned by persons or companies in Great Britain (including the common stock of the taxpayers' subsidiary company) were mortgaged to the corporation as security for the loan. By the Finance Powers (U.S.A. Securities) Act, 1941, and the regulations made thereunder, H.M. Treasury became a statutory mandatory or agent to, and did, in fact, carry out, in an executive manner, the provisions of the agreement:—

HELD: (i) the taxpayers remained throughout the beneficial owners of the shares in the subsidiary company, which, consequently, continued to be a subsidiary of the taxpayers for the purposes of excess profits tax.

(ii) the reference to "assessment" in the Finance Act, 1940, sched. V, pt. I, is a reference to a charge of tax, and should not be read as a mere piece of machinery.

[FOR THE FINANCE ACT, 1940, SCHED. V, PT. I, see HALSBURY'S STATUTES, Vol. 33, p. 194].

APPEAL by the taxpayers from a decision of MACNAGHTEN, J., dated July 17, 1946, dismissing an appeal by way of Case Stated by the Special Commissioners of Income Tax, who had held that the taxpayers remained beneficial owners of certain stock in an American company which formed part of the security for a loan from the government of the United States to H.M. Government, and that, consequently, the American company continued to be a subsidiary of the taxpayers for the purposes of excess profits tax.

J. Millard Tucker, K.C., and Heyworth Talbot for the taxpayers.

The Solicitor-General (Sir Frank Soskice, K.C.), J. H. Stamp and Reginald P. Hills for the Crown.

LORD GREENE, M.R.: Two questions are propounded in this appeal. The first, which was the only question raised before the Special Commissioners, was whether or not at the relevant time the appellant company were the beneficial owners of certain common stock in an American company called the American Thread Co. (Inc.). If they were, the American company was, for the purposes of the legislation relating to excess profits tax, a subsidiary of the appellant company. Subject to the second question, the effect of its being so treated would be to produce certain consequences under which the liability of the appellant company to excess profits tax would be increased. On the other hand, if the American company was not a subsidiary of the appellants, the excess profits tax would be correspondingly less. I need not refer in detail to the sections of the Acts which would produce these results, because the sole question to be decided here is whether or not, within the meaning of the relevant section, the English company was the beneficial owner of the shares. Again I need not refer to the sections in detail because there is no special meaning to be extracted from the context which would result in the words "beneficial owner" having some meaning other than their ordinary meaning. The Special Commissioners held that the appellant company were the beneficial owners of the stock and their decision was affirmed by MACNAGHTEN, J.

The appellant company unquestionably held the necessary 90 per cent. of the common stock, which is the figure required in order that a company may acquire the status of a principal company in relation to a subsidiary. There is no question that, until the events which I shall mention took place, the appellant company owned that stock beneficially. The company, however, claims that, in view of those events, the beneficial ownership was taken away from it in whole or in part, and that thereby it ceased to be beneficial owner.

The events relied on relate to an agreement come to between H.M. Government in the United Kingdom and an American company called the Reconstruction Finance Corporation on July 21, 1941, an Act of the United Kingdom Parliament called the Financial Powers (U.S.A. Securities) Act, 1941, and certain regulations and directions made pursuant to that Act. I do not find it necessary to go into the details of the agreement, the Act, the regulations or the directions. It is, I think, sufficient to state their general nature and effect.

The agreement was made on the occasion of a loan of \$425,000,000 granted by the Reconstruction Finance Corporation to H.M. Government in the United Kingdom, and it provided that security should be given for that loan. The security to be given is specified in a schedule to the agreement, which sets out a very large number of securities owned by persons or companies in Great Britain. Among those securities are the common stock of the American Thread Company (Inc.). The agreement provided that all the scheduled securities should be mortgaged to the Reconstruction Finance Corporation as security for the loan. It set out the mortgage provisions at great length. I think it fair to say that many of those provisions are to be found in quite ordinary mortgages, and, in so far as any unusual provisions with regard to the securities are to be found in the agreement, those provisions are nothing but mortgage provisions intended to make the security more watertight. The securities were to be deposited in the United States. Provision was to be made for securing that the interest and dividends on them should be paid to the Reconstruction Finance Corporation and applied in ways specified in the agreement, namely, payment of interest on the loan, the provision of a sinking fund, and repayment of capital, if necessary. Proxies were to be provided to enable the mortgagees to control the voting power of the various companies whose shares constituted security for the loan. Dividend mandates were to be provided also. When the loan was paid off the securities would be released. If it were not paid off, the provisions of the agreement could be enforced by the securities being disposed of on behalf of the mortgagees. For that purpose, blank transfers were to be signed and deposited. The interest of the Reconstruction Finance Corporation was nothing but that of mortgagees.

If that agreement had been voluntarily given effect to by the owners of the various securities which formed what was called the collateral for the loan, it could not have been suggested, I think, that they had thereby lost the beneficial interest in their property. The position then, reduced to its simplest terms, would have been this. The owners of the securities would have hypothecated them to the Reconstruction Finance Corporation to secure the loan made to the British Government. They would, in effect, have assumed the position of guarantors of the loan made by the Reconstruction Finance Corporation to the government, not, of course, in the sense that they would have assumed personal liability for the loan, but in the sense that they would have been using their own property to provide security to the lenders. If that had been done, the beneficial ownership in the securities would, unquestionably, have remained in the owners. There would simply have been created the relationship of mortgagor (by way of guarantee) and mortgagee. I have never heard it suggested that, where a mortgage transaction is made, the result of it is to deprive the mortgagor of his beneficial ownership. The interest of the mortgagee is merely the interest of a person holding a security and does not affect the beneficial ownership in the ordinary meaning of that phrase. In the present case, however, no such voluntary hypothecation took place. It would obviously have been impossible to put this agreement into operation without some form of compulsion. That compulsion was effected in this way. Under the agreement, H.M. Government undertook to provide the necessary security and to see that all the machinery (such as dividend mandates, blank transfers, and so on) was put into working order. It acquired the necessary powers to do that as

against the owners of the securities by the Act of Parliament to which I have referred. That Act of Parliament enables the Treasury to exercise any powers necessary to give effect to the agreement with the Reconstruction Finance Corporation. In particular, they were empowered to require securities and income and other payments arising therefrom to be placed at the disposal of the Treasury. Very wide powers were given, but the substance of it is that the Treasury became, so to speak, the statutory mandatory to carry out the hypothecation to the Reconstruction Finance Corporation of these various securities. It was given full powers of compulsion to enable it to carry out that mandate, and it carried it out.

The agreement, so far as the appellant company are concerned, was carried out smoothly and effectively. The deposit has created the rights in the American company of an equitable mortgagee. The blank transfers, and so forth, have never been used, but I do not think that matters. The company argued that, as a result of these operations, the beneficial ownership of the common stock has been wholly or partially removed from them and transferred elsewhere. I say "wholly" and I think that was suggested at one time, but I am not sure whether it was persisted in. The weight of the argument was that the beneficial ownership became divided between the Treasury and the company.

For the company it was said that a share is a bundle of rights, and certain of those rights, as a result of these transactions, were taken away from them. Particular emphasis was laid on the fact that the dividends were to be no longer payable to the appellant company, but were to be payable in accordance with the dividend mandate which they were required to give to the Reconstruction Finance Corporation. It was said—I had difficulty in following the argument—that the Treasury in some way became entitled to these dividends, and, therefore, that that particular element in the bundle of rights which constitute the stock was vested in the Treasury. I am unable to discover anything of the kind.

I return to the summary which I ventured to give of the position of the Treasury under the statute. The Treasury became a statutory mandatory or agent to carry out in an executive manner all the various provisions of the agreement. There are no words in the agreement, or in the Act of Parliament or regulations made under it, which can be construed as vesting in the Treasury any beneficial interest whatsoever in regard to these shares or any of the rights which go to make up the shares. I put more than once to counsel for the company the question: "If the beneficial interest is not in the company, where is it?" Counsel replied: "In the Treasury and the company taken together." I have already dealt with that, but when he was asked: "Where is that element which you say is vested in the Treasury, if it is not in the Treasury?" he vigorously replied that that was no business of his. All he was required to say was that the company had lost part of the beneficial interest and it did not matter for his purposes where it had gone. I am not satisfied with that method of handling the problem, because it seems to me, if anyone says that the company had lost part of their beneficial interest, that proposition can only be established if it can be shown that it has gone somewhere. The only place where it was said it had gone was the Treasury.

There was one element in this transaction which I should have mentioned before, and that is this. The Act of Parliament and the regulations provide that the owners of the hypothecated securities should receive in London the sterling equivalent of the dollar dividends paid on them. Similarly, if the securities were realised for the purposes of paying off the loan or part of it, the owners were to receive in London the sterling equivalent of the dollars. It was said the result is a complete deprivation in the case of the dividends, and a possible deprivation in the case of the capital, of the beneficial interest of the company in the shares. It seems to me that it is impossible that the operations so described can have the result suggested. The mortgagor who mortgages his shares on the terms that the mortgagee shall be entitled to collect the dividends and apply them towards the loan does not become any the less the beneficial owner of his shares because of the existence of that provision. That is the provision here. The owners of the securities, undoubtedly, lose their right to the dividends as such in dollars so long as the loan remains. That is always what happens in mortgages where, for instance, the mortgagee appoints

a receiver. It has never been suggested to my knowledge, and it cannot be suggested on principle, that the appointment of a receiver by a mortgagee affects the beneficial ownership of the shares. All, in substance, which is done in the present case is that a receiver is appointed by a mortgage deed. The machinery for compensating the owners in London by payment in sterling of the equivalent of what they have lost in the shape of the dollar dividends is machinery for compensating them, and does not have the effect in any way of altering the beneficial ownership of the shares.

That being the view I take of the essential nature of this transaction, and its object and effect, it is not necessary, as I have said, to go into the various details and to discuss some of the matters that were discussed below. In my opinion, the appellant company remained throughout the beneficial owners of the common stock of the American Thread Co., and, consequently, that company became a subsidiary of the appellant company for the purposes of the excess profits tax.

The second question leads to a very remarkable argument. It arises in this way. Excess profits tax was imposed by the Finance (No. 2) Act, 1939, pt. III. The charging section is s. 12. That charges excess profits tax on the excess profits arising from any trade or business to which the section applies. By sub-s. (2) the trades and businesses to which the section applies are defined. They are :

... all trades or businesses of any description carried on in the United Kingdom, or carried on, whether personally or through an agent, by persons ordinarily resident in the United Kingdom.

That sub-section is prefaced by the words "Subject as hereafter provided," which means, in my opinion (contrary to what MACNAGHTEN, J., thought), "subject as hereafter provided in the relevant part of the Act," and not merely "subject as provided in that particular section." I see no reason for confining it in the way that MACNAGHTEN, J., did, but whether that be right or wrong does not, in my view, really affect the question which we have to decide. The consequences of sub-s. (2) will appear presently, but I say at once, with all respect, I cannot take the view taken by the learned judge as to its construction in relation to the facts of this case. He thought that the business of the American Thread Co. was a business carried on by the appellant company through an agent, *viz.*, the American Thread Co. That seems to me to be putting on the word "agent" an interpretation which neither is the ordinary meaning of the word nor one which the context permits. "Agent" there means agent, and a company whose shares are controlled by another company is not by mere existence of that control properly to be described as agent. The learned judge gave that interpretation to the word by way of avoiding the difficulty which the argument which I am now discussing raised. In my opinion, the difficulty can be got round in a simpler manner. Trades in that section are confined to those carried on in the United Kingdom or carried on abroad through an agent. If the matter had stood there, the profits of the American company would not have come into the picture. Under s. 17 (3) of the Act provisions were made for bringing in for certain purposes the profits of what I may call a foreign subsidiary, *i.e.*, a subsidiary not a resident or carrying on a business within the United Kingdom. Putting it broadly, the effect of this provision was to aggregate the profits of the principal company which, *ex hypothesi*, is a United Kingdom company, with the profits of the subsidiary company, which may be a foreign company, for the purposes of the excess profits tax, the assessable entity being, of course, the United Kingdom company whose profits are treated as including the profits of the subsidiary, whether it be a United Kingdom subsidiary or a foreign subsidiary. Broadly speaking, that was the scheme by which the profits of a foreign company might be brought into computation for the purposes of the tax, notwithstanding that limitation on the tax laid down by sub-s. (2) of s. 12. That a foreign subsidiary or, indeed, any subsidiary, might qualify for such treatment, 90 per cent. of its shares had to be beneficially owned.

If s. 17 had remained in the legislation the point I am now dealing with would never have arisen, but the Finance Act, 1940, effected a number of important alterations in the law governing excess profits tax, and, in particular, it adopted a new scheme in connection with subsidiary companies and principal companies

or, as they are called in the side-note, "interconnected companies." By s. 28 it repealed the relevant portions of s. 17 of the Act of 1939, to which I have made a brief reference, and it substituted some very complicated provisions which are to be found in sched. V to the Act of 1940. Those provisions clearly aimed at bringing into the ambit of taxation the profits of the subsidiaries, whether foreign or not, of companies carrying on business here. Counsel for the appellant company frankly confessed that, if his second point was right, it meant that the obvious intention of the legislature had been defeated. Schedule V, pt. I, which contains three paragraphs, is headed "Assessment of excess profits tax." I repeat that sub-s. (3) of s. 17 of the Act of 1939, which provided for the aggregation of the profits of the principal company and its subsidiary, was repealed. Therefore, if there had been nothing but the repeal, no charge would have remained in respect of the profits of a foreign subsidiary, and it is said that the substituted provisions are ineffective to bring into charge the profits of a foreign subsidiary, and so to take the place of the repealed parts of s. 17.

Paragraph 1 of pt. I of sched. V to the Act of 1940 provides in sub-para. (1) for members of what is called in the Act a "group of companies," i.e., a principal company with its subsidiary or subsidiaries. That paragraph enacts that assessments shall be made in respect of the excess profits of a body corporate which is a member of a group of companies. By sub-para. (2):

Such assessment shall be made in respect of any trade or business carried on by a subsidiary member of a group of companies whether or not the trade or business is carried on in the United Kingdom, and whether or not the subsidiary member is ordinarily resident in the United Kingdom.

Paragraph 2 provides that an assessment to excess profits tax in respect of the trade or business of a body corporate which is a member of a group is to be made on the "then principal company of the group," but in the case of an assessment in respect of a trade or business of a subsidiary member tax shall be "recoverable from the principal company and the subsidiary member jointly and severally." If anything is clear it is, I think, that the legislature was under the belief that it had effectively brought in under this new machinery the excess profits of a subsidiary whether foreign or not foreign.

It is, however, said that all these are provisions for assessment only—machinery provisions which assume the existence of a charge on the excess profits of a foreign subsidiary but do not themselves create the charge. If no charge is created by the Act of Parliament, the insertion of these machinery provisions cannot, it is said, create a charge, and they have been put in under the false belief that there was to be found somewhere in the Act a charge on the excess profits of a foreign subsidiary. In my opinion, that argument fails. As I have said, it is a singularly unattractive argument, because, if correct, it would mean that Parliament had made a hideous mistake and that a great many provisions of this scheme were completely inoperative. If Parliament has made a mistake, so much the worse, but, having regard to the clear intention which is to be found in the language of this schedule, I cannot put on the section an interpretation which would lead to such a fantastic result. The argument proceeds in this way. The only type of company that can be assessed to excess profits tax is a company whose trade or business is carried on in the United Kingdom. It is said that is the only charging section. Under the original s. 17 the effect of aggregating with the profits of an English company the profits of its foreign subsidiary and treating them for the purpose of tax as profits of the English company was effective to bring those profits into tax notwithstanding the limitation imposed by sub-s. (3). It is said the present scheme is quite different. The profits of the subsidiary are not treated as the profits of the United Kingdom company, but they are treated as profits of the subsidiary company. Therefore, in the case of a foreign subsidiary they are not chargeable at all by reason of the language of sub-s. (3), and the reference to "assessments" which I have just read does not operate to take the place of a proper charging section.

In my opinion, that argument cannot prevail. As counsel for the Crown pointed out, the clear intention of the provisions of the schedule is to impose a tax. The language used directs the making of assessments. He also says, giving full weight to the distinction between charging provisions and machinery

provisions, that if, on the true construction of a taxing Act, the legislature has used a machinery provision such as is to be found in the word "assessment," with the clear intention of treating that as an assessment which will impose a liability to tax on the person assessed, the reference to "assessment" must be read as being, in effect, a reference to a charge of tax. It appears to me impossible to read the relevant provision of the Act of 1940 save in the sense that there is to be an assessment in relation to the profits of a foreign subsidiary company. If it is read as a mere piece of machinery, it is entirely inoperative. The only way in which effect can be given to the language is to treat the direction for making an assessment in respect of those profits as intended to make the profits liable to tax. For a reason different from that which MACNAGHTEN, J., took, I think that point also fails, and the appeal must be dismissed with costs.

MORTON, L.J. : I agree. I would only add that, when, in sched. V to the Act of 1940, the legislature uses the phrase "assessments shall be made in respect of its excess profits," I think it is plain that the legislature means that effective assessments shall be made, and assessments can only be effective if they are in fact a charge imposed on the parties.

ASQUITH, L.J. : I am entirely in accord with the judgment which my Lord has delivered.

Appeal dismissed with costs.

Solicitors : Gregory, Rowcliffe & Co., agents for Addleshaw, Sons & Latham, Manchester (for the taxpayers) ; Solicitor of Inland Revenue (for the Crown).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

PROGRESS BUILDING, LTD. v. WESTMINSTER CITY CORPORATION.

[KING'S BENCH DIVISION (Macnaghten, J.), March 31, April 1, 1947.]

Emergency Legislation—Requisition of premises—Transfer of possession—Power of competent authority—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927 as amended), regs. 49, 51.

A Minister of the Crown who, as a competent authority, requisitions property under the Defence (General) Regulations, 1939, holds the property on behalf of the Crown, and is entitled to transfer possession of it to another competent authority.

By virtue of the Defence (General) Regulations, 1939, regs. 49 and 51, (which were amended in pursuance of the Supplies and Services (Transitional Powers) Act, 1945, s. 1 (1)), the Minister of Works requisitioned certain leasehold premises during the war to accommodate the American Red Cross Society. When the premises were vacated by the Society after the war, the Minister of Works transferred possession of the premises to the Minister of Health, who in turn transferred possession to the defendants, as the local housing authority, to provide housing accommodation.

HELD : the Minister of Works was entitled to transfer possession of the premises to the Minister of Health and the latter to the defendants.

[FOR THE SUPPLIES AND SERVICES (TRANSITIONAL POWERS) ACT, 1945, s. 1 (1) AND THE DEFENCE (GENERAL) REGULATIONS, 1939, REGS. 49, 51, see HALSBURY'S STATUTES, Vol. 38, pp. 631, 702, 707.]

Case referred to :

(1) *Minister of Health v. Bellotti*, [1944] 1 All E.R. 238 ; [1944] K.B. 298 ; 113 L.J.K.B. 436 ; 170 L.T. 146 ; Digest Supp.

ACTION by the lessees of premises for a declaration that they were entitled to possession of the premises and an injunction restraining the defendants from preventing, hindering or interfering with their use and enjoyment of the premises. The premises were requisitioned during the war by the Minister of Works, and were subsequently transferred by him to the Minister of Health, who, in turn, transferred possession of the premises to the defendants, as housing authority for the area, for the purpose of housing accommodation.

Robert Fortune for the plaintiffs.

H. L. Parker for the defendants.

MACNAGHTEN, J. : The plaintiffs in this action, are the lessees of a block of residential flats, known as Marlborough Chambers, 70-72, Jermyn Street, in the city of Westminster. They bring this action for a declaration that they are entitled to possession of those premises, and, among other things, they claim an injunction restraining the defendants from directly or indirectly taking any steps calculated in any way to prevent, hinder, or interfere with the plaintiffs' use and enjoyment of the premises.

The premises were requisitioned by the Minister of Works on Sept. 10, 1943, for the accommodation of the American Red Cross Society. The requisition was made by virtue of the provisions of the Defence (General) Regulations, 1939, regs. 49 and 51. Under the Supplies and Services (Transitional Powers) Act, 1945, power was given to extend the purposes of certain Defence Regulations. The title of the Act begins with these words :

An Act to provide for the application of certain Defence Regulations for purposes connected with the maintenance control and regulation of supplies and services. . .

and by sub-s. (1) of s. 1 of the Act it is provided :

If it appears to His Majesty to be necessary or expedient that any Defence Regulation to which this section applies should have effect for the purpose of so maintaining controlling and regulating supplies and services as —(a) to secure a sufficiency of those essential to the well being of the community or their equitable distribution or their availability at fair prices . . . he may by Order in Council direct that the Regulation shall have effect by virtue of this Act whether or not it is for the time being necessary or expedient for the purposes specified in sub-section (1) of section one of the Emergency Powers (Defence) Act, 1939.

Pursuant to the power given by that Act, reg. 51 was amended so as to run thus :

(1) A competent authority, if it appears to that authority to be necessary or expedient so to do for any of the purposes specified in sub-section (1) of section one of the Supplies and Services (Transitional Powers) Act, 1945, may take possession of any land, and may give such directions as appear to the competent authority to be necessary or expedient in connection with the taking of possession of that land. (2) While any land is in the possession of a competent authority by virtue of this regulation . . . the land may, notwithstanding any restriction imposed on the use thereof (whether by any Act or other instrument or otherwise), be used by, or under the authority of, the competent authority for such purpose, and in such manner, as that authority thinks expedient for any of the purposes specified in sub-section (1) of section one of the Supplies and Services (Transitional Powers) Act, 1945.

It goes on to name the powers which the competent authority in that case may exercise.

The Minister of Works, no longer requiring the premises for the American Red Cross, transferred possession of them to the Minister of Health, who, in turn, after the necessary formalities transferred possession to the defendants to provide housing accommodation. The plaintiffs allege that the Minister of Works had no authority to transfer the possession of the flats to the Ministry of Health, and, consequently, that the Ministry of Health had no authority to authorise the defendants to make use of the flats. The Minister of Works is a competent authority within the meaning of the Defence Regulations. The question raised is : Did the Minister take possession by virtue of his office and as such officer, or did he take possession on behalf of His Majesty ? The words of the Emergency Powers (Defence) Act, 1939, seem plain enough, that it is on behalf of the Crown that the Minister exercises the power of requisition. The matter, one would have thought, was too plain for argument, but, if authority is needed, it is to be found in the decision in *Minister of Health v. Bellotti and Another* (1). That was a case dealing with refugees from Gibraltar. Some trouble arose and the refugees were given notice to quit the accommodation which had been provided for them in London, and an action was brought by the Minister of Health to turn them out. Various points were raised on behalf of the defendants, and LORD GREENE, M.R., said ([1944] 1 All E.R. 240, 241) :

I must deal, in the first instance, with what is really a preliminary point. The action is brought by the Minister of Health by that description. It is said that the

action ought to have been brought on behalf of the Crown and that the Minister of Health has no title to maintain it . . . It is argued by counsel for the respondents that . . . the possession of the Ministry of Health being possession on behalf of His Majesty nobody but His Majesty is competent to institute proceedings such as have been instituted here, which are in form a claim for damages for trespass and an injunction to restrain the respondents from occupying his rooms. In my opinion, that argument cannot prevail, by reason of the provisions of the Ministry of Health Act, 1919, s. 7 (1). Apart from those provisions, I do not suppose it would be disputed that the argument would be right, but under that sub-section it is provided that "the Minister may sue and be sued by the name of the Minister of Health, and may for all purposes be described by that name."

So there the MASTER OF THE ROLLS is not only saying that the Minister holds the requisitioned property on behalf of His Majesty; he goes so far as to say he did not suppose it would be disputed that that contention was right. I need say no more than that this decision has established that possession is possession on behalf of His Majesty and, therefore a competent authority is entitled to transfer possession to another competent authority. Indeed, that was done again and again during the war. The Minister of Works frequently requisitioned land and used it, not only for the purposes of the Secretary of State for War, but also for the Admiralty and for the Royal Air Force, and the contention now put forth that possession is not taken on behalf of the Crown cannot be disputed successfully in this court.

Judgment for the defendants with costs.

Solicitors: *Henry Boustred & Sons* (for the plaintiffs); *Allen & Son* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Affirmed. C.A. [1948] 2 All E.R. 875.

ARTILLERY MANSIONS, LTD. v.
MABARTNEY. ([1947] 1
All E.R. 686). *Approved.*
PROPERTY HOLDING CO.,
LTD. v. CLARK . . . [1948] 1 All E.R. 165

LTD., v. MABARTNEY.

March 25, 26, 1947.]

Action for possession—Lease of flat with stipulated for attendance—Total rent—Whether attendance subsistent part of whole rent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (2)—Rent and Mortgage Interest Restrictions Act, 1923 (c. 32), s. 10 (1).

An unfurnished flat, the rateable value of which was less than that prescribed by the Rent Restrictions Acts, was let to a tenant at a yearly rent of £170, a further sum of £15 a year being specified for service charges which were stipulated in the agreement to be keeping the rooms and furniture clean, sweeping chimneys, lighting fires, valeting and general attendance, arranging to keep the staircase clean, and providing a hall porter to attend to the hall door and to take messages and parcels. In addition to these contractual services, the landlord provided a storeroom for luggage, etc., a lift and a liftman, central heating and a hot water supply, and a housekeeper who was available to cook and serve meals for which she was paid separately. In an action for possession:—

HELD: (i) the rent of the flat was the total payment under the agreement, including the payment in respect of attendance.

Wood v. Wallace (1920) (90 L.J.K.B. 319) and *Hocker v. Solomon* (1921) (91 L.J.Ch. 8) *not followed*; *Woods (L. H.) & Co., Ltd. v. City and West End Properties, Ltd.* (1921), (38 T.L.R. 98) and *Wilkes v. Goodwin* ([1923] 2 K.B. 86) *followed*.

(ii) where the parties themselves had made a severance between rent, in the strict sense, and the payment for services, it was reasonable to assume that the amounts allocated were a genuine estimate of the value of the services specified and they should *prima facie* be taken as correct.

(iii) the contractual rights were reasonably and sufficiently covered by the charge of £15, and, as, in regard to the whole rent of £185, it did not form a substantial part within *Palser v. Grinling* ([1946] 2 All E.R. 287), and s. 12 (2) of the Act of 1920, as amended by s. 10 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, applied and the landlord was not entitled to possession,

[AS TO DWELLING-HOUSES LET AT RENT INCLUDING ATTENDANCE, see HALSBURY, Hailsham Edn., Vol. 20, p. 314, para. 370; and FOR CASES, see DIGEST, Vol. 31, pp. 559, 560, Nos. 7068-7077].

Cases referred to:

- (1) *Wood v. Wallace* (1920), 90 L.J.K.B. 319; 124 L.T. 539; 84 J.P. Jo. 517; 31 Digest 559, 560, 7069.
- (2) *Hocker v. Solomon* (1921), 91 L.J.Ch. 8; 727 L.T. 144; 31 Digest 560, 7070.
- (3) *Woods (L. H.) & Co., Ltd. v. City & West End Properties, Ltd.* (1921), 38 T.L.R. 98; 31 Digest 565, 7121.
- (4) *Wilkes v. Goodwin*, [1923] 2 K.B. 86; 92 L.J.K.B. 580; 129 L.T. 44; 31 Digest 560, 561, 7080.
- (5) *Palser v. Grinling*, [1946] 2 All E.R. 287; [1946] 1 K.B. 631; [1947] L.J.R. 97; 175 L.T. 204.

ACTION for possession of a flat. The facts appear in the judgment.

Diplock for the landlords.

Sebag Shaw for the tenant.

DENNING, J.: This is a claim by the landlords for the possession of a flat occupied by the tenant on the fifth floor of one of the buildings of Artillery Mansions in Victoria Street, London. The question that arises is whether or not the tenant is protected by the Rent Restrictions Acts.

The tenancy agreement, made in June, 1944, was one under which the landlords agreed to let the flat to the tenant for one year from June 24, 1944, and thereafter on a quarterly tenancy at a rent of £170 a year. In addition, the tenant agreed to pay the landlords by way of further or additional rent £15 a year for service charges. I have to determine whether this flat is excluded from the Act by reason of the fact that it is let at a rent which includes payment in respect of attendance within s. 12 (2) of the Act of 1920.

The landlords provide a large number of services and facilities for the tenant which are not included in the written contract between them. They provide, for instance, a storeroom in the basement where the tenants can keep luggage, and so forth. They provide a lift and a liftman as a facility for the tenants and for people visiting them. They provide central heating and a hot water supply. They have also instituted a system whereby a housekeeper is available to cook meals for and to serve the meals on the tenants of the flats, but none of that comes within the agreement. In particular, the facility of providing meals is a matter which is done by the housekeeper, so to speak, on her own account. She provides the meals, charges for them and takes the profit. What is specified as coming within the contractual terms of the service is:

The service to be provided by the landlords shall include keeping the rooms and furniture clean, sweeping chimneys, cleaning windows, lighting fires, valeting and general attendance.

In addition, there is a specific clause whereby the landlords agree to arrange for the staircase to be kept clean, and to provide a hall porter to attend to the hall door and to take messages and parcels.

To see whether or not the case comes within s. 12 (2) of the Act of 1920, I start with the fact that the rateable value is less than the prescribed amount of £105. *Prima facie*, therefore, the flat is within the protection of the Act. I next turn to the proviso to that sub-section, and I find that the flat is let at a rent which includes payment in respect of attendance. I am satisfied that the earlier cases of *Wood v. Wallace* (1) and *Hocker v. Solomon* (2) should no longer be followed, having regard to the decision of the Divisional Court in *L. H. Woods & Co., Ltd. v. City & West End Properties, Ltd.* (3), and the observations of the Court of Appeal in *Wilkes v. Goodwin* (4), and, particularly, the observations of YOUNGER, L.J. ([1923] 2 K.B. 105) where he says:

... the word "rent" in this exception surely means not rent in the strict sense but the total payment under the instrument of letting.

In the present case the total payment under the instrument of letting is not only the £170, but also the £15, making £185 altogether. Any other view would lead to an impossible position having regard to the fact that when the contractual tenancy comes to an end the tenant is entitled to the benefit of all the terms and conditions of the contract of tenancy which are consistent with the Act. In order to have that benefit, she must pay the £185, but not more. There-

fore, it is necessary that all payments which are made in respect of the contractual stipulations should be added together and treated as rent for the purpose of this section. This rent of £185 included payments in respect of attendance, and, therefore, it is within the proviso to s. 12 (2) of the Act of 1920.

This proviso must, however, now be read subject to s. 10 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, which says that :

... a dwelling-house shall not be deemed to be *bona fide* let at a rent which includes payments in respect of attendance or the use of furniture unless the amount of rent which is fairly attributable to the attendance or the use of the furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent.

That sub-section is, no doubt, dealing with the familiar case where there is an inclusive figure including both the strict rent and the attendance. It is the primary task of the court in such a case to find out how much of the inclusive sum is fairly attributable to the attendance. It was in relation to such a situation that the analysis and the observations of the Court of Appeal in *Palser v. Grinling* (5) primarily applied. In my opinion, they also apply in a case such as the present where there is not an inclusive rent, but the parties have specifically agreed on one figure, £170, for the rent and another figure, £15, for the services. In a case of this kind, however, where the parties themselves have made the severance, I think that in the ordinary way it is reasonable to assume that the amounts allocated are a genuine estimate of the value of the services mentioned. I am supported in this view by the analysis which has been put before me. It has been got out with the greatest care in accordance with the judgment of MORTON, L.J., in *Palser v. Grinling* (5) : but it became apparent in the course of the evidence that there were considerable margins of error and considerable difficulties arising in making the various apportionments, adjustments, estimates and deductions required by that calculation. When one has such a difficult matter to assess and estimate, it seems to me that when the parties have in their agreement set down their own figure, it is *prima facie* to be taken as correct. I see nothing in all these calculations to satisfy me that this £15 is not a perfectly proper figure to put on the value of the services which the landlords contract to provide for that sum. It says that the services to be provided by the landlords shall include keeping the rooms and furniture clean, sweeping chimneys, cleaning windows, lighting fires, valeting and general attendance. It seems to me on the figures that I have heard, that those contractual rights are reasonably and sufficiently covered by the charge of £15 per annum on account of it. It is not necessary for me to go into the particular details. With regard to the question of the lift and the liftman, there is no contractual right to it, as I understand the agreement, so that, in accordance with what MORTON, L.J., said, it is a matter which I should disregard, but in any case, following the approach in all these cases to what constitutes attendance, I myself should have thought that the provision of a liftman operating a lift such as this, which in ordinary circumstances is an essential means of access to the flat, would not be attendance.

The question, therefore, is whether the £15 forms a substantial portion of the whole rent of £185. It does not form a substantial part within the test laid down by the Court of Appeal. It is less than 15 per cent. of the whole.

In the result, in my judgment, this action fails. The house is *prima facie* within the Act, and the landlords have not satisfied me that there are circumstances existing which take it out of s. 12 (2) of the Act of 1920 as amended by s. 10 (1) of the Act of 1923. The action, therefore, must be dismissed with costs.

Judgment for the defendant with costs.

Solicitors : Wainwright & Pollock, O'Bryen-Taylor & Co. (for the landlords) ; William Foux (for the tenant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

HAWKINS v. PRICE.

[CHANCERY DIVISION (Evershed, J.), March 14, 17, 18, 19, 1947.]

Sale of land—Memorandum of contract—Material term not included in memorandum—Term exclusively for benefit of one party—Right to waive and proceed on agreement as evidenced by memorandum—Term specifying date of vacant possession—Law of Property Act, 1925 (c. 20), s. 40 (1).

A

If a memorandum or note of a contract for the sale of land omits a material term of the bargain, it fails to comply with s. 40 (1) of the Law of Property Act, 1925, subject to the qualification that, if the omitted term is exclusively for the benefit of one party, he may sometimes waive the benefit of it and sue for enforcement of the contract without it.

B

On January 31, 1946, vendor and purchaser met and a bargain was struck for the sale of a freehold bungalow and land. The purchaser paid a deposit of £100 and the vendor signed a deposit receipt as follows: "Received of H.H. [the purchaser] the sum of £100, being deposit on bungalow and ground named 'Oakdene,' Station Road, Stoke Mandeville, Bucks., sold for £1,000." In an action by the purchaser for specific performance of the agreement of sale, it was found that the agreement contained a term as to vacant possession of the property being given by Mar. 31, 1946, which was not mentioned in the deposit receipt, that term not being pleaded by the purchaser:—

C

HELD: the purchaser could not succeed because

D

(i) he had failed to prove that the agreement on which he had brought his action (which must be taken to include, not merely the terms specified in the deposit receipt, but also the term as to vacant possession, which was a material term of the agreement and not merely collateral to it) was evidenced by a memorandum or note thereof in writing in accordance with s. 40 (1) of the Law of Property Act, 1925;

North v. Loomes ([1919] 1 Ch. 378) distinguished. *Johnson v. Humphrey* ([1946] 1 All E.R. 460) approved.

E

[AS TO CONTENTS OF MEMORANDUM, see HALSBURY, Hailsham Edn., Vol. 29, p. 241, para. 324; and FOR CASES, see DIGEST, Vol. 40, pp. 26-32, Nos. 111-172.]

Cases referred to:

F

(1) *North v. Loomes*, [1919] 1 Ch. 378; 88 L.J.Ch. 217; 120 L.T. 533; 12 Digest 156, 1109.

(2) *Martin v. Pycroft* (1852), 2 De G.M. & G. 785; 22 L.J.Ch. 94; 20 L.T.O.S. 135; 16 Jur. 1125; 42 E.R. 1079 L.J.J.; 12 Digest 358, 2975.

(3) *Allsopp v. Orchard*, [1923] 1 Ch. 323; 92 L.J.Ch. 257; 128 L.T. 823; 42 Digest 449, 209.

(4) *Johnson v. Humphrey*, [1946] 1 All E.R. 460; 174 L.T. 324.

WITNESS ACTION for specific performance of a contract of sale of land. The facts appear in the judgment.

G

C. L. Fawell for the purchaser.

S. Seuffert for the vendor.

H

EVERSHED, J.: This is an action, brought by the alleged purchaser, for specific performance of a contract for the sale to the plaintiff of a bungalow and ground known as "Oakdene," Station Road, Stoke Mandeville, Buckingham. Many questions have been indicated by the amended defence, but, in my view, there is one question only for determination—whether, on the facts of the case, the plaintiff is in a position to prove an enforceable bargain having regard to the terms of s. 40 (1) of the Law of Property Act, 1925.

The property, "Oakdene," consists of a one-storied dwelling-house, containing five living rooms or bedrooms and a scullery, and having attached to it some garden ground, the exact extent of which I do not know, but which has been used for fruit growing. In the dwelling-house at all material times lived the defendant, Mrs. Price, a lady now some 74 years old, who is substantially an invalid. There also lived in the house her own daughter, her son-in-law (the daughter's husband), and their child, nearly seven. The plaintiff, Hawkins, is

in business as a market gardener and fruit buyer and seller. In July, 1945, an old friend of Mrs. Price, a Mrs. Ward, knowing that Mrs. Price was anxious to find a buyer of her growing fruit on the trees, introduced Mr. Hawkins to her. On January 31, 1946, Mrs. Ward informed Mr. Hawkins that she had the strongest ground for believing that Mrs. Price was willing to sell him the bungalow at his figure of £1,000. Mrs. Ward and Mr. Hawkins went over to Mrs. Price's bungalow, and then and there the bargain was made.

What was the bargain? As pleaded in para. 1 of the statement of claim, it is stated as follows:

It was orally agreed between the plaintiff and the defendant that the defendant would sell and the plaintiff would buy the freehold bungalow and ground of the defendant known as Oakdene, situate in Station Road, Stoke Mandeville, aforesaid for the sum of £1,000.

According to the statement of claim, that is all, but I am clear that there was another term which was part of the bargain, namely, that possession should be given on Mar. 31, particularly as regards the garden. That that was an important term of the arrangement is made plain from the correspondence. In every letter the term or condition that vacant possession should be given and completion had on that date was insisted on as one of the important parts of the arrangement. That term, however, does not form any part of the agreement as alleged in para. 1 of the statement of claim, nor is there any evidence of it in the note or memorandum which is relied on by Mr. Hawkins to satisfy s. 40 of the Law of Property Act, 1925. That document came into existence in the following circumstances. At the meeting on Jan. 31, Mr. Hawkins stated that the proper thing would be for him to pay a deposit and he drew a cheque on the Westminster Bank for £100. Mr. Hawkins was then concerned to get some writing as evidence of the bargain he had made, and it was arranged that Mrs. Ward's daughter should prepare a receipt which Mrs. Price should be asked to sign. Miss Ward did prepare the document, and next day or the day after Mrs. Price signed it. It is in these terms:

Received of Mr. Harold Hawkins, 20 Brook Street, Aston Clinton, Bucks., the sum of £100, being deposit on bungalow and ground named "Oakdene," Station Road, Stoke Mandeville, Bucks., sold for £1,000.

That document is alleged to constitute a note or memorandum in writing of the bargain sufficient to satisfy s. 40 of the Law of Property Act, 1925. The defence, by para. 1, denies that the oral agreement as alleged in para. 1 of the statement of claim was made. Paragraph 2 of the defence is as follows:

If, as is not admitted, an oral agreement was entered into between the plaintiff and the defendant on January 31, 1946, for the sale of Oakdene, Station Road, Stoke Mandeville, such agreement was subject to the following express conditions, *viz.*, that the plaintiff should find for the defendant suitable alternative accommodation prior to March 31, 1946, unless the defendant should find such alternative accommodation prior to the said date and the defendant should be in the position of being able to give the plaintiff vacant possession on March 31, 1946.

The second alleged condition adumbrated a suggested statutory tenancy on the part of the daughter and the son-in-law, and the plea in para. 3 of the defence was that neither condition was complied with. I observe that the conditions as so pleaded have not been proved. I am satisfied that there was no condition as to finding alternative accommodation. I am not satisfied on the evidence before me that there was any statutory tenancy. In other words, it was no part of the bargain that the sale should be conditional on Mrs. Price being able to give vacant possession. It is, however, clear that the date—March 31—in reference to the giving of possession is something indicated by the defence as material to the bargain. In para. 5 of the defence there is a general plea of s. 40 of the Law of Property Act.

The first matter I have to determine is this. I have said that I hold the agreement to have been, not in the form pleaded in para. 1 of the statement of claim, but in that form together with the added term which I have stated in regard to possession, that term also involving the question of completion. Counsel for Mr. Hawkins says that that term, though not pleaded and although there is no evidence of it in the receipt, does not adversely affect the plaintiff's rights because it is substantially, if not exclusively, for the plaintiff's benefit,

A and one, therefore, which he is entitled to waive, and that he, having waived it, may sue on the agreement without it, the agreement so shortened being sufficiently evidenced by the receipt. Counsel adds that in any case, in the events which have happened, the term about possession on Mar. 31, or, possibly, during April or May, has ceased to have any practical significance, all those months having long since passed, and that it has ceased to be significant, not through any fault of the plaintiff, but because the defendant has proceeded to repudiate her obligations under the contract, so that, if the defendant were now to be entitled to set up this oral term and then to say that the plaintiff's rights were defeated because there was no sufficient memorandum to satisfy the statute, that would be allowing the statute to be used as an instrument of fraud, because it would be allowing it to be used to defeat what justice demanded. Counsel has further said that the plea of the statute in any case, on a proper view of the defence, is not raised as regards this matter. All that the defence has done is to plead the statute generally as an answer to the agreement which the plaintiff pleads, and, if the agreement was, in truth, as the plaintiff pleads it, then, since all the terms in para. 1 are evidenced in the receipt, the statute is satisfied. It is said it would be contrary to principle and the practice of the court to allow para. 2 of the defence to be amended by substituting for the plea of the somewhat vague condition about the defendant being able to give the plaintiff vacant possession an allegation of an additional term as to the date of possession, and then to enable the defendant to say that that term is not evidenced by any memorandum in writing to satisfy the statute.

C Those are formidable arguments, and particularly so when reference is had to the authorities to which counsel has drawn my attention, but, as I have already indicated, I have reached the conclusion that the plaintiff cannot succeed because he fails to satisfy what the statute requires him to satisfy (that statute D having been pleaded sufficiently), namely, that the agreement he seeks to prove has been evidenced in writing in accordance with the statute. Indeed, as I think, the plaintiff is placed on the horns of a dilemma. If he relies strictly on his pleading, he has failed to prove the contract which he has alleged, because the contract with the term added, as it seems to me, is substantially a different contract from that which he has pleaded, but, if, notwithstanding the plea, he is entitled to set up some other contract and then waive one of its terms, it seems to me that the general plea of the statute would then be an answer to it.

E It is, first, necessary to observe what the statute says. Section 40 (1) is in these terms so far as material :

No action may be brought upon any contract for the sale . . . of land . . . unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing . . .

F The agreement on which the action is brought is the agreement which the plaintiff and the defendant made, and that agreement, as I have held, consists not merely of the few terms specified in para. 1 of the statement of claim, but also of the term which I think was a material part of the bargain, namely, the term in regard to possession. That agreement is one and indivisible. Can it be said that there is a memorandum or note of that agreement in writing ?

G That raises the question : Is it necessary that every term of the parole agreement should be so evidenced ? There is, I think, clear authority that every material term must be so evidenced. The memorandum, however, need not refer to matters which the law implies. Such matters, I assume, would not in terms be part of the bargain struck, but, whether they were or not, it is clear that an implied term, such as that the vendor should make a good title, has not to be noted in the writing. But it is said that there is a further exception, and what I am concerned with and the difficulty in this case, is the scope of that further exception. The matter is thus stated in *FRY ON SPECIFIC PERFORMANCE* (6th ed.), p. 504, n :

H It would seem that where a stipulation of no great importance and solely benefiting the plaintiff is omitted from the memorandum, the defendant will not, in an action for specific performance, in which the stipulation is not asserted against him, be allowed to set up that the memorandum is insufficient by reason of such omission to satisfy the statute, if the plaintiff chooses to waive the stipulation.

The case cited in support of that is *North v. Loomes* (1). I have also been referred

to the last edition of WILLIAMS ON VENDOR AND PURCHASER, and at vol. 1, pp. 4, 5, the same point is dealt with, and the material sentence is this:

It appears, however, that if a stipulation, which is to the detriment or for the benefit of one of the parties exclusively, is omitted from the memorandum, that party may submit to perform it or waive the benefit of it (as the case may require), and may with such submission or waiver specifically enforce the contract as stated in the memorandum. But this exception does not apply where no agreement at all has been actually concluded.

There is no doubt that the two textbooks differ, that in FRY, but not in WILLIAMS, it is said that the stipulation not only has to be exclusively for the benefit, or to the detriment, of one party or the other, but also should be "of no great importance." I am very anxious not to try and lay down matters of general principle which are not necessary for the decision of this case, but it is, as things have turned out, incumbent on me to express a view, though not intended as an exhaustive definition, of the scope of this exception such as it is.

I wish to preface what I am about to say by observing that, as I see it, there may well be a difference between cases in which the memorandum is the contract or purports to be a record of the contract, on the one hand, and, on the other, cases where the contract sued on is oral, and the question is whether some document, such as a receipt for the deposit (which does not on the face of it purport to be an agreement), sufficiently satisfies the statute. I say that for this reason. In one of the cases cited (*Martin v. Pycroft*) (2) the question arose as regards an agreement for the grant of a sub-lease. The plaintiff sued for specific performance of the agreement, and the written document relied on was plainly and obviously intended to be an agreement. It was so described and expressed, and was on the face of it an exhaustive written agreement between the parties. The defendants, in resisting the decree, set up the allegation that, though not in writing, it was part of the arrangement that the plaintiff should pay the defendants a premium of £200 for the privilege of getting this sub-lease. To that the plaintiff assented, submitted to pay the £200, and said that, so submitting, he was entitled to specific performance of the contract, but PARKER, V.C., refused to grant specific performance on the ground that the Statute of Frauds was a fatal obstacle to the plaintiff. KNIGHT BRUCE, L.J., in the Court of Appeal, expressing the judgment of the court, took a different view, and said that where, in circumstances such as were there proved, the plaintiff submitted to be bound by a term only for the benefit of the defendants, it would be contrary to all proper principles to allow the defendants to resist specific performance of the agreement contained in the written contract by setting up the added term to which the plaintiff had assented.

North v. Loomes (1), on the other hand, was a case in which the agreement made was a parole agreement for the sale by North to Loomes of certain premises for £590. The written memorandum relied on was a receipt in this form: "Received of Mr. Joseph Goddard Loomes the sum of Fifty pounds deposit on the purchase price Five Hundred and Ninety pounds (£590) for the house and premises and land in the occupation of Mr. R. Keene, situate in the High Street, Chinnor, and known as Holmleigh. The balance of the purchase price to be paid on or before March 25, 1918. Purchase price, £590; Balance £540. (sgd.) Frederick J. North," and there was a date. It was alleged that the bargain that was made included another term, not directly referable to the sale in the sense of affecting the title, or the price, or the right to possession, and so on, but a term, collateral to the bargain, that the defendant purchaser (Loomes) would pay both his own costs and those of the vendor (North). The obligation to pay these costs on the part of Loomes was stoutly denied. Certain correspondence had ensued while matters were in negotiation for the conveyance, and, Loomes having repudiated any bargain, the action was brought by North. Loomes set up as a defence the very term which he had previously repudiated, namely, his obligation to pay costs, and stated that, since that term was not in the memorandum, the plaintiff was defeated by reason of the statute. I say "set up" but the defence, in the form in which it was presented, did not in terms plead the matter in that way, and it was, therefore, necessary, if this defence was to be open to the defendant, that the defence should be amended that that might be pleaded, and the learned judge, not unnaturally, refused to allow such an amendment. He did, however, say that, even

if such an amendment was made, or if the defence, as it stood, left it open to the defendant to plead this additional term, nevertheless, since the term was one (and here one gets the qualification referred to in *FRY*) of insufficient importance to have been referred to in the receipt, it being a term exclusively for the benefit of the party suing (namely, the vendor, North), North would be entitled to waive his right to have all the costs paid and to sue on the agreement as recorded in the receipt, which receipt contained a reference to all the terms of sufficient importance to be recorded in the document.

- A If I apply the principle which one finds in that decision—and I do not overlook the final paragraph in the judgment, referring to *Martin v. Pycroft* (2), which was added by the learned judge after he had written the earlier part of his judgment and after he had used the phrase “of sufficient importance”—there are obviously certain marked distinctions. In the first place, if the provision in *North v. Loomes* (1) about paying the costs could not be regarded as of sufficient importance to be worth recording, that observation could not fairly, in my judgment, be applied to the term about vacant possession which the parties made in this case. I need only recall on that head the reference I have already made to the correspondence which the plaintiff’s solicitors wrote. Throughout they laid emphasis on this term about vacant possession on March 31. They (and I assume they acted on the instructions of their client) regarded it as an obviously important clause. Secondly, I am far from satisfied that that term can be described as one exclusively for the benefit of the plaintiff. The contract was made on January 31. The date fixed (March 31) was two months ahead, and it may well be that, if there had been nothing agreed about possession or completion, a reasonable time might have expired on a date not greatly different from March 31, but it has to be remembered what were the circumstances as regards the defendant, her daughter and son-in-law as the plaintiff stated them.
- D The plaintiff wanted this house, not for his own occupation, but for that of a foreman, and he was particularly anxious to get possession of the garden so as to be able to attend to the fruit trees not later than the end of March. When all those circumstances are borne in mind, apart from the obvious importance that there should be something fixed about completion, it seems to me that the term was for the benefit, and intended for the benefit, of both parties. Mr. Hawkins was anxious to be secure of possession of the garden by March 31, and it may be some of the house, but he was willing to concede to Mrs. Price the right to remain on for an additional two months. I do not, therefore, think this is a case where one party or the other could have waived the term on the ground that it was exclusively for his or her benefit. So, without travelling further into the detail of these cases, it is, perhaps, prudent that I should confine myself to saying that this term was, in my judgment, of real importance so as to be a very substantial and material part of, and not merely collateral to, the bargain, and was, further, not exclusively for the benefit of one party or the other, certainly not exclusively for the benefit of Mr. Hawkins and one which he would be entitled, therefore, to waive.
- E

- Now, I have already indicated that the question of importance may or may not be an essential element in these cases, according as one accepts the statement of the text in *WILLIAMS*, on the one hand, or that in *FRY*, on the other, but, so far as it is necessary for me to do so, I state my own view to be, that, if the term is really a fundamental part of the bargain and to that extent a material term, unless there is a note or memorandum of it, *prima facie* the plaintiff must fail to establish that there is a note or memorandum of the agreement within the terms of the section. In the absence of the note or memorandum of such a term, the note or memorandum which does exist is of some agreement which is materially different from or is not the agreement sued on.
- G

- H *Allsopp v. Orchard* (3) was referred to, and I do not think I need say anything about it beyond that there the alleged agreement was contained in letters. It was pleaded by the plaintiff, suing for specific performance, that it was on its proper construction an agreement for the sale of the rectory and all the glebe land, and that was the agreement he set up. The learned judge held that the true agreement was different from that if, indeed, there was any final agreement because there should have been an exclusion from the glebe land of three acres which had never been defined. The plaintiff sought to waive any exclusion, saying he was willing to transfer the whole of the glebe land, but it

was held that there was no room for the doctrine of waiver, because the plaintiff had failed to prove the contract he sought to establish.

There is one other case to which it is necessary to refer, the recent decision of ROXBURGH, J., in *Johnson v. Humphrey* (4). That, again, was a case in which the bargain alleged was an oral bargain, and there was a memorandum of it made on the following day. The question there was similar in some respects to the present one—whether the bargain which had been proved contained a term to which there was no reference in the written memorandum. ROXBURGH, J., said [1946] 1 All E.R. 462, 463:

I am quite satisfied that one of the terms to which the plaintiff and the defendant agreed on Nov. 9 was that vacant possession should not be given until the defendant could make other suitable arrangements for herself and her furniture . . . But that the stipulation was made, and insisted upon, that she was not to give vacant possession until she had made some suitable arrangements for herself and her furniture, is to my mind established beyond all doubt. I do not think there is any conflict of evidence on the point. If there was a term agreed to by both parties on Nov. 9 that the lady should give vacant possession when she could make other suitable arrangements for herself and her furniture, the memorandum does not contain all the terms of the bargain because it does not contain that term. It leaves the matter as a big query. . . But it does not say when possession is to be given: therefore, plainly it does not include all the terms of the bargain, if I am right in holding, as I do hold, that one of the terms related to the giving of vacant possession. Nor do I think it matters precisely what that term was and whether or not it was too vague to be enforceable. If the term was too vague to be enforceable in a court of law, it would only mean that there was no contract, and, therefore, there could be no memorandum of it. Therefore, in my judgment, once I reach the conclusion, which I do, that there was a term about vacant possession agreed to on Nov. 9, the memorandum signed by the defendant on Nov. 10 cannot be a memorandum sufficient to comply with the Law of Property Act, 1925, s. 40, because it omits a material term of the bargain.

It is, no doubt, true, as counsel for the plaintiff says, that the decision of that case may be rested on the ground that there was no real bargain at all. It is also true, as counsel points out, that, apparently, none of the cases (*North v. Loomes* (1) in particular) was cited to the learned judge, but there is no doubt to my mind that the learned judge is there affirming the proposition of law that, if the memorandum omits a material term of the bargain, it fails to comply with s. 40 of the Law of Property Act, 1925. In my judgment, that proposition is in general correct. No doubt, there is the qualification to it that, if a term is exclusively for the benefit of one party, that party may sometimes waive the benefit of it and sue on the contract for enforcement, even although the memorandum contains no evidence of that term. I say "may sometimes," because I do not want to lay down any final conclusion as regards the question whether the term in question must be of importance or material. I have indicated that, if the term is really an essential part of the bargain, my own view is that there must be some memorandum of it, but I make no attempt to determine the point at which a term may cease to be of such fundamental importance as to make it unnecessary that there should be a note of it. Subject to the qualification I have indicated, I see no ground to doubt the correctness of the decision of ROXBURGH, J., in *Johnson v. Humphrey* (4). I, therefore, have come to the conclusion that the plaintiff fails to prove such a contract as he set out to prove, and that the only contract which he can prove is one to which there is the fatal objection that it is insufficiently recorded in the receipt. The result must be that the action fails.

Judgment for defendant.

Solicitors: Kirby, Millet & Ayscough, agents for Horwood & James, Aylesbury, Bucks. (for the purchaser); Pyke, Franklin & Gould, agents for Parrott & Coales, Aylesbury, Bucks (for the vendor).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Re HOLLIDAY'S WILL TRUSTS, HOUGHTON AND ANOTHER
v. ADLARD AND OTHERS.

[CHANCERY DIVISION (Romer, J.), January 23, March 17, 18, 1947.]

Executors—Apportionment between capital and income—Settlement by will of residuary estate—Power to postpone conversion—Tenants for life entitled to retain income of wasting or hazardous assets—Residue including absolute interest in income-producing fund subject to annual charge on income.

Wills—Settlement—Apportionment between capital and income—Settlement of residuary estate including absolute interest in income-producing fund subject to annual charge on income.

By his will a testator, who died in 1927, settled his residuary estate on certain trusts. He gave the trustees a discretionary power to postpone sale and conversion and declared that any yearly interest accruing after his death and until actual sale and conversion should be applied as income, without regard to the amount of such income or the wasting or hazardous nature of the investments. The residue included interests derived under two settlements made by the testator's father. In the events that had happened, the testator was at his death absolutely entitled to certain sums of money under these settlements, subject to a discretionary power given to the trustees of the settlements to apply the annual income of the whole or any part thereof for the benefit of the widow of the testator's brother, C. Until 1939, C.'s widow had received £400 a year out of the settlement funds, and the surplus, after the testator's death, was received by his trustees, but between 1939 and her death in 1942, C.'s widow received the whole income of both funds. The testator's trustees had never exercised any discretion whether or not to sell the testator's interest in these funds. They had now received the sums to which he was entitled under the settlements and the question was whether, as between tenants for life and remaindermen of the testator's residue, these sums ought to be apportioned so as to give something in the nature of income to the tenants for life, or whether the whole amounts ought to be treated as capital. The life tenants contended that an apportionment should be made in accordance with the principle of *Re Chesterfield's Trusts* (24 Ch.D. 643):—

HELD: (i) the testator's interest in the settlement funds was not a reversionary interest, but an absolute interest subject only to a charge on income.

(ii) since these interests produced income and were immediate interests subject only to an annual charge on income, it was not necessary for the trustees, at the time of the testator's death, to exercise a discretion whether they should sell or retain.

Rowlls v. Bebb ([1900] 2 Ch. 107) distinguished.

(iii) the principle of *Re Chesterfield's Trusts* did not apply to an income-producing fund which was absolutely vested subject to an annual charge on income, and, accordingly, the rule applicable was that the tenants for life must submit to all the annual charges on income.

(iv) since the tenants for life had received income from time to time and were entitled to retain it under the will and their rights in relation to the funds were limited to that, there was no necessity for apportionment, because there was no equity which demanded any such interference with the ordinary course of administration as laid down in the will, and, therefore, the sums received by the trustees must be applied as capital.

[AS TO THE RULE IN *RE CHESTERFIELD'S TRUSTS*, see HALSBURY, Hailsham Edn., Vol. 14, p. 371, para. 694; and FOR CASES, see DIGEST, Vol. 20, pp. 368-370, Nos. 1065-1073.]

Cases referred to:

- (1) *Re Chesterfield's (Earl) Trusts* (1883), 24 Ch.D. 643; 52 L.J.Ch. 958; 49 L.T. 261; 20 Digest 368, 1065.
- (2) *Rowlls v. Bebb*, *Re Rowlls*, *Walters v. Treasury Solicitor*, [1900] 2 Ch. 107; 69 L.J.Ch. 562; 82 L.T. 633; Digest Supp.
- (3) *Re Darby*, *Russell v. Macgregor*, [1939] 3 All E.R. 6; [1939] Ch. 905; 108 L.J.Ch. 347; 160 L.T. 602; Digest Supp.
- (4) *Allhusen v. Whittell* (1867), L.R. 4 Eq. 295; 36 L.J.Ch. 929; 16 L.T. 695; 23 Digest 464, 5358.

ADJOURNED SUMMONS to determine whether, as between tenants for life and remaindermen of the testator's residue, there should be an apportionment of certain funds comprising part of the residue. The facts appear in the judgment.

C. L. Fawell for the trustees of the will.

J. L. Arnold for the tenants for life.

R. W. Goff for the remaindermen.

ROMER, J. : This summons raises questions affecting two sums of money which are held by the plaintiffs as trustees of the will of the testator, James Richardson Holliday. The first sum represents money settled by a settlement dated Apr. 8, 1895, to which the testator's father and others were parties, and the other sum represents a fund settled by the will of the testator's father.

The testator made his will on Jan. 24, 1922, and by it he gave his residuary estate to his trustees on the usual trusts for sale and conversion and subject thereto to hold the proceeds upon the trusts therein declared. After directing the payment of an annuity to his wife, and making other dispositions, he directed his trustees to hold the proceeds of his residuary estate as to one-third part thereof upon trust to pay the income thereof to certain named nieces and the survivors or survivor of them during their respective lives, and upon the death of the survivor the one-third share, as well capital as income, was given to the trustees of the Public Picture Gallery Fund, Birmingham. The testator then directed his trustees to hold one other third part of the proceeds of his residuary estate as to one-half thereof in trust for a named niece and as to the other half in trust for another named niece, and, subject as aforesaid, he directed his trustees to hold the remaining one-third part on trust to pay the income to a sister for life—she is now dead—and from and after her decease he directed his trustees to stand possessed of the same one-third part, as well capital as income, as to one half in trust for a daughter of that sister and as to the other half for another daughter of that sister, and he proceeded then to settle the shares of the nieces in his residuary estate on trust for themselves for life, and then their issue were to take, and, subject to a power of appointment over one half of each share in default of issue as therein mentioned, the same Public Picture Gallery Fund, Birmingham, was to take each share. There was then a power to the trustees to postpone for such period as they should judge expedient the sale, conversion and getting in of his estate, and he authorised his trustees to retain investments as therein mentioned. By cl. 20 he declared that the dividends, interest and other yearly produce of his estate to accrue after his death and until the actual sale, conversion and getting in thereof should be deemed the income thereof applicable as such for the purposes of the said trusts without regard to the amount of such income or to the wasting or hazardous nature of the investments yielding the same. The testator died on July 22, 1927, and his widow, to whom he bequeathed an annuity, died on Jan. 2, 1939.

The problem which is before the court relates to two funds, and the trusts by virtue of which those funds have now come into the hands of the testator's trustees are set out in para. 9 of the affidavit of Mr. Frederick Leonard Houghton sworn on Aug. 19, 1946. Mr. Houghton says :

Included in the testator's residuary estate were the following interests, namely : (a) His beneficial interest under a settlement, dated Apr. 8, 1895, and made between the father of the testator, of the first part, Arthur Godlee and Edgar Hedley Howell, of the second part, and the testator's brother, Frank, the said Edgar Hedley Howell and Arthur Godlee of the third part. Under this settlement the father settled a fund (therein called "Charles' Fund") [Charles was a brother of the testator] on trust for the benefit of Charles and others during the life of Charles and after Charles' death (in the event which happened of his leaving no child) in trust for the testator and his brother Frank absolutely in equal shares with a proviso that it should be lawful for the trustees of the settlement if they in their absolute discretion thought fit to pay or apply the annual income of the whole or any part of Charles' fund to or for the benefit of any wife of Charles who should survive him during the residue of her life or during such shorter period as the trustees might in their absolute discretion think fit. (b) His beneficial interest under the will and codicil, proved on May 18, 1898, of the father (who died on Mar. 12, 1898) whereby part (therein called "Charles' Fund") of the proceeds of sale and conversion of the father's residuary trust estate were directed to be held on trusts after the death of Charles for his children and in default of children for the testator absolutely with a proviso (in similar terms to the proviso in the settlement) in favour of any widow of Charles.

Charles died on Apr. 7, 1899, without issue, but leaving a widow, namely, Mary Holliday, him surviving. Mary Holliday died on Oct. 30, 1942, having received for some years £100 without deduction of tax from "Charles' fund" under the settlement and £300 without deduction of tax from "Charles' fund" under the father's will and codicil, but after 1939 she received the whole income of "Charles' fund," both under the settlement and under the father's will and codicil, this being less than the £100 and the £300. Mr. Houghton then states :

A Half Charles' share under the settlement and all Charles' share under the father's will (less duties and costs) have now been received by the plaintiffs and were of the respective values at the date of transfer of £2,866 and £11,549 and are constituted by the investments respectively specified [in an exhibited document].

B The question in relation to these funds arises as between tenant for life and remainderman and is whether these funds ought to be apportioned so as to give something in the nature of income to the income beneficiaries under the testator's will, or whether the whole amounts ought to be treated as capital, and what principle should be applied if an apportionment is required.

C An exhibit to Mr. Houghton's affidavit shows the payments which were made to the executors and trustees of the will of the testator in respect of the surplus income of those two "Charles' funds." In 1927—that being the year in which the testator died—there was an apportioned amount of £71 under the will fund and £75 under the settlement fund. In 1928 there was a surplus to the estate of £100 under the will fund, and £58 under the settlement fund, and so on. In sums of varying amounts there was surplus income from both these funds down to 1939, the surplus in that year being a small one. To complete the evidence the summons was adjourned until to-day so that a further affidavit could be put in on behalf of the plaintiff trustees giving the facts affecting the question whether the trustees exercised a discretion in the matter of retaining or selling the interest of the testator in these two "Charles' funds." This further affidavit has now been filed and the effect of it is, I think, summed up in one sentence. Mr. Houghton says :

E We were, of course, fully aware of such interests and that we were receiving surplus income of such funds from time to time, but we never consciously considered the question whether we should sell such interests and the question of sale was never raised. We assumed as a matter of course that we should retain them.

F He then exhibits a document showing the investments constituting the testator's residuary estate when originally constituted, and some of those investments consisted and still consist of non-trustee securities.

F It is argued on behalf of those interested in income under the trusts of the testator's will that an apportionment of these funds which have now come to the hands of the trustees should be effected in accordance with the decision in *Re Chesterfield's Trusts* (1), and the kind of principles which, it is said, are relevant to the present case are stated thus in JARMAN ON WILLS, 7th ed., pp. 1203, 1204 :

G In most cases, however, the testator gives the trustees a discretionary power of sale, or power to postpone conversion, and then the tenant for life cannot compel a realisation of the property so long as the trustees, in the proper exercise of their discretion, think fit to keep it unconverted ; in such a case the tenant for life gets nothing until the property falls into possession or is sold ; but he may have a right to an apportioned part of the fund when it falls into possession . . . In such a case as that above referred to [*Rowlls v. Bebb* (2)] where conversion ought to have taken place, either because there was no power to postpone, or because the power was not exercised or improperly exercised, it becomes necessary to determine what portion of the property belongs to the tenant for life or his representatives.

H Those passages refer to reversionary or other interests not producing income, and the leading case on the subject of reversionary interests is *Rowlls v. Bebb* (2). In that case the Court of Appeal were satisfied that the trustees had not, in fact, exercised a discretion whether to retain or to realise a reversionary interest which formed part of the testator's estate and the court also came to the conclusion, having regard to the considerations which were disclosed in evidence, that it would not have been proper for the trustees to have exercised their discretion in favour of retention. It was held that, notwithstanding a clause in the will somewhat resembling cl. 20 in the will in the present case, the reversionary interest ought to be apportioned (when it fell into possession) as between

tenant for life and remainderman in accordance with the principle of *Re Chesterfield's Trusts* (1). The argument advanced on behalf of the income beneficiaries in the present case is that such an equity is similarly applicable here, and should be applied.

To arrive at a conclusion on this subject it is necessary, first, to see precisely what the interest of the testator was in the two "Charles' funds" at the time of his death. Charles had died in 1899, without issue, but his widow was still alive. That being so, one looks at the settlement of 1895 to see what the interest of the testator's estate was at the time of his death. The position then was that the settled property was held in trust for the testator and his brother, Frank, absolutely in equal shares, but subject to a proviso that it should be lawful for the trustees of that settlement, if they in their absolute discretion should think fit so to do :

... to pay or apply the annual income of the whole or any part of Charles' fund or so much thereof as shall not have been so applied as aforesaid to or for the maintenance support and benefit of any wife of the said Charles Holliday who shall survive him during the residue of her life or during such shorter period as the trustees may in their absolute discretion think fit.

The interest of the testator under the other "Charles' fund" was precisely the same, save only that he had a sole interest in that fund (*i.e.*, it was not shared by his brother, Frank, or by anyone else). Consequently, he had, during his lifetime and at all periods after the death of his brother, Charles, and his estate had at the time of his death and subsequently, an absolute interest in income-bearing property, and the only barrier separating him while he was alive, and his estate after he was dead, from receipt of that income and of the funds themselves was the power of the trustees of those funds to divert some or all of the income in their discretion from time to time to the maintenance, support and benefit of Charles' wife so long as she remained alive. It seems to me clear that that interest was not a reversionary interest in any true sense of the word at all. It was an absolute interest, but the income was temporarily charged in favour of a third person. In my view, there is no justification for holding that the equity which has long since been applied to reversionary interests in the strict sense—namely, interests which are wholly in reversion and bringing in no income to the estate—should be applied to an interest of that character for the purpose of adjusting the rights as between the tenants for life and remaindermen, that equity having no application, in my judgment, to an income-bearing fund which is absolutely and immediately vested and subject only to a charge imposed on the income for the benefit of a third party.

Counsel for the income beneficiaries conceded that the interests of the estate in the two "Charles' funds" were not truly reversionary interests, but, he said, they were the kind of interests which sufficiently justified and ought to attract an application of the same principle in order that justice might be done between the income beneficiaries, on the one hand, and the capital beneficiaries, on the other. He contends that these funds ought to be apportioned on the *Chesterfield* basis, but that the amounts which have been received by way of surplus income since the testator's death and paid to the income beneficiaries must be brought into account against the proportion of the sum which would be allocated to income on the *Chesterfield* calculation. As to this, I would only observe that the method of bringing such sums into account (with interest) would seem to give rise to difficult questions and somewhat intricate calculations. Counsel for the capital beneficiaries, on the other hand, argues that that kind of principle has no application to an income-bearing fund of this nature and that this must be treated as a case of an income-producing fund subject to an annual charge on income, and that, accordingly, in such cases as this, the rule applicable is that a tenant for life must keep down, or, at all events, submit to, all annual charges on income, and that the income beneficiaries, having received income since the testator's death, are entitled to keep it by virtue of cl. 20 of the will. That, he contends, is the beginning and end of the matter, and no question of apportionment or necessity for apportionment arises because there is no equity which demands any such interference with the ordinary course of administration as laid down in the testator's will itself.

I accept that view of the matter. I do not propose in this judgment to go into any further consideration of the decision in *Rowlls v. Bebb* (2), or the cases

which preceded it. They were cases of non-income-bearing reversionary interests which, as such, fell to be apportioned. I do not regard these as non-income-producing reversionary interests at all, and it seems to me that, as they produced income and were immediate interests subject only to an annual charge on income, there was nothing for the trustees to direct their minds to at the date of the testator's death, from the point of view of inquiring whether they should sell or whether they should retain. Their interest in the funds was not reversionary, and the fact that some income might be diverted to a third party did not attract an inquiry of that kind.

- A No authority in point was cited, and, so far as I am aware, no authority precisely in point exists. *Re Darby* (3) was referred to, but, I think, only for purposes of comparison. In that case a father gave to his daughter an absolute interest in his estate, but subject to an annual sum charged on the estate in favour of the girl's mother, namely, the testator's widow. She inherited that estate on those terms, and then she made her own will and charged her residuary estate with an increased annuity in favour of her mother. The question arose on her death, leaving her mother surviving, whether or not (*inter alia*) the doctrine of *Allhusen v. Whittell* (4) should be brought into play in relation to payments to be made to the mother. I think the only point sought to be made on that authority was that it did not, apparently, occur to anyone to regard the daughter's interest in her father's estate as being a reversionary interest in any sense of the word, but it was treated as an absolute interest in possession, subject only to a charge upon income. The case was used merely as a matter of comment, and not as an authority on the question which I have to decide.

- C I decide this case on the short ground that these were absolute interests subject only to a charge on income; that the tenants for life of the testator's estate got such income as was available from time to time and were and are entitled to retain it; that their rights in relation to the funds are limited to that and extend no further; that this is not a case of a reversionary interest in respect of which the principle recognised and applied in *Rowlls v. Bebb* (2) operates; and, consequently, that no question arises of apportioning the sums which are now in the hands of the trustees. That being so, I need not express any opinion on what view should be taken of the evidence disclosed by the further affidavit or how—assuming that this had been a *Chesterfield* case (1)—that evidence should be treated. I will declare that the sums received by the plaintiffs on the death of Mary Holliday (the widow of the testator's brother, Charles), as representing both the "Charles' funds," ought to be held and applied as capital under the will and codicil of the testator.

Declaration accordingly.

- F Solicitors: *Emmet & Co., agents for Wragge & Co., Birmingham* (for all parties).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Affirmed. H.L. [1948] 2 All E.R. 378. ———

- G RUSHDEN HEEL CO., LTD. v. KEENE (INSPECTOR OF TAXES). RUSHDEN HEEL CO., LTD. v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Greene, M.R., Morton and Somervell, L.JJ.), March 10, 11, April 2, 1947.]

- H *Income Tax—Deductions against profits—Cost of litigation—Appeal in respect of incidence of excess profits tax—Income Tax Act, 1918 (c. 40), sched. D, Rules applicable to Cases I and II, r. 3 (a)—Finance (No. 2) Act, 1939 (c. 109), s. 18 (1).*

Revenue—Excess profits tax—Deductions against profits—Cost of litigation—Appeal in respect of incidence of tax—Finance (No. 2) Act, 1939 (c. 109), s. 14 (1).

The costs and expenses of a successful appeal in respect of the incidence of excess profits tax are not allowable as a deduction in the computation of profits for the purposes of either income tax or excess profits tax. The deduction authorised by the Finance (No. 2) Act, 1939, s. 18 (1), of the amount

of the excess profits tax payable in respect of a trade or business in computing for the purposes of income tax the profits and gains arising from that trade or business does not extend beyond that expressly mentioned in the sub-section, viz., the excess profits tax itself, nor are the costs and expenses in question deductible as being "wholly or exclusively laid out or expended for the purposes of the trade" within the Income Tax Act, 1918, sched. D, Rules Applicable to Cases I and II, r. 3 (a), for an expense is not deductible under that rule if it falls on the trader in some character other than that of a trader, e.g., as in this case, where the expenditure was incurred by the trader primarily in his capacity as a taxpayer. *Strong & Co. Ltd. v. Woodfield* ([1906] A.C. 448), followed. By s. 14 (1) of the Finance (No. 2) Act, 1939, profits for the purposes of excess profits tax are to be computed on income tax principles.

Decision of ATKINSON, J., [1946] 2 All E.R. 141, reversed.

[FOR EXPENSES WHOLLY OR EXCLUSIVELY EXPENDED FOR PURPOSES OF TRADE, see HALSBURY, Hailsham Edn., Vol. 17, p. 152; para. 312; and FOR CASES, see DIGEST, Vol. 28, pp. 42-44, Nos. 215-226.]

FOR THE FINANCE (No. 2) ACT, 1939, s. 18 (1), see HALSBURY'S STATUTES, Vol. 32, p. 1203.]

Cases referred to:

- (1) *Strong & Co., Ltd. v. Woodfield*, [1906] A.C. 448; 75 L.J.K.B. 864; 95 L.T. 241; 5 Tax Cas. 215; 28 Digest 57, 290.
- (2) *Allen v. Farquharson Bros. & Co.* (1932), 17 Tax Cas. 59; Digest Supp.
- (3) *Worsley Brewery Co., Ltd. v. Inland Revenue Comrs.* (1932), 17 Tax Cas. 349.

APPEAL by the Crown from a decision of ATKINSON, J., dated June 6, 1946, and reported [1946] 2 All E.R. 141, where the facts are set out.

The General Commissioners for the division of Wellingborough held that the costs and expenses incurred by the taxpayers in an appeal to the Special Commissioners in respect of the incidence of excess profits tax should not be allowed in the computation of the taxpayers' profits for the purposes of income tax or for the purposes of excess profits tax. On appeals by the taxpayers, by way of Cases Stated, ATKINSON, J., allowed the appeals. The Crown appealed.

The Solicitor General (Sir Frank Soskice, K.C.), Reginald P. Hills and Norman Rowe for the Crown.

J. Millard Tucker, K.C., and J. W. P. Clements for the taxpayer.

Cur adv. vult.

Apr. 2. LORD GREENE, M.R., read the following judgment. These two appeals can conveniently be dealt with in one judgment. The questions for decision may be stated succinctly in this way: Are the costs and expenses of a successful appeal in respect of the incidence of excess profits tax allowable as a deduction in the computation of profits (a) for the purposes of income tax (b) for the purposes of excess profits tax. To decide these questions it is not necessary to state the facts set out in the Case by the General Commissioners for the division of Wellingborough whose decision was as follows:

That the expenses claimed be disallowed both for income tax and excess profits tax, and that the appeals be, accordingly, dismissed.

On appeal to the King's Bench Division, ATKINSON, J., reversed this decision both as to income tax and as to excess profits tax.

It will be convenient to deal first with the question whether these costs and expenses are allowable as a deduction for the purposes of income tax. Section 18 (1) of the Finance (No. 2) Act, 1939, which imposed excess profits tax, provides that excess profits tax payable in respect of a trade or business for any chargeable accounting period shall, in computing profits for the purposes of income tax, "be allowed to be deducted as an expense incurred in that period." The phrase "allowed to be deducted" echoes the language used in the Income Tax Act, 1918, sched. D, cases I and II, r. 1:

The tax shall be charged without any other deduction than is by this Act allowed. Similar phraseology as to the allowance or non-allowance of deductions appears elsewhere in the rules. The simplest argument submitted on behalf of the taxpayers was to the effect that, as the amount of the tax has to be ascertained before the deduction allowed by the section can properly be made, the cost of ascertaining it must, by implication, also be an allowable deduction, whether

the ascertainment is effected by a simple calculation by accountants or by means of an appeal, successful or unsuccessful, to commissioners and, perhaps, ultimately to the House of Lords. There is, in my opinion, a simple answer to this argument—that the deduction authorised by the section does not extend beyond that expressly mentioned, *viz.*, the tax itself, and I see no justification whatever for extending its scope beyond what the section has in express terms provided. If the legislature had wished to authorise the deduction of such costs and expenses it could easily have said so.

A Once this special argument on the meaning of s. 18 (1) is disposed of, we are thrown back on the relevant rules which are generally applicable to deductions for the purposes of income tax. I have already quoted r. 1 of the Rules Applicable to Cases I and II. Rule 3 of the same rules, which alone requires to be considered, prohibits deductions in respect of

B (a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation.

The meaning of these words has been debated in a number of cases. The question has most frequently arisen in cases where the disbursement sought to be deducted was what may be very broadly described as of a commercial nature and the question has been whether it could be described as “money wholly and exclusively laid out or expended for the purposes of the trade.” The present

C case differs, in that an altogether different element is present, *viz.*, a liability to tax the ascertainment of which necessitates the expenditure. It is true that the excess profits tax is charged on the profits of the trade and the assessment is on the trader as a trader. Excess profits tax also differs from income tax in that it is not aptly described as the Crown’s share of the profits. It is also said on behalf of the taxpayers that it is a trade purpose to ascertain correctly the amount of excess profits tax which the trader is liable to pay, and that, if D he did not do so, his trade would suffer in the sense that, either he would not know its financial position, or he might be depleting his resources by submitting to excessive tax demands. From this is deduced the proposition, accepted by ATKINSON, J., that the cost of arriving at the correct figure, whether by simple accountancy or by litigation, successful or unsuccessful, is money wholly and exclusively laid out for the purposes of the trade.

E In answering the question raised I do not obtain any assistance from the cases that have been cited to us other than three to which I will now refer. Special reliance is placed by the Crown on the well-known *dicta* of LORD DAVEY in *Strong & Co., Ltd. v. Woodfield* (1). The deduction there claimed was in respect of the damages and costs awarded against the taxpayers (who were brewers) to a visitor at one of their licensed houses who was injured by the fall of a chimney. The only decision by the commissioners was that the deduction F claimed was not allowable. LORD DAVEY expressed the view ([1906] A.C. 453) that the words “for the purpose of the trade” mean

... for the purpose of enabling a person to carry on and earn profits in the trade ... It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits.

G I do not myself find in these *dicta* a completely satisfactory answer to the present problem. The language that we have to construe is the language of the rule and there is always the risk of finding oneself construing, not the rule, but a paraphrase of the rule expressed in a previous judgment. I should have thought that in *Strong & Co., Ltd. v. Woodfield* (1) it might have been said that an innkeeper who did not compensate a guest when the chimney of the inn fell on him and injured him would be likely to suffer in his trade, but the House did H not accept this argument. LORD DAVEY’s formula, however, at once confronts us with the question: “What is the meaning of the phrase ‘for the purpose of enabling a person to carry on and earn profits in the trade’ as applied to the present case?” It is said, and said, I think, with some force (and ATKINSON, J., agreed), that the ascertainment of a trader’s liabilities is essential for the successful carrying-on of his trade, whether they be trading liabilities in the strict sense or tax liabilities imposed on him as a trader in respect of his trade. I find, however, in *Strong & Co., Ltd. v. Woodfield* (1) what appears to me to be a clear answer to the present appeal. It is, I think, a matter not of *dictum*, but

of decision in that case that an expense is not deductible if it falls on a trader in some character other than that of a trader. This was the ground of the opinion of LORD LOREBURN, L.C., with which LORD MACNAGHTEN and LORD ATKINSON agreed. Their Lordships held that the expense there in question fell upon the taxpayers in their character not of traders but of householders. In the present case the excess profits tax is charged on the trader who carries on the trade, but his obligation to pay it is his obligation as a subject and a taxpayer, and, in ascertaining the amount of his liability, he is putting himself in a position to discharge his duty to the Crown. If his trading activities had come to an end, his obligations as a taxpayer would still have remained in respect of previous years. I am prepared to assume (although I do not so decide) that the ascertainment of the proper amount of tax payable ought, as the taxpayers argue, to be regarded as necessary for the proper carrying-on of the trade, and, therefore, for earning profits in the future, but I cannot agree that the money can be said to have been laid out "wholly and exclusively" for that purpose. It was laid out, as it appears to me, just as much, if not more, for the purpose of ensuring that the company, like any other taxpayer, should pay the proper amount of tax, no more and no less.

Only two cases have been referred to in which the element of expense connected with the payment of tax as distinct from what I have called a commercial expense had to be considered. The first is *Allen v. Farquharson Bros.* (2) a decision of FINLAY, J. The claim was for a deduction for income tax purposes of the costs of an appeal to the Special Commissioners against assessment to income tax under sched. D in respect of trading profits. The appeal had been in the main successful and the assessment had been considerably reduced in consequence. General Commissioners had held that the amount claimed was money necessarily wholly and exclusively laid out for the purpose of the business. FINLAY, J., referred to the distinction between income tax and excess profits duty and said that the former was the Crown's share of profits while the latter was a sum deducted before the profits are arrived at, but he did not regard the distinction as material for the decision of the case. He approved the practice of allowing the expenses of keeping an accountant, or in the case of large businesses an accountant's department. He referred to the probability that such a department would deal with income tax matters and he did not suppose that this fact would be used as a reason for disallowing the expense of the department. With this I agree, and I may add that an apportionment of the expense of such a department between its ordinary activities and its purely tax activities would normally be difficult and vexatious and any resulting tax probably negligible in amount. If FINLAY, J., meant more than this, e.g., if he meant that an accountancy expense incurred solely for the purpose of conducting a tax controversy with the Crown can be deducted, I would respectfully disagree. On the substance of the case, FINLAY, J., held that the expenditure there in question was an application of profits after they had been earned and not an expenditure necessary to earn the profits. He thus answered his question in the language of LORD DAVEY. It could, I think, have been as well answered on the ground which I have mentioned above, viz., that the expenditure was incurred by the company primarily in its capacity as a taxpayer and for the purpose of regulating the position as between itself as a taxpayer and the Crown.

The other case is *Worsley Brewery Co. Ltd. v. Commissioners of Inland Revenue* (3), a decision of this court. The company had employed accountants to audit their accounts for the 7 years 1914 to 1920 and to settle with the commissioners their excess profits duty position for each year. The fees paid for this work had been allowed as deductions both for income tax and excess profits duty purposes. In 1925 the company instructed other accountants. They completed their investigations in 1928 and as a result it was found that the company had paid too much duty and large sums were repaid to them. The company claimed that the costs of this investigation constituted an allowable expense for excess profits duty purposes and ought to be spread over the seven accounting periods in question. It does not appear to what extent the actual question of deductibility was argued. There was no reason why it should have been, since, as LORD HANWORTH, M.R., said (17 Tax Cas. 355), it was quite unnecessary to decide it. No advantage would have been gained by the company unless the

expense could be written back into the seven years since excess profits duty had come to an end. The sole question, therefore, was whether or not such a sum, if allowable, could be written back, and it was held that it could not. LORD HANWORTH, M.R. (*ibid.*) referred to the custom (which he appears to have approved) to allow accountancy charges in the computation of the profits for the purpose of excess profits duty. ROMER, L.J. (*ibid.*, p. 360) was "prepared to assent to the view" that the expense of an investigation by an accountant usually employed or by any accountant and the preparation of the profit and loss account and the balance sheet was a legitimate deduction both for income tax and for excess profits duty purposes. This, he thought "appears to be or at any rate may be taken" to be an expense made for the purpose of earning profits, but the expense of a later investigation made for the purposes of settling a question "between the trading concern and some third party" as to the correctness of the original ascertainment he was unable to regard as an expense incurred for the purpose of earning the profits. He said (*ibid.*):

It is not incurred for that purpose at all; it is incurred merely for the purpose of settling the dispute which has arisen.

These observations of ROMER, L.J., were relied on by the taxpayers in the present appeal. The argument is, I think, based on a misconstruction of what the Lord Justice said. His reference to the deductibility of accountancy expenses related only, as I read his words, to the ordinary investigation of a company's accounts for the purpose of drawing up or checking its profit and loss account and balance sheet "in the normal way." That this is what he meant is, I think, made clear by the contrast which he draws between work of that description and work undertaken for the purpose of a dispute between the company and a "third party"—by which, of course, he meant the Crown. It appears to me that the reference to the deductibility of accountants' fees does not extend to cover the case of accountants' fees incurred solely for the settlement of a tax question: *a fortiori* it cannot be relied upon as indicating a view that all the costs incurred in connection with a tax dispute, including the costs of litigation, are deductible. The language of ROMER, L.J., in my opinion, and with all respect to ATKINSON, J., who thought otherwise, was not intended by him to convey any such meaning.

This disposes of the question so far as deduction for the purposes of income tax is concerned. Under s. 14 (1) of the Finance (No. 2) Act, 1939, profits are to be computed for excess profits tax on income tax principles as adapted in accordance with the provisions of pt. I of sched. VII to the Act. There is nothing material in those provisions, and it follows that the costs and expenses in question cannot be deducted for excess profits tax purposes. Both appeals must be allowed with costs here and below.

MORTON, L.J.: I agree, but as we are differing from the view of the learned judge I desire to add a few words on what is, I think, a crucial portion of his judgment. He relies on the judgment of ROMER, L.J., in *Worsley Brewery Co. Ltd. v. Inland Revenue Commissioners* (3) and says it entirely confirms his own view. I think he understands ROMER, L.J., as saying that any expenses incurred to ascertain the profits of a business are money wholly and exclusively laid out or expended for the purposes of that business. I do not think that ROMER, L.J., intended to say this, and I respectfully agree with the construction which the Master of the Rolls has placed on the judgment of ROMER, L.J. If that judgment were given the wider meaning, it would, I think, lead to remarkable results. In the course of the argument it was put to counsel for the taxpayers that, if the expenses of a successful appeal to the Special Commissioners were allowable as a deduction, there was no logical reason why the expenses of a further appeal to the High Court, to the Court of Appeal, and, if leave were given, to the House of Lords, should not also be an allowable deduction. He agreed. It was then put to him that the same result must follow whether the taxpayer was ultimately successful or unsuccessful, and he agreed that this was so. He rightly qualified his answer by pointing out that such expenses must be "reasonable and necessary having regard to the requirements of the trade" in view of s. 32 of the Finance Act, 1940, but he admitted that that section could only affect the amount of the expenses allowed and had no bearing on the question whether the expenses which I have mentioned were or were not an allowable

deduction within r. 3 of the Rules Applicable to Cases I and II. I agree with the order proposed.

LORD GREENE, M.R. : I have the authority of SOMERVELL, L.J., to say that he has read my judgment and agrees with it.

Appeals allowed with costs.

Solicitors : *Solicitor of Inland Revenue* (for the Crown) ; *Scott & Son* (for the taxpayers).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Affirmed. H.L. [1948] 2 All E.R. 367.

SMITH'S POTATO ESTATES, LTD. v. BOLLAND (INSPECTOR OF TAXES). SMITH'S POTATO CRISPS (1929), LTD. v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Greene, M.R., Morton and Somervell, L.JJ.), March 10, 11, April 2, 1947.]

Income Tax—Deductions against profits—Cost of litigation—Expenses of ascertaining profits—Appeal vital to retain services of valuable employee—Income Tax Act, 1918 (c. 40), sched. D, Cases I and II, r. 3 (a).

Revenue—Excess profits tax—Cost of litigation—Expenses of ascertaining profits—Appeal vital to retain services of valuable employee—Income Tax Act, 1918 (c. 40), sched. D, Cases I and II, r. 3 (a)—Finance (No. 2) Act, 1939 (c. 109), s. 14 (1).

To secure their own supply of potatoes for the purpose of their business, a company formed and held all the shares in a subsidiary company which, with the parent company's money, acquired a large estate, previously managed for many years by an experienced farmer, Y. To retain Y.'s valuable services, the company entered into an agreement with him under which he was paid, in the accounting year ending Mar. 31, 1941, £6,486, which was included in the accounts of the subsidiary company. In computing the profits of the subsidiary company (which were thrown in with the parent company's profits) for assessment to excess profits tax for that chargeable accounting period, the Commissioners of Inland Revenue, acting under the Finance Act, 1940, s. 32, decided that no deduction should be allowed in respect of Y.'s remuneration in excess of £3,500, being the amount the commissioners considered reasonable and necessary having regard to the requirements of the trade or business and to the actual services rendered by Y. By virtue of the Finance Act, 1941, s. 34, the substantial additional taxation for which the parent company was liable on that basis would, in future years, be recoverable from Y., and, as they had every reason to believe that that would be the basis for Y.'s future allowed remuneration, both companies, regarding Y.'s employment as essential to the well-being of the enterprise and fearing they would suffer through Y.'s discontent at the prospect of the parent company, as a public company, being obliged to enforce its rights against him, appealed to the Board of Referees against this decision, and that Board held that £5,800 out of the sum of £6,486 was deductible. As a result, the commissioners did not seek to disallow any part of Y.'s remuneration in subsequent years. The subsidiary company incurred legal and accountancy costs of £622 in the preparation and prosecution of that appeal :—

HELD : though there was a special business motive for prosecuting the appeal to the Board of Referees, viz., the protection of the benefit of Y.'s services, a matter going to the earning, as distinct from the taxation, of future profits, the immediate and substantive purpose was to obtain a reduction of tax, and as, in accordance with the decision in *Rushden Heel Co., Ltd v. Keene* (ante p. 699), costs incurred in ascertaining the correct amount of tax are incurred by a taxpayer partly, if not mainly, in his capacity as taxpayer to secure that his liability as a taxpayer is assessed at the correct amount, and cannot be said to be wholly and exclusively laid out for the purposes of trade, the costs incurred in prosecuting the appeal were, there-

fore, not deductible for the purposes of income tax or for the purposes of excess profits tax.

Decision of ATKINSON, J. ([1946] 2 All E.R. 284), reversed.

[EDITORIAL NOTE.] This case must be read with *Rushden Heel Co., Ltd. v. Keene*; *Same v. Inland Revenue Commissioners*; which immediately precede it. The ratio *decidendi* in all the three cases is the simple one that for a deduction to be allowable in computing income tax it must be in respect of a disbursement *wholly and exclusively* laid out for the purposes of the trade: Income Tax Act, 1918, sched. D, Rules Applicable to Cases I and II, r. 3 (a); and the expense of litigation designed to secure a reduction in taxation, while, no doubt, *partly*, cannot be said to be *wholly and exclusively* incurred for those purposes. At first sight it may seem inconsistent that the expense of inducing an unsatisfactory director to retire is a business expense deductible from the company's profits when computing income tax—the case referred to by LORD GREENE, M.R., is *Mitchell v. B. W. Noble, Ltd.* ([1927] 1 K.B. 719)—whereas the expense of persuading a valuable employee to remain with the company is not, but on consideration it appears clear that the former expense can be said to have been incurred wholly and exclusively for the purposes of the trade and not to have fallen partly on the trader in his capacity as a taxpayer.

As TO EXPENSES WHOLLY OR EXCLUSIVELY EXPENDED FOR PURPOSES OF TRADE, see HALSBURY, Halsbury Edn., Vol. 17, p. 152, para. 312; and FOR CASES, see DIGEST, Vol. 28, pp. 42-44, Nos. 215-266.]

Case referred to:

- C (1) *Rushden Heel Co., Ltd. v. Keene (Inspector of Taxes), Rushden Heel Co., Ltd. v. Inland Revenue Comrs.*, p. 000, *ante*, *revsg.*, [1946] 2 All E.R. 141.

APPEALS by the Crown from a decision of ATKINSON, J., dated June 6, 1946, and reported [1946] 2 All E.R. 284.

The Special Commissioners had disallowed a deduction, for the purposes of income and excess profits tax, of legal and accountancy costs incurred by a subsidiary company in successful appeals by it and its parent company to the Board of Referees against the proportion of the remuneration of an employee which was allowable in computing the profits of the subsidiary company for assessment to excess profits tax.

On appeals by the taxpayers by way of Case Stated ATKINSON, J., allowed the appeals. The Crown appealed. The facts appear in the judgment of LORD GREENE, M.R.

E *The Solicitor-General (Sir Frank Soskice, K.C.), Reginald P. Hills and Norman Rowe for the Crown.*

F. Grant, K.C., and A. G. Tribe for the taxpayer.

Cur. adv. vult.

F Apr. 2. LORD GREENE, M.R., read the following judgment: In these two appeals similar questions are raised to those with which I have already dealt in the two appeals of *Rushden Heel Co., Ltd. v. Keene* and *Rushden Heel Co., Ltd. v. Commissioners of Inland Revenue* (1) (p. 699 *ante*), the decision in which admittedly covers them. There is, however, an additional argument based on special facts which were not present in the *Rushden Heel* cases (1), and those facts I must now state sufficiently to make this judgment intelligible.

G Smith's Potato Estates, Ltd. (the "estate company") is a subsidiary of Smith's Potato Crisps (1929), Ltd. (the "parent company") and the latter company was assessable to excess profits tax in respect of the profits of the estates company. The Commissioners of Inland Revenue, acting under s. 32 of the Finance Act, 1940, disallowed, in the computation of profits of the estates company for the period ending Mar. 31, 1941, the excess over £3,500 of the remuneration paid to Mr. Young, the general manager of the estates company. Both companies appealed to the Board of Referees and were successful in getting H the sum of £3,500 increased to £5,800. The estates company incurred legal and accountancy costs in the preparation and prosecution of that appeal and claimed to deduct them in computing its profits for income tax purposes. This claim of the estates company is the subject of the first of these two appeals. The second of the two appeals is concerned with a claim by the parent company (which is assessable to excess profits tax as above mentioned in respect of the profits of the estates company) to deduct the same costs in computing the profits of the estates company for purposes of excess profits tax. The Special Commissioners rejected both claims, but their decision was reversed in each case by ATKINSON,

J., in accordance with his judgment in the *Rushden Heel* cases (1). The Special Commissioners also decided the additional point in favour of the Crown, but ATKINSON, J., although it was not necessary for his decision, thought that they were wrong in so doing.

The additional point arises in this way. In 1936 the parent company, a very large consumer of potatoes, being desirous of providing a secure source of supply, formed the estates company as a wholly-owned subsidiary to acquire, as it did acquire, a well-equipped farm of 6,944 acres. As the boards of the two companies had no knowledge of farming, Mr. Young, who had managed the farm for the vendors for many years, was engaged as manager at a fixed salary and a commission under a written agreement. Owing to a variety of circumstances this agreement did not produce for Mr. Young the level of remuneration which had been expected, and as the result of his dissatisfaction and other considerations the boards, who attached great importance to keeping the services of Mr. Young, paid him a substantial bonus for the year ending Mar. 31, 1940. Mr. Young, however, still had grounds for dissatisfaction, and in Sept., 1940, he gave notice to terminate his engagement, intimating that he would not renew it unless the terms were substantially altered. As a result of negotiations a new agreement was entered into under which Mr. Young's remuneration for the year ending Mar. 31, 1941, worked out at £6,486 14s. 0d. His remuneration in the preceding years had been very much smaller. It was the excess of this sum over £3,500 that the Commissioners of Inland Revenue disallowed as above mentioned. By virtue of s. 34 (1) of the Finance Act, 1941, if a similar disallowance had taken place in respect of any accounting period after the end of Mar., 1941, the parent company, by reason of the additional tax which would thereby have fallen upon it, on giving notice to Mr. Young, would have been entitled to recover from him the amount of such additional tax. Although this section did not apply to the period in respect of which the costs in dispute were incurred, it was feared that the disallowance of the excess salary which had taken place would be followed by similar disallowances in the following years and that in that case the parent company would or might, as a public company, be obliged to enforce its rights against Mr. Young. Mr. Young protested vigorously against the suggestion that in future years action might be taken in this way and insisted on being paid in full. The two companies regarded Mr. Young as essential to the well-being of the enterprise and were afraid that, if they did have occasion to enforce their rights against him, they would suffer through his discontent. They, accordingly, prosecuted their appeal to the Board of Referees with the success already described, and, as a result, the Commissioners of Inland Revenue did not seek to disallow any part of Mr. Young's remuneration in subsequent years.

The commercial advantages thus obtained were relied on as affording a special ground for saying that the costs in question were money wholly and exclusively laid out for the purposes of the trade. The Special Commissioners held that there was a special business motive for prosecuting the appeal to the Board of Referees, viz., the protection of the benefit of Mr. Young's services, a matter going to the earning, as distinct from the taxation, of future profits, but that the immediate purpose of the appeal was that of all taxation appeals, viz., to get a reduction of tax. This, they regarded as a substantive purpose in itself and, accordingly, they thought that the costs of the appeal were not wholly and exclusively laid out for the purpose of the trade. ATKINSON, J., thought that, as the expense of getting rid of a troublesome director is an allowable expenditure, expense incurred to retain an employee who is vital to the business must also be allowable.

In my opinion, the Special Commissioners took the right view. It is in substance the same as the view which I have already expressed in the *Rushden Heel* cases (1), viz., that costs incurred in ascertaining the correct amount of tax are incurred by a taxpayer partly, if not mainly, in his capacity as a taxpayer, and to secure that his liability as a taxpayer is assessed at the correct amount, and cannot be said to be wholly and exclusively laid out for the purposes of his trade. The analogy taken by ATKINSON, J., is, I think, with all respect, a misleading one. Expense incurred in getting rid of a troublesome director is what I have described in my judgment in the *Rushden Heel* cases (1) as a commercial expense. No element of liability as a taxpayer enters into it, and there

is no question of a dual purpose, such as there is when one purpose in incurring the expense is to secure a reduction of liability to tax. Both appeals must be allowed with costs here and below.

MORTON, L.J. : I agree, and I cannot usefully add anything.

LORD GREENE, M.R. : I have SOMERVELL, L.J.'s authority to say he has read the judgment which I have just delivered, and he agrees with it.

Appeal allowed with costs.

A Solicitors : *Solicitor of Inland Revenue* (for the Crown) ; *Warren, Murton & Co.* (for the taxpayer).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

B *Re VICKER'S LEASE, POCOCK v. VICKERS.*

[COURT OF APPEAL (Lord Greene, M.R., Morton and Asquith, L.JJ.), April 1, 1947.]

Lease—Fishing rights—Grant for a term of years—Retention by owner of "one rod for her own use"—Effect of retention.

C By a lease for 21 years, beginning on Dec. 25, 1933, the owner granted to the lessee fishing rights on a stretch of the River T. at an annual rent of £250, and a schedule to the lease contained stringent covenants by the lessee as to how he was to exercise the right of fishing. By cl. 3 of the lease the owner retained "for her own use a rod in the said fishing." The owner had died and the question was whether cl. 3 operated as a re-grant of a profit *a prendre* for the beneficial use of the owner for the duration of the lease and capable of alienation by her during her lifetime or by her successors in title after her death, or whether the clause gave merely a contractual right limited to the owner's lifetime :—

D **HELD** : on the true construction of the lease, cl. 3 gave a contractual right to the owner which came to an end on her death, and was not a re-grant of a profit *a prendre*.

Decision of ROXBURGH, J. ([1947] 1 All E.R. 195) reversed.

E [AS TO RESERVATION OF FISHING RIGHTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 110-112, paras. 118, 119 ; and FOR CASES, see DIGEST, Vol. 25, p. 20, Nos. 168-171.

AS TO PROFITS A PRENDRE, see HALSBURY, Vol. 11, pp. 387-389, paras. 682-687 ; and FOR CASES, see DIGEST, Vol. 19, pp. 199, 200, Nos. 1509-1523.]

F APPEAL by the plaintiffs, the executors of the lessee, from an order of ROXBURGH, J., dated Jan. 13, 1947, and reported *ante*, p. 195. The facts appear in the judgment of LORD GREENE, M.R.

A. C. Nesbitt for the executors of the lessee.

Andrew Clark, K.C., and *G. C. D. S. Dunbar* for the executors of the lessor.

G LORD GREENE, M.R. : The controversy in this case turns on a short paragraph in a lease for 21 years, beginning Dec. 25, 1933, of fishing rights on a stretch of the River Test and of a dwelling-house and some land. Besides the crucial clause to which I have referred, there are certain covenants by the tenant set out in the first schedule to the lease which have some materiality. They are expressed to be covenants, and nothing but covenants. There is a covenant to pay rent and rates and taxes, and covenants to protect and preserve the fish, etc., to exercise the rights and privileges of fishing so as to do as little injury as possible to the banks and the tenants and others holding land on the adjoining banks and to make compensation for injury, to exercise the fishing rights in a sportsmanlike manner by fair rod and line angling, not to net, except for the destruction of coarse fish, not to permit worming or minnowing except in high flood, except for the taking of coarse fish, to employ a keeper to remove nets and prevent poaching and so forth, not to assign, under-let or transfer without the written consent of the owner, and there is the usual covenant to deliver up at the end of the term. The clause that gives rise to the difficulty is cl. 3. It is not expressed to be an exception or a reservation, nor are the words such as one would expect to find if what was intended was a re-grant. I use those three

words, "exception," "reservation" and "re-grant," in a technical sense. The clause has all the appearance of something put in quite independently of anything else in the lease, and its language is more appropriate to a contractual term than to the grant or the creation of some estate. The clause is as follows :

It is hereby understood and agreed that the owner shall retain for her own use a rod in the said fishing but not on either bank between the Mill and Greatbridge.

The arguments, when tracked to their foundations, all turn on the words "for her own use." Mr. Andrew Clark, for the executors of the lessor, who is dead, says that this clause cannot be an exception or a reservation, because you cannot have an exception or a reservation of a profit *a prendre*—i.e., nothing can be excepted or reserved out of a grant, but that, in such circumstances, you can only have a profit *a prendre* created by re-grant. This, he says, is the re-grant of a profit *a prendre*, and he interprets the words "for her own use" as merely stating or emphasising the fact that she, the lessor, is to have the right of a rod for her own use in the sense that she is to be the absolute and beneficial owner, during, of course, a limited period. That period (Mr. Clark says) is the duration of the lease, because, it being a re-grant, that was the limit to what the lessee could give, and he must be taken to have re-granted everything that was possible having regard to the length of his own estate. Mr. Clark says that the words "for her own use" cannot be construed as imposing some limitation on alienation or enjoyment, because, if they were so construed, it would be repugnant to the whole conception and nature of a profit *a prendre*. It follows, according to his argument, that this is a re-grant of a profit *a prendre* for the beneficial use of the lessor herself, and, as such, is capable, not merely of personal enjoyment, but of alienation by her or by her successors in title after her death.

Mr. Clark does not, as I understand his argument, contest the proposition that by apt words, or words that on their true construction have that meaning, it is competent to give to a person the personal right to fish and to take away the fish caught, a right that would, of course, be limited to some definite period. If it purported to be an out-and-out grant, different considerations might apply, but when you are dealing with a limited period, be it a day or a year or twenty years or a lifetime, I understand him to admit that there is nothing in law to prevent you giving to a person the personal right, exercisable by nobody else, to fish and take away the fish. He would say that very clear words are required to produce that result, and I think he would also say that, if the construction of the words led to such a result, the right could not be a profit *a prendre*, but would be a personal licence and nothing else, notwithstanding the fact that the right included the right to take away the fish. I hope I have not misunderstood Mr. Clark or attributed to him some concession greater than he intended to make, but, speaking for myself, I should require very strong authority to convince me that, if parties were minded to create such a right, the law in some way prevented them from doing so. In the present case the language that is used is not sufficiently clear, he says, to produce such a result. Mr. Nesbitt, on the other hand, for the executors of the lessee (who is also dead), maintains that this is a purely contractual matter and that there is no question of exception or reservation. Nor, he says, are the words what you would expect to find in the case of a re-grant, although he admits that in a suitable context the word "retain" might operate to effect a re-grant. Here, however, he says, looking at this clause in the position where it is to be found in the lease, you would not naturally read it as showing an intention to re-grant, and he particularly relies on the words "for her own use."

On Mr. Clark's construction it appears to me that those words are really surplusage. Precisely the same effect would be achieved, according to his argument, if they had been left out, because the word "owner" must be construed as including heirs and assigns and there is nothing to suggest anything but a beneficial right. Therefore, the words "for her own use" would be mere surplusage. Why are they put in? I think some light can be found on that when one realises the nature of this particular subject-matter. First, the right is expressed as "a rod." In other words, it is, in one sense, metaphorical—in another sense, not metaphorical. What the word appears to contemplate is the right to use some physical object, namely, a rod—the rod which implies, it is said, the right to fish by rod and line angling. That word, I think, must not be ignored. What has the lessor got? Something, namely a rod, which she

is to use for her own use. The right of fishing is one which you would expect to find in some way limited or qualified by prescribing the particular conduct that a sportsmanlike person would be expected to observe in a river such as the Test. Indeed, the lessee himself was put under very stringent covenants which are the perfectly proper and natural covenants to which I have referred. It is said by Mr. Clark that, if his construction is accepted, precisely the same covenants would by implication extend to the lessor as the proprietor of the rod, but I am not at all sure that that is so. They are not expressed as conditions ; A they are expressed to be purely in covenant and nothing else, and if the lessor had been going to be subject to the same obligations in respect of fishing on the river, one would have expected them to have been set out expressly. But, however that may be, I cannot avoid inferring, from the whole tenor of this document and the covenants, that fishing on this particular river is a thing in which you want to know your fisherman, and I can well understand that it B would be quite natural that the person granting a rod or giving a right to maintain a rod on the Test would expect to exercise some choice in the person to whom he granted it. I think that the fact that it is necessary to impose these restrictions rather confirms that view. If Mr. Clark's contention were correct, the lessor the next day could have assigned this right to anyone she chose, and her executors today could assign it to anyone that they chose, for value or not C for value. That is a right which I should not have expected to find in a document of this kind, unless the language compelled me, and, when I find that the right in question is put in in a three-lined clause by itself, expressed in language which is much more apt to express a contractual obligation than the creation of a right such as a profit *a prendre*, I am confirmed in the view that the proper construction is that it is a contractual obligation.

ROXBURGH, J., thought the case difficult, but he took the view that what the D draftsman was contemplating was a bundle of rods, and he visualised the owner as granting the rods but retaining one rod for her own use. He thought that the phrase "for her own use" did not involve any conception except that the rod was to belong beneficially to the owner. Mr. Nesbitt's construction is not necessarily limited to the personal use of the rod by the lessor. He concedes that it is possible that she personally might have lawfully allowed someone else to use it during her life, but, if she had any such licensing power (he says), it E would be personal to her. I do not find it necessary to express any concluded opinion on that, but my own strong impression is that that alternative is not the correct view, and I should have thought that this was a case where the right to use the rod as I have suggested, the rod being regarded as, in a sense, a physical object, was intended to be one for her own exclusive personal use, which must die with her and in her lifetime was not alienable. The case, I F agree, is not an easy one, but that is the conclusion to which I have come, and in the result the appeal succeeds.

MORTON, L.J. : I agree. It is a small point, but perhaps worth mentioning, that at the opening of this lease we find that it is :

... made between Bertha Vickers [then the address is given] (hereinafter called "the owner") of the one part and Percy Coventry Tarbutt ... (hereinafter called "the tenant") of the other part.

G There is not in that opening clause what one finds so often—an extension of the words "the owner" to include the successors in title of the person named. I do not doubt that in parts of this lease, by reason of the context, the expression "the owner" would extend to the successors in title of Miss Vickers, but, in my view, it refers only to Miss Vickers in cl. 3. The next point to be noted is that the fishing rights which are conferred by the lease are obviously of considerable H value, so much so that the rent is £150 for the house, out-house and cottages and for the fishing £250. Then, as my Lord has pointed out, there are very elaborate terms laid down as to how the tenant is to exercise his right of fishing. It is suggested that this brief cl. 3 was intended to confer on Miss Vickers and her successors in title not only the right to fish and to take away the fish, but to assign that right for value to any person or, if they so wish, to license a different person to come and fish each day for a monetary payment. That would obviously be a very valuable right to be reserved or re-granted to the owner, and it would at the same time be a right which would be quite onerous to the fishing

tenant. For my part, I cannot imagine that, if it were intended to confer such a right as that upon Miss Vickers and her successors in title, it would have been done by the use of the words which appear in cl. 3. I think that a very different form of words would have been employed, and a very full and careful form of words. I think that by the words: "It is hereby understood and agreed that the owner shall retain for her own use a rod in the said fishing," it was intended to do nothing more than to enable Miss Bertha Vickers to come and fish herself. It may possibly be that Miss Vickers would have had the right personally to allow, for example, her nephew to come and fish. As to that I feel some doubt, but it is not necessary to express a view on it. However that may be, in my judgment, this is not a right which was ever intended to endure beyond the life of Miss Vickers, and I agree that this appeal should be allowed.

ASQUITH, L.J.: I also agree.

Appeal allowed with costs.

Solicitors: *Holmes, Son & Pott* (for the appellants); *Montagu's and Cox & Cardale*, agents for *Branson & Son*, Sheffield (for the respondents).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

M.W. INVESTMENTS, LTD. v. KILBURN ENVOY, LTD.

[COURT OF APPEAL (Lord Greene, M.R., Cohen and Asquith, L.JJ.), March 21, 24, 1947.]

Landlord and Tenant—Lease for term of years or duration of hostilities, whichever the longer—Lessee's option for further term—Validation of War-Time Leases Act, 1944 (c. 34), ss. 1, 3 (3), 7 (3).

A lease "for the term of three years from Jan. 5, 1942, or for a period covering the duration of hostilities between Great Britain and Germany and Italy and 12 months after the date of the termination of hostilities whichever period shall be the longer . . ." contained in cl. 5 (4) an option, providing: "If the term of this lease shall not extend for a period of seven years from the said Jan. 5, 1942, and the lessee shall be desirous of continuing the term for a full period of seven years from such date and of such desire shall give not less than three calendar months' notice in writing prior to the expiration of the term granted by this lease then the lessor will grant a further term up to Jan. 5, 1949 . . . [at] a yearly rent equivalent to the highest aggregate certain and contingent rents paid . . . in any year during the term of this lease . . ."

HELD: (i) the Validation of War-time Leases Act, 1944, by s. 1, operated to make the lease one for 10 years determinable by one month's notice given by either side after the end of the war, and cl. 5 (4) was reconcilable with the statutory term, and, if the lease were to be brought to an end by notice within seven years, the option in the sub-clause would be valid and exercisable by the lessee.

(ii) the provision as to rent in cl. 5 (4) was also reconcilable with the *habendum* introduced by the Act, the rent provided for being the highest rent for a full year (*i.e.*, a year ending on Jan. 4) since the beginning of the tenancy.

(iii) cl. 5 (4) was a provision which related to the duration of the tenancy and was not therefore excepted from the operation of s. 1 by s. 3 (3) of the Act.

(iv) the option could be validly exercised before it was ascertained that the lease would not extend for seven years.

Decision of VAISEY, J. ([1946] 2 All E.R. 567) reversed.

[FOR THE VALIDATION OF WAR-TIME LEASES ACT, 1944, see HALSBURY'S STATUTES, Vol. 37, p. 340.]

APPEAL of defendants from an order of VAISEY, J., dated Oct. 25, 1946, reported at [1946] 2 All E.R. 567. VAISEY, J., held that cl. 5 (4) of the lease was irreconcilable with the statutory term substituted by the Validation of War-Time Leases Act, 1944, s. 1, and the option given thereby was, therefore, not exercisable. The facts appear in the judgment of LORD GREENE, M.R.

Andrew Clark, K.C., and C. R. Russell for the lessees.
Neville Gray, K.C., and H. de W. Mulligan for the lessors.

LORD GREENE, M.R. : By a document purporting to be a lease dated Feb. 10, 1942, the lessors demised to the lessees a cinema at Kilburn

. . . for the term of three years from Jan. 5, 1942, or for a period covering the duration of hostilities between Great Britain and Germany and Italy and twelve months after the date of the termination of hostilities whichever period shall be the longer

A subject to the extension of such period as provided by cl. 5 (4).

The only other clause to which I need refer is cl. 5 (4), which provides :

If the term of this lease shall not extend for a period of seven years from the said Jan. 5, 1942, and the lessee shall be desirous of continuing the term for a full period of seven years from such date and of such desire shall give not less than three calendar months' notice in writing prior to the expiration of the term granted by this lease

B then the lessor will grant a further term up to Jan. 5, 1949 . . .

The question for decision depends on the operation of the Validation of War-Time Leases Act, 1944, in relation to that document. It was admittedly invalid as a lease for the reason that the term was not fixed, its continuance depending on something which, at the beginning of the lease, was uncertain, namely, the duration of hostilities between Great Britain and Germany and Italy. If it had not been for that defect in the document, the operation of the option clause,

C cl. 5 (4), would have been simple. If the period of the war plus twelve months did not extend for seven years from Jan. 5, 1942, the option was to be exercisable, and the result would have been that the tenant would have obtained his full seven years, but the effect of the invalidity of the lease would have been, subject to a point I will mention in a moment, to invalidate the option clause. It was suggested that the lease was, at any rate, a valid lease for three years and that the

D option clause could have been fitted in to it. I do not find it necessary to express any opinion as to that argument. VAISEY, J., inclined to think that the lease would have been a valid lease for three years. Counsel for the lessors argued that it would not, because he said on the true construction of the *habendum* it was for the duration of the war or three years. The point which we have to consider, however, is the application of the Act.

There is a general observation that I think may be made with regard to this

E Act. It is common knowledge that it was passed to meet a very awkward situation caused by the circumstance that it was not realised, save perhaps in more instructed quarters, that a lease for the duration of the war would be invalid in law. There were, I suppose, hundreds of such leases made during the war, and it was to remedy that position that this relieving statute was passed. One thing which appears clear on the face of the statute is that the

F legislature was minded to give to the parties who in all good faith had entered into invalid agreements something which would be as nearly as possible a practical, valid equivalent of what they had intended to contract for. For the invalid term, namely, a term for the duration of the war, was to be substituted a term of ten years determinable by notice given by either side after the end of the war if the war should end before the expiration of that ten-year term. That was

G putting the parties as nearly as possible into the position in which they would have been if the provisions of the lease had been valid from the first. The notice which either party is empowered to give takes, for practical purposes, the place of the end of the war, just as under the contractual terms, ignoring the twelve months in this particular case, which is irrelevant for the present point, the term would have come to an end at the expiration of the war. It is important to have that point in mind, because it has a bearing on the construction of the whole Act.

H Section 1 (1) of the Act provides :

Subject to the provisions of this section, any agreement, whether entered into before or after the passing of this Act, which purports to grant or provide for the grant of a tenancy for the duration of the war shall have effect as if it granted or provided for the grant of a tenancy for a term of ten years, subject to a right exercisable either by the landlord or the tenant to determine the tenancy, if the war ends before the expiration of that term, by at least one month's notice in writing given after the end of the war. . . .

That section is expressed in simple language, and I ask myself : Have we here

an agreement? The answer is: We have an agreement dated Feb. 10, 1942. I then ask myself: Does that agreement purport to grant a tenancy for the duration of the war, a phrase which is interpreted in the Act and covers the present case? The answer to that is: Yes. Then I say: What, then, is to be the result of the Act? The result is that the agreement is to have effect as if it granted or provided for the grant of a tenancy for a term of ten years determinable in the manner stated. The statute tells me to treat this document as though the term it created had been a term of the nature described in s. 1. When I turn to s. 7 (3), I find that the Act, subject to the provisions of s. 3, is to be deemed to have had effect, in relation to any agreement, as from the date on which the agreement was entered into. We, therefore, have a document, the one and only blot in which, a blot which invalidated the document (subject to the three years' agreement, of course, which I have mentioned), has been removed by statute and, in place of that blot, that invalid clause in the *habendum*, there is substituted the statutory provision. We, therefore, now have a lease for ten years determinable by notice.

If there had been nothing else in the statute, I should have not felt any difficulty. I should have construed the document on the footing that it has now been amended *ab initio* in the manner provided by the statute. It is to be observed that the statute does not limit its operation to a mere alteration of the *habendum*. It provides that the agreement—that is, the whole agreement—is to have effect as if the *habendum* had been of the kind mentioned in s. 1. Bearing that in mind, what am I to do when I come to the option in cl. 5 (4)? I should have thought that, if, in the *habendum* to this document, there had been inserted for the contractual term the statutory term, the construction of cl. 5 (4) would not have been difficult. It would have been necessary to reconcile the language of that sub-clause with the language of the *habendum* as altered by statute. The result, it seems to me, would have been clear, *viz.*, that, if the lease were to be brought to an end by notice within the seven years, the option would be a valid one exercisable by the tenant. In my view, that construction would have been the only one which could have been put on this document as soon as the new *habendum* provided for by the statute was substituted for the contractual *habendum*. Otherwise you would be left in this position, that the two parts, namely, the statutory *habendum* and cl. 5 (4) would have been irreconcilable. That was what the judge found had happened, because he said that he could not reconcile the two provisions, but, with all respect to him, I do not find any difficulty about it. I am prepared to accept what I think the judge stated quite accurately ([1946] 2 All E.R. 570) where he said:

On the other hand, such of the original provisions as contradict or conflict with or are incompatible with the positive provisions of the Act must be rejected, or at any rate modified, when and so far as they are susceptible of modification.

If I may say so with respect, I entirely agree with that statement, and counsel for the lessors accepted it. Therefore, in so far as the alteration of the *habendum* requires a modification or alteration of words in cl. 5 (4) to give full effect to what s. 1 tells us to do, those words must be modified accordingly. Section 1, as I have said, appears to give a clear direction as to what is to be done to this invalid clause in the lease, and I cannot myself see how the directions given by s. 1 can be satisfied unless any other clause in the lease which is referential to or dependent on the invalid term is construed, and, if necessary, modified, accordingly.

Counsel for the lessors would not accept that argument. His argument really amounts to this. He says that the term of the lease, when altered by the statute, is a ten-year term, and it is impossible to reconcile the language of cl. 5 (4) with the conception of a ten-year term, because, as he points out, the option only arises if "the term of this lease" shall not extend for a period of seven years from Jan. 5, 1942. He says the term of this lease is a ten-year term and to talk about a ten-year term not extending for seven years is nonsense, and, therefore, one cannot dovetail the option clause into the lease as modified by the statute. That seems to me to be flying in the face of s. 1 which provides that an alteration must be made in the *habendum*, and, if a consequential alteration is necessary and permissible, it must be made, but I should have thought that, if this lease, as a contractual document, had originally contained the *habendum* as fixed by the statute, then the only way of construing the option

clause would have been by reconciling the language of the two in the way I have suggested. Otherwise, you would be left in the position, which the court will never accept unless it is absolutely forced to, of saying: "Here are two irreconcilable provisions and one of them must be rejected and treated as a nullity." If the parties had by contract put in what is now the statutory term, I would have found no difficulty, as a matter of construction, in giving the effect to the option clause which is contended for by the lessees. The gist of the argument of counsel for the lessors, in effect, although he disclaimed it, is that we should construe the option clause as though the statutory alteration in the *habendum* had never been brought about, and that is a conclusion which I cannot possibly accept.

That brings me to the consideration of another provision in the Act on which a good deal of argument turned; that is, s. 3 (3) which provides:

Nothing in the said section 1 shall affect any provision of an agreement to which that section applies, being a provision which does not relate to the duration of the tenancy, and any such provision shall continue to apply in relation to the tenancy as it takes effect under that section.

There has been argument whether this option clause is a provision which does or does not relate to the duration of the tenancy within the meaning of that sub-section. VAISEY, J., held that it did relate to the duration of the tenancy.

That was one of the grounds that he gave for his decision in favour of the lessors. He does not state why it leads to that result, but I think his reasoning must have been something like this. It was suggested by counsel for the lessees that sub-s. (3) is really a saving sub-section, and his first argument was that the option clause was a provision which did not relate to the duration of the tenancy and, therefore, that it was saved. I do not myself take that view. I think the judge was right and counsel for the lessors was right in maintaining that the

option clause was a provision which did relate to the duration of the tenancy. The phrase "relate to" in that context is obviously a very wide phrase and, much as I dislike paraphrases, I think it means a provision which is not conditioned or affected by the duration of the tenancy. That makes sense, because sub-s. (3) excludes the operation of s. 1 in the case of provisions which do not relate to the duration of the tenancy, but, obviously, to make sense of the Act and make it workable, a provision which does relate to the duration of the tenancy must, if the Act is to have its full effect, be affected by s. 1. This option clause is a provision which relates to the duration of the tenancy, in my view, because the exercise of the option is contingent on that duration, and, accordingly, the Act does, as one would expect when it alters the *habendum*, necessarily alter such provisions in other parts of the Act as are dependent in any way on the length of the term contemplated by the contractual *habendum*.

Accordingly, I construe sub-s. (3) in this way, that s. 1 is not to operate on provisions in the lease which are not conditioned by or affected by the *habendum*. Those are to remain as they were, valid or invalid, but once you find a provision which is conditioned by the *habendum*, then the section contemplates that s. 1 in such a case is to have its full operation. That brings me back to what I said before. If s. 1 had stood alone, taken in combination with the retrospective s. 7 (3), the effect would have been that one must construe the whole document in the light of the alteration in the *habendum* which is effected by the statute. I, therefore, do not find myself the least embarrassed by s. 3 (3), and, accepting the judge's view of it, which I think is right, for the reasons I have given, it seems to me to operate not against the lessees but in their favour because it leaves s. (1) to be complied with according to its clear direction.

The argument of counsel for the lessors was really based on a very technical construction of the option clause and a construction which, however right it would have been if the contractual *habendum* had been valid, is impossible to maintain having regard to the directions in the Act. He says: The term of the lease is now ten years and it is not true to describe the length for which the lease, in fact, lives as the "term" of the lease, and if notice had been given to bring that ten-year term to an end at the end of nine years it would not have been correct to say that the lease had had a nine-years term. However right that argument might be in other contexts, I find it unacceptable in this particular context, and I do not think I need add anything more to what I have said

about the necessity of reconciling inconsistent provisions in the same document. If, indeed, the technical meaning of the word "term" is so strong that it cannot yield to a context, which is really what counsel is saying, then I accept the principle I quoted from VAISEY, J., and the word "term" must be altered and some other phrase substituted. If, however, you read the words: "If the term of this lease—that is to say, a ten-year term determinable by one month's notice—shall not extend for a period of seven years," the whole thing makes sense. If you read the word "term" in that context, which is the right context having regard to the statute, it would mean the actual period for which the lease has lasted. A

The other point on which the judge decided was the impossibility, as he thought it, of reconciling the provisions as to rent contained in the option clause with the new *habendum* substituted by the statute. The rent in the *reddendum* under the original document was, first, a minimum yearly rent; secondly, an additional rent based on net takings; and, thirdly, what is sometimes called an insurance rent—that is to say, a yearly sum equivalent to the amount which the lessor should from time to time pay by way of premium. That insurance rent was to be paid once a year immediately following the payment by the lessor of such premiums. The rent year under the lease which began on Jan. 5, 1942, was the year ending Jan. 4 in each year. When you come to the option clause, you find that the rent to be paid under the new tenancy which is to be granted under the option clause is to be B
C

... a yearly rent equivalent to the highest aggregate certain and contingent rents paid under cl. 1 hereof in any year during the term of this lease and insurance rent.

The judge found it difficult to see exactly how that could be fitted in, but, once the option clause is construed in the way in which I consider it ought to be construed, I find no difficulty. The year is the lease year ending Jan. 4. Obviously, having regard to the power to give a month's notice, the tenancy may be put an end to in the middle of the year, and in such a case it seems to me that the rent must be the highest rent for a full year since the beginning of the tenancy, namely, Jan., 1942, disregarding the broken part of the year. That might have happened if the original contractual *habendum* had been good, because the war cannot have been contemplated as likely necessarily to end on Jan. 4 in any year. In the result, you would have had to disregard the broken year. The same thing is perfectly easy to do under the new statutory provisions. I feel no difficulty about that, and, indeed, counsel for the lessors admitted that that argument would not stand if he was wrong on his main argument that the option clause would not fit the new conditions at all. D
E

There is only one minor point that I should mention. Counsel for the lessors suggested that the option could not be exercised until it had been ascertained that the lease would not extend for seven years. That argument, in my opinion, is unsound. If you have an option conditional on the happening of a future event, there is nothing to prevent you exercising that option at once, although it will have no effect unless the event happens. You need not wait until the event happens, unless the language of the option clearly says so, and in the present case it does not do so. F

I must complete the facts to show what happened. The Act was passed on Aug. 3, 1944. On May 9, 1945, came the end of the war as declared by S.R. & O., No. 703, of 1945. On Dec. 4, 1945, the tenants gave notice in writing exercising the option. On May 2, 1946, the lessors took out the originating summons which has led to this appeal. VAISEY, J., declared that the option never was and never could be exercisable. His judgment was given on Oct. 25, 1946, and, relying on that, the landlords gave the month's notice required by the statute on Oct. 31, 1946. The effect of all that seems to me to be that the determination of the lease, or the expiration of the term, within the meaning of the option clause as properly construed, was the date on which the landlords' notice took effect. That notice, as I have said, took the place under the statute of the end of the war which the parties had provided for contractually. The result, therefore, was, on the facts as they happened, that the tenants had given not less than three calendar months' notice in writing before the expiration of the term, which took place on the expiration of the landlords' notice of Dec. 4, 1946. I say expressly "expiration of the term," which is the phrase in the option clause, G
H

but I have already explained that that phrase and references to the term must, in my opinion, to comply with the directions of s. 1 of the Act, be construed as meaning the actual ending of the term in the events which happened, and the term came to an end in the events which happened when the landlords' notice expired. The result, therefore, is that the appeal must be allowed with costs here and below and an appropriate declaration made.

- COHEN, L.J. : Counsel for the lessors argued that the option in question
- A here was a provision relating to the duration of the tenancy, and that, therefore, s. 3 (3) of the Act did not apply. With this I agree and I do not desire to add anything to the reasons given by my Lord relating to counsel's argument based on this construction of the Act and the option clause. Counsel argued, alternatively, that, if the option clause was not a provision relating to the duration of the tenancy, s. 3 (3), therefore, applied, and that he was entitled on this construction to succeed, because the option clause was, as he said, invalid
- B *ab initio* and s. 3 (3) did not cure the invalidity. I do not think it necessary to decide this point, but I am by no means satisfied, as at present advised, that it is well founded. It seems to me there is much to be said for the alternative view, which I would summarise as follows : (i) If the option does not relate to the duration of the tenancy it is because a provision only relates to the duration of the tenancy within s. 3 (3) if it fixes or directly affects the duration of the
- C tenancy ; (ii) none the less, having regard to s. 7 (3) and s. 1 (1), all the provisions of the agreement must be construed as from the date of its execution as if for a reference to the term purported to be created thereby there was substituted a reference to the term of ten years determinable as in s. 1 (1), mentioned ; (iii) if so construed, the option clause is not invalid, notwithstanding that in its original form it might have been invalid—indeed, probably was invalid—owing to the uncertainty as to the duration of the war ; (iv) the option would be a
- D valid one exercisable by the tenant if the lease were to be brought to an end by notice within the seven years. For these reasons, I agree with the Order proposed by my Lord.

- ASQUITH, L.J. : I agree with the conclusions of my Lord. I think those conclusions follow from the unassisted operation of s. 1 and s. 7 (3) of the Act, without recourse to s. 3 (3). Indeed, if it were necessary to decide the point,
- E I should incline to the view that s. 3 (3) does not apply, since the option clause seems to me to be a provision which does relate to the duration of the tenancy and is, therefore, outside the sub-section. The entire argument for the lessors, as it seems to me, hinges upon the assumption that the Act draws a vital distinction between the statutory term of ten years, and the duration of the tenancy, which may well be less if the one month's notice is given to determine the ten years term. According to the argument, in applying the Act to the contractual
- F option in cl. 5, one must substitute for the words "term of the lease," "term of ten years," not "term of ten years determinable at one month's notice." It seems to me for the reasons given by my Lord, which I will not repeat, that the plain intention of the Act is that the latter and not the former substitution should take place. If it is made, there is no difficulty in amalgamating the statutory and contractual provisions into a coherent and consistent whole.
- G I agree that the appeal succeeds.

Appeal allowed with costs.

Solicitors : J. G. Bosman, Robinson & Co. (for the lessees) ; Harringtons (for the lessors).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re PRIESTLEY'S CONTRACT.

[CHANCERY DIVISION (Romer, J.), March 19, April 1, 1947.]

Sale of Land—Interest on unpaid purchase money—Purchaser in possession before date fixed for completion—Delay in completion—Default of vendor in deducing title—Special conditions incorporating Law Society's Conditions of Sale "so far as not varied or inconsistent"—Law Society's Conditions of Sale, cl. 6, 7.

By a contract dated Jan. 23, 1946, a purchaser agreed to buy a house from P. and M., who were stated to be selling as trustees for sale under a trust deed. It was provided by the special conditions of sale that the property was sold subject to the Law Society's Conditions of Sale (1934 ed.) so far as they were not varied by or inconsistent with the special conditions. By cl. 3 of the special conditions, the purchaser agreed to pay interest at 5 per cent. on the balance of the purchase money from the date fixed for completion, Feb. 20, 1946, until payment. It was further provided that cl. 6 (2) (d) of the Law Society's Conditions, which provides for payment of interest on the purchase money by a purchaser authorised to take possession before completion, should be deemed to be omitted from the contract. The purchaser was let into possession before completion, which was delayed owing to the discovery by the purchaser's solicitors that the real trustees for sale, in whom the property was vested, were P. and his wife, and that a proposed deed appointing M. trustee in place of P.'s wife had not been executed. This deed was not, in fact, executed until Apr. 5, 1946. In proceedings by the vendors, P. and M., under the Law of Property Act, 1925, s. 49, for a declaration that they were entitled to interest on the unpaid purchase money from Feb. 20, 1946, the date fixed for completion, until actual completion, the purchaser contended that, under cl. 7 (3) of the Law Society's Conditions, he was under no liability to pay interest inasmuch as the delay in completion was "attributable to the default by the vendors in deducing title in accordance with the contract":—

HELD: (i) the deed of appointment was of vital importance, and, until it was executed, M. had no interest in the property, and, as the vendors were under an obligation both to show title on the face of the abstract which they delivered and to prove their title by production of the proper evidence, and both these obligations ought properly to be performed by the vendors well before the day fixed for completion, the vendors were in default on and after Feb. 20, 1946, in deducing title in accordance with the contract.

(ii) the deletion of cl. 6 (2) (d) of the Law Society's Conditions freed the purchaser from payment of interest on unpaid purchase money from the date of taking possession, but did not override his liability under cl. 3 of the special conditions to pay interest from and after the date fixed for completion.

(iii) the words "no interest shall become payable by the purchaser" in cl. 7 (3) of the Law Society's Conditions mean no interest payable under cl. 7 (1), which is clearly directed to purchasers who do not take possession before completion, and, therefore, the purchaser, being in possession, was not entitled to rely on cl. 7 (3) of the Law Society's Conditions as freeing him from the liability which he accepted under cl. 3 of the special conditions.

Per curiam: The concurrence of a mortgagee who is immediately redeemable is simply a matter of conveyancing and is not comparable to the due execution of a deed, such as a deed of appointment, which constitutes the very title of one of the vendors and without which he has no interest in the property at all.

[AS TO INTEREST ON UNPAID PURCHASE MONEY, see HALSBURY, Hailsham Edn., Vol. 29, pp. 348-350, paras. 465-469; and FOR CASES, see DIGEST, Vol. 40, pp. 197-203, Nos. 1641-1697.]

Cases referred to:

- (1) *Fludyer v. Cocker* (1805), 12 Ves. 25; 33 E.R. 10; 40 Digest 199, 1660.
- (2) *A.-G. v. Christ Church, Oxford (Dean), Ex. p. Maddox* (1842), 13 Sim. 214; 12 L.J.Ch. 28; 6 Jur. 1007; 60 E.R. 83; 40 Digest 198, 1654.

- (3) *Birch v. Joy* (1852), 3 H.L. Cas. 565; 10 E.R. 222, H.L.; *varying S.C. sub nom. Joy v. Birch, Birch v. Joy, Sturgis v. Birch* (1848), 12 L.T.O.S. 365, L.C.; 40 Digest 198, 1656.

ADJOURNED SUMMONS under the Law of Property Act, 1925, s. 49, by the vendors for a declaration that they were entitled to interest on the balance of purchase money under a contract for the sale of a dwelling-house. The facts appear in the judgment.

- A *G. D. Johnston* for the vendors.
C. R. Russell for the purchaser.

Cur. adv. vult.

- Apr. 1. ROMER, J., read the following judgment: This is a summons which has been taken out under s. 49 of the Law of Property Act, 1925, by the vendors under a contract of sale, and by it they ask for a declaration that they are entitled to interest on the sum of £1,620, the balance of the purchase money of the property described in the contract, at the rate of 5 per cent. per annum from the date fixed for completion, *viz.*, Feb. 20, 1946, to the day of actual completion. The dispute between the parties arises out of the fact that the purchaser was let into possession of the property sold prior to the date fixed for completion, and his contention is that, on the true construction of the contract, he is under no liability to pay interest on the unpaid purchase money inasmuch as the delay in completion was attributable to the default of the vendors in deducing title.

- By the contract which was dated Jan. 23, 1946, the purchaser, Mr. Dennis Arthur Pook, agreed to purchase from the vendors, Mr. Lawrence Vernon Priestley, solicitor, and Mr. Thomas Leslie Mallard, incorporated accountant, a certain dwelling-house, land and premises known as "Shottery," 8, The Highway, Orpington, Kent, for the sum of £1,800. It was provided by cl. 1 of the special conditions of sale that the property was sold subject to the Law Society's Conditions of Sale (1934 ed.), so far as they were not varied by or inconsistent with the special conditions. Clause 3 provided that the date fixed for completion was 4 weeks from the date thereof, namely, Feb. 20, 1946, and that the balance of the purchase money (credit being given for the deposit of 10 per cent. payable on the sale) was to be paid on that day and if not so paid would carry interest at 5 per cent. until payment. The condition then stated that the deposit had been paid to Messrs. Arthur Ray and Company, of Orpington, as stakeholders and provided for delivery of requisitions, replies and draft conveyance, and that completion should take place at the offices of the Bingley Building Society or their solicitors. Clause 4 stated that the vendors were selling as trustees for sale holding on trust for sale. Clause 8 provided that vacant possession would be given on completion and that cl. 6 (2) (d) of the general conditions should be deemed to be omitted from the contract. Clauses 6 and 7 of the Law Society's Conditions of Sale (1934 ed.) are as follows:

6. Where, under the contract or otherwise, a purchaser is authorised to take possession of the property before the actual completion of a purchase, then (save as otherwise agreed) the following provisions shall apply:—(1) The taking of possession shall not be deemed to be—(a) an acceptance by the purchaser of the vendor's title, (b) a waiver of the right of the purchaser to make requisitions or objections in respect of the title. (2) A purchaser who takes possession shall, from the date of taking possession, and until the time of actual completion, or until the vendor resumes possession by reason of the rescission of the contract—(a) keep the property in as good a state of repair and condition as it was in at the time of taking possession, (b) pay all rents, rates, taxes, costs of insurance and of repairs, and other outgoings in respect of the property, (c) be entitled to receive the rents and profits as if the date fixed for completion had arrived, (d) pay interest on the purchase money or the balance thereof at the rate specified in the next following condition. (3) If the sale is rescinded the purchaser shall—(a) forthwith deliver up possession of the property to the vendor, in as good a state of repair and condition as aforesaid, (b) apply any insurance money received by him in respect of the property, in making good any loss or damage to the property, or otherwise account for the same to the vendor. (4) Provided that (subject to the requisite apportionment being made of all rents, rates, taxes, costs of insurance and of repairs, and other outgoings and without prejudice, in case of the purchaser's default, to the rights of the vendor under condition 32) the vendor shall repay to a purchaser whose contract is rescinded, his deposit money, if any (including any purchase money previously paid), but without interest thereon, and the purchaser shall return forthwith all abstracts and papers in his possession belonging to the vendor, and shall not make any claim

on the vendor for costs, compensation or otherwise. 7. (1) If from any cause whatever (save as hereinafter mentioned) the completion of the purchase is delayed beyond the date fixed for completion, the purchase money, or where a deposit is paid, the balance thereof, shall bear interest at the rate of £5 per cent. per annum from the date fixed for completion to the day of actual payment thereof. (2) Provided that, if delay in completion arises from any other cause than the purchaser's own act or default, the purchaser may (except in a case to which condition 6 applies)—(a) at his own risk, deposit the purchase money, or where a deposit is paid, the balance thereof, at any bank in England or Wales, and (b) give notice, in writing, forthwith of such deposit, to the vendor or his solicitors, and in that case the vendor shall (unless and until further delay in completion shall arise from the purchaser's own act or default) be bound to accept the interest, if any, allowed thereon, as from the date of such deposit, in lieu of the interest accruing after the date of the deposit, which would otherwise be payable to him under this condition. (3) No interest shall become payable by a purchaser if and so long as delay in completion is attributable to—(a) default by the vendor in deducing title in accordance with the contract, or in giving an authority to inspect the register kept under the Land Registration Act, 1925, or in conveying; or (b) any other act or default of the vendor or his Settled Land Act trustees. (4) The vendor shall, as from the date when interest becomes payable under paragraph (1) of this condition, have the option (to be exercised in writing at any time before actual completion and before a deposit of the purchase money or the balance thereof under paragraph (2) shall have been made) of taking the rents and profits or an apportioned part thereof (as the case requires) less the outgoings or an apportioned part thereof, up to the date of actual completion, in lieu of the interest otherwise payable under the said paragraph (1); and, if the said option is exercised, the same payments, allowances and apportionments shall be made, as if the date fixed for completion had been the date of actual completion.

The completion of the contract was delayed beyond Feb. 20, 1946, and I propose to consider, first, whether the purchaser is right in his contention that such delay was, in the words of cl. 7 (3) of the general conditions, "attributable to default by the vendors in deducing title in accordance with the contract." If the purchaser is right on this point the further question will arise whether, having regard to the contract as a whole, he is exempted from payment of interest by cl. 7 (3) notwithstanding that he was allowed to enter into and remain in possession.

The history of the matter, so far as the question of title is concerned, appears from the correspondence exhibited to the affidavits which were filed on this application. On Jan. 9, 1946, Mr. Priestley sent to the purchaser's solicitors (Messrs. A. C. Warwick & Co.) the contract, which he had signed, and it seems that he also enclosed an abstract of title. Messrs. Warwick amended the contract in one respect and returned it to Mr. Priestley on Jan. 22 with the request that he would let them have the rest of the abstract in exchange for the purchaser's part of the contract as the purchaser desired to complete as early as possible. On Jan. 24, Mr. Priestley forwarded a supplemental abstract of title. The original and supplemental abstracts of title were not exhibited and I did not see them at the hearing, but it appears that they showed that at the date of the contract the property agreed to be sold was vested in Mr. Priestley and his wife, Mrs. Olive Priestley, to whom the property had been conveyed on trust for sale, and that they had mortgaged the property to the Bingley Building Society.

It also appears from a letter from Messrs. Warwick to Mr. Priestley on Feb. 14 that the abstract of title purported to abstract a deed of appointment, stamped, duly executed and attested and dated as of Jan., 1946, whereby Mr. Thomas Leslie Mallard was appointed a trustee for sale in the place of Mrs. Olive Priestley. A letter of Feb. 22 to Mr. Priestley from a firm of solicitors in Birmingham, however, says that the appointment had not the word "January" inserted. On Jan. 29 Messrs. Warwick sent in their requisitions on title and in answer to requisition number 16 were informed by Mr. Priestley, who was acting as solicitor to the vendors, that "the conveyance to the vendors, the mortgage by them and the deed of appointment" would be handed over to the purchaser on completion. On Feb. 1 Messrs. Warwick wrote to Mr. Priestley asking (*inter alia*) what was the date of the deed of appointment of new trustees and whether it had been executed by all three parties, and they asked to be supplied with a copy of executions and attestations. On Feb. 3 Messrs. Warwick enclosed a draft conveyance subject to outstanding requisitions. In answer to Messrs. Warwick's queries in their letter of Feb. 1 Mr. Priestley wrote on Feb. 5 saying:

The deed of appointment is not dated, but is intended to be dated the same date as the

vacating receipt on the mortgage to the Bingley Building Society. The deed has been executed by Olive Priestley in the presence of a clerk with Messrs. A. V. Hammond & Company, solicitors, Bradford, and will be executed by me on completion. The deed is held by Messrs. Mogford, Son & Warwick, solicitors, Birmingham, at whose office it is intended completion shall take place as they are solicitors for the Bingley Building Society at Birmingham.

In response to this information Messrs. Warwick replied on Feb. 5 :

A In view of your further reply the conveyance must be by yourself and Olive Priestley. Mr. Mallard should not have been a party to the contract. Please return our draft conveyance so that it can be amended.

Mr. Priestley answered on Feb. 6 that the conveyance was to be made by himself and Mr. Mallard, who were the newly appointed trustees for that purpose. On the following day Messrs. Warwick wrote :

B The legal estate is still vested in yourself and Olive Priestley, by whom the conveyance must be made, as the proposed appointment is not complete. Mr. Mallard has no interest in the property whatsoever. There appears to be no object in making an appointment of new trustees of the property immediately before the conveyance of the property concerned.

C To this Mr. Priestley answered on Feb. 13 that Mrs. Priestley would not be a party to the conveyance and that the appointment would be completed before the sale to the purchaser. Messrs. Warwick persisted in their objection by letter dated Feb. 14 and on Feb. 19 Mr. Priestley again stated that the appointment would be completed immediately before completion and the Bingley Building Society mortgage discharged so that on the date of the completion the vendors would be in a position to convey the property contracted to be sold free from encumbrances. He asked Messrs. Warwick whether, if the appointment was forthwith completed and stamped, they would then raise any objection and if so what. On Feb. 20 (which was the date fixed for completion by the contract) Messrs. Warwick pointed out that no explanation had been given why it was necessary to appoint new trustees solely for the purpose of the conveyance to their client. They added :

In fact no appointment has been made and the existing trustees are the only persons competent to convey, and they will be shewn as discharging the mortgage.

E Nothing much further seems then to have happened for more than a month, and then, in answer to a letter from Mr. Priestley of Mar. 27, Messrs. Warwick wrote on Mar. 28 that on a certain basis, which is not for present purposes relevant, and

F . . . provided the deed of appointment of new trustees is completed and executed by all three parties and duly stamped, and we are supplied with a full abstract of this deed, together with the address of Mr. Mallard, we will then be in a position to prepare the conveyance in this matter.

G On Apr. 1 Mr. Priestley wrote to say that the deed of appointment of new trustees would be completed and stamped before completion of the sale and would, in fact, probably be done in about a week's time, and on Apr. 17 he wrote further informing Messrs. Warwick that the appointment of Mr. Mallard as trustee was completed and had been dated Apr. 5, 1946. On May 2 Messrs. Warwick wrote to Mr. Priestley that they had received abstract of deed of appointment, duly examined, from their agents, and, subject to outstanding requisitions, they enclosed conveyance for execution by the vendors. Then came the completion statement in which the vendors claimed interest from Feb. 20, and as a result of such claim, which has led to the present summons, it only remains to say that the sale has never been completed.

H It is on the above facts that the question arises whether the delay from and after Feb. 20, 1946, in completing the contract was "attributable to default by the vendors in deducing title in accordance with the contract." Counsel for the vendors argued that it was not. He said that the vendors' obligation was to show title at or before completion of the sale and, provided they did so, they could not be said to be in default. He said that the vendors had abstracted a deed of appointment of new trustees which had already been executed by Mr. Priestley's wife and which would be executed by Mr. Priestley also, and thus perfected, at completion of the sale. Execution by Mr. Mallard was not required to give the deed validity and, in any case, he would be bound to execute it

in that he was a party to the contract for sale. Counsel compared the position with that of a sale by a mortgagor free from encumbrances who has to obtain the concurrence of the mortgagee and sufficiently discharges his obligation by obtaining such concurrence at completion. I think these contentions fail to pay due regard to the requirements of the position. As stated in *WILLIAMS ON VENDOR AND PURCHASER* (4th ed., vol. 1, p. 204), a vendor is under an obligation both to show title on the face of the abstract which he delivers and to prove his title by production of the proper evidence, and both these obligations ought properly to be performed by the vendor well before the day fixed for completion. In the present case the deed of appointment passing the legal estate from Mr. and Mrs. Priestley to Mr. Priestley and Mr. Mallard was obviously of vital importance in this matter, and until it was signed, sealed and delivered both by Mr. Priestley and by Mrs. Priestley it is clear that Mr. Mallard had no interest in the property whatsoever. The only relevant document which existed down to the date fixed for completion, and, indeed, down to some date in Apr., 1946, was an undated and unstamped parchment, purporting to have been executed by Mrs. Priestley and in the custody, apparently, of the mortgagees, but otherwise having no legal effect at all. Accordingly, at no material time did a document conferring title on the vendors exist and it follows that no such document was or could be abstracted prior to Feb. 20. It is no answer, in my judgment, to say that, if the purchaser had attended completion, all would have been well. It might or might not have been, so far as the stamping of the document and its execution by Mr. Priestley were concerned, but the purchaser would have had no previous abstract of the document or opportunity for inspection and consideration. The concurrence of a mortgagee who is immediately redeemable is simply a matter of conveyancing and is not comparable to the due execution of a deed, such as the deed of appointment, which constitutes the very title of one of the vendors and without which he had no interest in the property at all. I am, accordingly, of opinion that the vendors were in default on and after Feb. 20, 1946, in deducing title in accordance with the contract and that this question, therefore, must be answered in favour of the purchaser.

As preliminary to the second point which falls to be considered it will be convenient to refer to the circumstances in which the purchaser was let into possession of the property sold and cl. 6 (2) (d) of the general conditions of sale was agreed to be omitted from the contract. By para. 5 of his affidavit sworn in support of this application Mr. Priestley states as follows:

Concurrently with the said contract it was agreed that the purchaser should be entitled to possession of the said property before the actual date of completion on the conditions following, *viz.*, (a) that the sum of £200 should be deposited in the bank in the joint names of myself and the purchaser's solicitors, Messrs. A. C. Warwick & Co. (b) Purchaser undertaking to complete within one month after taking possession and that time in this respect should be of the essence of the contract. (c) That certain furniture belonging to me should be allowed to remain until completion. (d) That no interest should be payable on the purchase money in respect of such possession before completion, *i.e.*, for the period prior to date fixed for completion by the contract, but it was verbally agreed that the purchaser would pay interest for his occupancy of the premises if the sale was not completed on the appointed day.

Mr. Pook, by his affidavit, denies that it was ever agreed that he should pay interest if the sale was not completed before the date fixed for completion, and, accordingly, counsel for the vendors did not rely on the oral agreement to this effect deposed to by Mr. Priestley. The correspondence discloses that the purchaser was proposing to buy some small articles of property in the house which belonged to Mr. Priestley and that certain furniture should remain there for the time being. The purchaser, who had paid a deposit on the property as early as Dec. 14, 1945, was anxious to go into possession as soon as possible. Mr. Priestley wrote on Jan. 10, saying that, if it would suit Mr. Pook's convenience, he could probably arrange for him to take possession by the end of Jan., and, if they had not been able to complete by then, he (Mr. Pook) could deposit the balance of the purchase money in the joint names of Messrs. Warwick and Mr. Priestley pending completion. On Jan. 14 Messrs. Warwick replied that the financial arrangements which the purchaser had made to cover the purchase would not allow him to deposit the balance of the purchase money except in exchange for the deeds. In those circumstances they suggested that he be

allowed to take possession as a tenant at will, he being responsible for the outgoings from the time he should take possession until completion. On Jan. 15 Mr. Priestley wrote :

If your client is having a mortgage on the house I would agree to his taking possession upon his paying into the joint names of yourself and myself the balance of cash that he will be finding and signing the proposed mortgage to enable you to complete, it being stated that he takes possession undertaking to complete the matter within one month thereafter and that time is of the essence of the contract in this respect.

A Apparently, Mr. Priestley and Mr. Pook had a meeting on Jan. 21 and on the following day Messrs. Warwick wrote to Mr. Priestley confirming (*inter alia*) that :

. . . it was agreed that on our client going into possession before completion no interest would be payable on the purchase money as provided by the conditions. Accordingly we have made provision for the deletion from the contract of cl. 6 (2) (d) which relates to this . . . As arranged we have placed on deposit the sum of £200 in the joint names of yourself and ourselves at Lloyds Bank, Ltd., Sydenham.

B Mr. Priestley replied on Jan. 23, approving Messrs. Warwick's amendment of the contract and saying that he was giving instructions for the key of the house to be handed to Mr. Pook at any time. It was on the arrangements as outlined above that the purchaser shortly afterwards entered into possession of the property. So far as Mr. Pook's liability to pay interest on the purchase money is concerned, such liability is dependent, in my judgment, on the terms of the written contract between the parties which may be read in the light of, but are not (except so far as concerns the further £200 deposit) for present purposes affected by, the arrangements made between them.

C On the question of general principles counsel for the vendors referred me to certain authorities in support of the proposition that *prima facie* a purchaser in possession is bound to pay interest on any unpaid balance of purchase money. D The cases to which he referred were *Fludyer v. Cocker* (1), *A.-G. v. Christ Church, Oxford (Dean)* (2) and *Birch v. Joy* (3). In the first of these cases SIR W. GRANT, M.R., said with regard to a purchaser who takes possession without a conveyance : (12 Ves. 27) :

E The purchaser might have said, he would not have anything to do with the estate, until he got a conveyance. But that is not the course he took. He enters into possession : an act that generally amounts to a waiver even of objections to title. He proceeds upon the supposition, that the contract will be executed ; and therefore agrees, that from that day he will treat it, as if it was executed. The act of taking possession is an implied agreement, to pay interest ; for so absurd an agreement, as that the purchaser is to receive the rents and profits, to which he has no legal title, and the vendor is not to have interest, as he has no legal title to the money, can never be implied.

F In *A.-G. v. Christ Church, Oxford (Dean)* (2), SIR LANCELOT SHADWELL, V.-C., directed a purchaser in possession to pay interest on the purchase money " according," as he said (13 Sim. 217), " to the common course of the court." In *Birch v. Joy* (3) LORD ST. LEONARDS, L.C., said (3 H.L. Cas. 590) :

G There is nothing on the face of this contract to give to the purchaser all the rents of the estate from a given day, and to absolve him from the payment of interest on the purchase money, and therefore, if the purchaser is to find a stipulation of that sort in his favour, he must find it somewhere else ; it is not in this contract. This contract, if it had been executed by a court of equity, would have been executed according to equity and good conscience, and according to the rules of the court, upon which there cannot be a doubt, nor has there been any difference at the Bar. From the time at which the purchaser was to take possession of the estate he would be deemed its owner, and he would be entitled as owner to the rents of the estate, and would have kept them without account. From the same period the seller would have been deemed owner of the purchase money, and that purchase money not being paid by the man who was receiving the rents, would have carried interest, and that interest would have belonged to the seller as part of his property. A court of equity, as a general rule, considers this to follow. The parties change characters ; the property remains at law just where it was, the purchaser has the money in his pocket, and the seller still has the estate vested in him ; but they exchange characters in a court of equity, the seller becomes the owner of the money, and the purchaser becomes the owner of the estate. That is the settled rule of a court of equity ; and in applying that rule to this contract, the court would not have had the slightest difficulty.

Counsel for the vendors contended that these principles apply to the present

case subject only to this, that, having regard to the deletion, by express agreement, of cl. 6 (2) (d) of the general conditions, the purchaser was freed from payment of interest from the time he took possession until the date fixed for completion, but that this freedom ceased on that date. He contended, as a different way of putting the matter, that in any case the contract should, if ambiguous, be construed in the light of these general equitable principles. Counsel for the purchaser contended, on the other hand, that this is not an application for relief under the general jurisdiction, but is a claim to 5 per cent. interest under the contract itself, and that, in any event, the parties made a bargain for themselves and that, accordingly, there is no room for the application of any general principles. My view of the matter is that I must look to the contract itself for the elucidation of the problem, but that, if an ambiguity arises out of it, then the *prima facie* liability of a purchaser in possession to pay interest should be borne in mind. I approach, therefore, the construction of the contract. By cl. 3 of the special conditions the purchaser agreed to pay interest at 5 per cent. on the balance of the purchase money (credit being given for the deposit of 10 per cent. payable on sale) from the date fixed for completion until payment. Condition 6 of the general conditions (as amended by agreement between the parties) imposed on Mr. Pook, as a purchaser taking possession before completion, the obligation, as from the date of taking possession, to keep the property in repair and to pay rents and other outgoings until the time of actual completion. The condition also conferred on him, during the same period, the right to receive the rents and profits. The deletion of cl. 6 (2) (d) freed the purchaser from payment of interest on unpaid purchase money from the date of taking possession, but did not override his liability, imposed by special condition 3, to pay such interest at 5 per cent. from and after the date fixed for completion. Such, then, being the purchaser's rights and liabilities, the question next is how and to what extent they are modified by general condition 7. Condition 7 (1) is clearly directed to purchasers who do not take possession before completion, for the question of interest payable by purchasers who do take possession has already been dealt with by condition 6 (2). By condition 7 (2) purchasers who do not take possession, but not (by reason of the exception contained in the sub-clause) purchasers who do take possession, are entitled to deposit the purchase money in a bank if completion is delayed through no default of their own, and in such case the vendor has to be content with the interest earned by the money deposited. A purchaser in possession, however, has in like circumstances to continue to pay interest on the unpaid balance of purchase money at 5 per cent. per annum. Condition 7 (3) deals with the position where not only is the purchaser not responsible himself for the delay in completion, but such delay is attributable to certain specified defaults of the vendor, and in such cases the sub-clause exempts the purchaser from payment of interest. The question is whether this exemption operates in favour of Mr. Pook, who agreed by special condition 3 to pay interest after the date fixed for completion, and who was entitled both before and after that date to the receipt of the rents and profits by virtue of general condition 6 (2) (c). It was argued that, as the exception in condition 7 (2) does not appear in condition 7 (3), the inference, as a matter of construction, is that the latter sub-clause includes purchasers who take possession as well as purchasers who do not. I think this argument attributes more weight to the exception in sub-cl. (2) than it can properly bear. Sub-clause (2) is merely a proviso to sub-cl. (1) and I have already pointed out that sub-cl. (1) is directed to the case of purchasers who do not take possession as distinct from the case of purchasers who do. I think the exception to sub-cl. (2) was inserted *ex abundanti cautela* having regard to the apparent generality of the language used in sub-cl. (1). In my judgment, just as sub-cl. (2) is a proviso to, and in reality a part of, sub-cl. (1), so also is sub-cl. (3) referable to sub-cl. (1) and the words "no interest shall become payable by a purchaser" mean "no interest payable under sub-cl. (1) shall become payable by a purchaser," viz., by a purchaser not in possession. This view of the matter is, I think, confirmed by sub-cl. (4), the provisions of which only appear to be applicable to cases where the purchaser has not entered into possession.

I am, accordingly, of opinion that, as Mr. Pook was and is a purchaser in possession, he is not entitled to rely on general condition 7 (3) as freeing him from the liability which he accepted under special condition 3. I am not sorry

to arrive at this conclusion because it accords with the principles which have been accepted as fair and equitable in the decisions to which I have referred. These principles were departed from to the extent of exempting the purchaser from payment of interest from the date of taking possession to the date fixed for completion and the reason was that the purchaser made a £200 deposit in the names of agreed stakeholders. I should, however, require much clearer language than any that is to be found in the contract before me to justify the view that the parties to a sale intended to oust these principles of equity altogether. Nor is such justification to be found in the letters to which I have referred and which disclose the general arrangements under which possession of the property was given. I observe that in the completion statement the vendors sought to charge 5 per cent. interest on the whole of the purchase money except the original 10 per cent. deposit of £180. This is wrong as they are clearly not entitled to interest at that rate on the further deposit of £200 to which I have referred.

Declaration accordingly.

Solicitors: *Cliftons* (for the vendors); *A. C. Warwick & Co.* (for the purchaser).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

C DIXON & GAUNT, LTD. AND ANOTHER v. INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Atkinson, J.), March 25, 26, 27, April 1, 1947.]

Revenue—Excess profits tax—Practice—Appeal to Special Commissioners—Burden of proof—Finance Act, 1941 (c. 30), s. 35 (1)—Finance Act, 1944 (c. 23), s. 33 (2).

In an appeal by the taxpayer to the Special Commissioners against a direction made by the Commissioners of Inland Revenue under the Finance Act, 1941, s. 35 (1), as amended by the Finance Act, 1944, s. 33 (2), the burden of proof rests primarily on the commissioners of inland revenue to justify the direction, and it is not, therefore, for the taxpayer to open in the first instance and show a *prima facie* case in support of his appeal.

Thomas Fattorini (Lancashire), Ltd. v. I.R.C. ([1942] 1 All E.R. 619) applied.

[FOR THE FINANCE ACT, 1941, s. 35, see HALSBURY'S STATUTES, Vol. 34, p. 131; and FOR THE FINANCE ACT, 1944, s. 33, see *ibid.*, Vol. 37, p. 329.]

Cases referred to:

(1) *Thomas Fattorini (Lancashire), Ltd. v. I.R.C.*, [1942] 1 All E.R. 619; [1942] A.C. 643; 111 L.J.K.B. 546; 167 L.T. 45; 24 Tax Cas. 328, H.L.; Digest Supp.

(2) *Crown Bedding Co., Ltd. v. I.R.C.*, [1946] 1 All E.R. 452;

(3) *Marshall Castings, Ltd. v. I.R.C.*, [1946] 2 All E.R. 16;

CASE STATED by the Special Commissioners of Income Tax.

On an appeal by the taxpayers against a direction by the Commissioners of Inland Revenue under the Finance Act, 1941, s. 35 (1) (as amended), the taxpayers submitted that the onus lay on the Commissioners of Inland Revenue to justify the making of the direction and that it was, accordingly, for them to open the appeal and establish the facts necessary for that purpose. The Special Commissioners ruled that it was for the taxpayers to open and establish a *prima facie* case in support of the appeal. The taxpayers stood on their submission and called no evidence and the Crown did likewise. The Special Commissioners confirmed the direction. The facts appear in the judgment.

Millard Tucker, K.C., and *John Clements* for the taxpayers.

The Solicitor-General (Sir Frank Soskice, K.C.) and *R. P. Hills* for the Commissioners of Inland Revenue.

Cur. adv. vult.

Apr. 1. ATKINSON, J.: This case raises an interesting question of procedure. The Finance (No. 2) Act, 1939, s. 17 (which deals with subsidiary companies in connection with interconnected companies) provides:

(3) If the subsidiary company is a subsidiary of the principal company throughout the chargeable accounting period . . . profits or losses arising from . . . the subsidiary company . . . shall be treated for the purposes of this Part of this Act as if . . . they were . . . profits or losses . . . of the principal company . . . (6) For the purposes of this section, a body corporate shall be deemed to be a subsidiary of another body corporate if and so long as not less than nine-tenths of its ordinary share capital is owned by that other body corporate, whether directly or through another body corporate or other bodies corporate . . .

The Finance Act, 1941, s. 35, provides :

(1) Where the Commissioners [of Inland Revenue] are of opinion that the main purpose for which any transaction or transactions was or were effected (whether before or after the passing of this Act) was the avoidance or reduction of liability to excess profits tax, they may, if they think fit, direct that such adjustments shall be made as respects liability to excess profits tax as they consider appropriate . . . (3) Any person aggrieved by a direction of the commissioners under this section may appeal to the Special Commissioners, whether on the ground that the main purpose of the transaction or transactions was not the avoidance or reduction of liability to tax or on the ground that no direction ought to have been given, or that the adjustments directed to be made are inappropriate.

The Finance Act, 1944, s. 33, extended the Finance Act, 1941, s. 35, by providing that for the words "the main purpose for which any transaction or transactions was or were effected" should be substituted the words "the main purpose or one of the main purposes." Then sub-s. (3) (which is introduced by the rather important words "If it appears") provides :

If it appears in the case of any transaction or transactions . . . one or more of which involves : (a) the transfer or acquisition of shares in a company . . . that, having regard to the provisions of the law relating to excess profits tax, other than the said s. 35 and this section, which were in force at the time when the transaction . . . was . . . effected, the main benefit which might have been expected to accrue from the transaction or transactions during the currency of excess profits tax was avoidance or reduction of liability to the tax . . .

That is the position in which the Commissioners of Inland Revenue are placed. If they are of opinion that "one of the main purposes" of the transaction was tax evasion, or that "the main benefit which might have been expected to accrue" was tax evasion, then they can make a direction under the section.

In this case James Hare, Ltd., owned shares in Dixon & Gaunt, Ltd. On Aug. 30, 1940, they transferred 7,000 shares to a transferee. The Commissioners of Inland Revenue then issued a notice, which is set out in para. 2 of the case :

I am to inform you that the Commissioners of Inland Revenue have considered the transaction consisting of the transfer by James Hare, Ltd., of 7,000 shares in the above-named company on Aug. 30, 1940. The commissioners are of opinion that avoidance or reduction of liability to excess profits tax was, or is, under the said s. 33 (3), deemed to have been, the main purpose or one of the main purposes for which the transaction was effected. They have, therefore, directed by virtue of the powers conferred on them by the Finance Act, 1941, s. 35 (1) (as amended) that the excess profits tax liability of Dixon & Gaunt, Ltd., be computed on the basis that the company shall continue to be treated as a subsidiary company of James Hare, Ltd., within the meaning of the Finance Act, 1940, s. 28 and sched. V . . .

Notice of appeal to the Special Commissioners against the direction was sent by the solicitors on behalf of the companies, and three grounds were set out : (1) avoidance of tax was not the purpose ; (2) no direction ought to have been given ; and (3) the adjustments were inappropriate. On the appeal coming on, counsel appearing for the companies submitted :

. . . that the onus lay upon the Commissioners of Inland Revenue to justify the making of the direction, and that it was, accordingly, for their representative in the first place to open and establish the facts necessary for that purpose.

Certain authorities were referred to. The representative of the Commissioners of Inland Revenue opposed this submission and contended that it was for the companies to open their case and call evidence in support of their appeal. Then the Case proceeds :

We, the [Special] Commissioners, ruled that it was for [the companies] to open in the first instance and establish on the evidence a *prima facie* case in support of the appeal which they had entered. We indicated that, if such a *prima facie* case were established, the onus might then shift to the Crown, but we did not feel it necessary

at that stage to make any decision upon the point. Counsel for the companies there-upon elected to call no evidence, but to stand upon his submission [and the Commissioners of Inland Revenue did the like].

No evidence being called on either side, the Special Commissioners confirmed the direction. They say :

A We held that the companies, having entered an appeal upon certain grounds specified in the letter of Nov. 2, 1945, should have proved before us enough facts to establish a *prima facie* case in support of such appeal, in accordance with usual practice, and that as they had not done so the appeal failed.

They were asked to state a Case, and they have stated this Case, which raises the question : On whom was the onus of proof—whose duty was it to begin and prove their case ?

The Income Tax Act, 1918, s. 137, provides :

B (4) If, on an appeal, it appears to the majority of the commissioners present at the hearing, by examination of the appellant on oath or affirmation, or by other lawful evidence, that the appellant is overcharged by any assessment or surcharge, the commissioners shall abate or reduce the assessment or surcharge accordingly, but otherwise every such assessment or surcharge shall stand good.

C There was very good ground for putting the burden on the taxpayer of proving that assessments for income tax were too high, because otherwise the taxpayer would only have to keep no books, no banking account, and insist on being paid in Treasury notes, and no one living could ever prove what his income was or establish any liability to income tax.

There is another set of provisions which for my purpose resembles s. 35 of the Act of 1941. The Finance Act, 1922, s. 21, provides :

D With a view to preventing the avoidance of the payment of super-tax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted as follows : (1) Where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of [the accounting period] distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of super-tax, a reasonable part of its actual income from all sources for the said year or other period, the commissioners may, by notice in writing to the company, direct that for purposes of assessment to super-tax, the said income of the company shall . . . be deemed to be the income of the members, and the amount thereof shall be apportioned among the members . . .

E Each member is to be charged in respect of the sum apportioned to him. That section only applied to companies consisting of not more than five members and did not apply to companies which were subsidiaries of a company, to put it shortly, in which the public were substantially interested.

F It is to be observed that the expressions : "Where (or if) it appears," and "may direct," are used in both sections. A right of appeal was given by para. 1 of sched. I to the Act of 1922 :

G A company which is aggrieved by any direction given under s. 21 of this Act may appeal to the Special Commissioners . . . and the commissioners shall hear and determine the appeal . . . and the provisions of the Income Tax Acts relating to appeals against assessments shall, with any necessary modification, apply for the purposes of an appeal under this provision.

H Therefore, you have this distinction between appeals under s. 21 of the 1922 Act and s. 35 of the 1941 Act. There is an express provision incorporating the provisions relating to income tax appeals, true, with the words "with any necessary modification" in the case of an appeal against a direction under s. 21, but there is no similar provision in relation to appeals under s. 35. There are certain provisions dealing with appeals under s. 35 contained in regulations made under statutory authority. The Excess Profits Tax Regulations, 1943, deal with directions given in relation to excess profits tax. Regulation 2 (1) provides :

. . . "Direction" means a direction of the Commissioners of Inland Revenue against which, under any of the enactments relating to excess profits tax an appeal lies to the Special Commissioners.

Regulation 6 is the important one :

The provisions of regs. 5 to 11 of the Principal Regulations shall, with any necessary

modifications, apply in relation to any notice of appeal and to the hearing of an appeal against the direction as they apply to a notice of appeal and to the hearing of an appeal against an assessment.

The regulations referred to are contained in S.R. & O., 1939, No. 1734, and relate to excess profits tax. The first regulation is :

Subject to the express provisions of the Act and this regulation, the enactments of the Income Tax Act, 1918, and the Finance Act, 1925, enumerated in the schedule to these regulations shall, with the modification therein described, apply to the assessment and collection of excess profits tax, and the hearing of appeals in connection therewith. A

Be it noted that that does not refer to directions at all, but merely to assessments to excess profits tax, and is not incorporated by the order to which I have just referred. Of regs. 5 to 11 the only one of any importance is reg. 5 :

With reference to any notice of appeal and to the hearing of an appeal, the General or Special Commissioners, as the case may be, shall, subject to the provisions of the Act and to any regulations made thereunder, have all such powers in relation to any matter of appeal as are possessed by them in relation to notices of appeal and the hearing of appeals under any Act for the time being in force relating to income tax. B

It is to be noted that that merely gives the Special Commissioners hearing these appeals the same powers as the commissioners hearing appeals in relation to income tax. No provision anywhere in connection with excess profits tax has been called to my attention which in any way incorporates s. 137 of the Income Tax Act, 1918, where the burden is put on the appellant. C

At this point I ought to add this. The Commissioners of Inland Revenue have very extensive powers of getting all the information they want, *e.g.*, under the Act of 1937, sched. V, pt. III, para. 1 ; s. 35 of the Act of 1941 ; and other provisions. It is quite clear that they have the fullest power of demanding particulars and seeing accounts and books and anything they want. Therefore, it is or ought to be certain that they have in their possession before they make any direction sufficient information to make it appear that a direction should be made. Both s. 21 of the Act of 1922 and s. 35 of the Act of 1941 start with what is in effect a charge of evasion. Under s. 21 it is a charge of not distributing profits to avoid taxation, and, under s. 35, it is a charge of entering into some transaction to evade excess profits tax. The Commissioners of Inland Revenue ought not to make those charges unless they have formed an honest opinion that they are justified. That means that they must have certain facts in their possession on which they have formed their view. There can be no difficulty about placing those facts before the Special Commissioners. They are under no disadvantage if called on to justify their claim. On the other hand, it is not intended that they should be able to say to themselves : " Well, let us draw a bow at a venture and allege that such and such a transaction is intended to evade taxation and then we will try and justify it by cross-examination." That is not the intention of these sections. Quite apart from authority, it seems to me that a man charged with evasion should be told what the facts are on which the Commissioners of Inland Revenue rely, on which they base their opinion and their charge. The question on an appeal is not whether the Commissioners of Inland Revenue had been of that opinion, but whether it appears to the Special Commissioners hearing the appeal that such and such a result must be expected to follow from the transaction. It is a procedure which is intended to get the view and judgment of the Special Commissioners who are hearing the appeal. To my mind, the answer to the question asked in this case must depend on the answer to the question where lies the burden of proof. D
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Here I have weighty authority. The first case relied on was *Thomas Fattorini (Lancashire), Ltd. v. Commissioners of Inland Revenue* (1). The facts were complicated, but the point for the purposes of the case with which I have to deal was this. A company wished to purchase more investments, and, not having the money, borrowed the necessary sum from the bank. One of the terms on which the money was lent was that the company would distribute nothing in dividends until the debt had been paid off. The company adhered to their bargain, and, instead of distributing dividends among the shareholders, they paid the income, which could have been distributed otherwise, to the bank in discharge or reduction of their liability. They were attacked by the Commissioners of Inland Revenue under s. 21 of the Act of 1922 for not having H

distributed a reasonable amount of their income. The commissioners said, in para. 24 of the Case Stated (24 Tax Cas. 334) :

We considered that, as the company was an investment company which, after Aug. 24, 1936, held investments producing revenue for which the company had paid £18,000, there was a *prima facie* case that the reasonable course was that the company should so manage its affairs as to provide for distribution of dividend ; and that the company had not displaced such *prima facie* case by evidence that this could not have been done without jeopardising the interests of the company, or without making it impossible to acquire the shares which it desired to buy.

They asked in their questions :

Whether the matters set forth in para. 24 are such as to show that we misdirected ourselves as to the onus of proof in a case where it is admitted that an investment company with a substantial income has not distributed any part of it.

In other words, they said : " You have it proved that here is a company receiving a big income. It has distributed nothing. There is a *prima facie* case. The burden is on the company to prove that what they did was not unreasonable. The Board of Referees found against the company and there were appeals which eventually reached the House of Lords. The Lords decided that the Board of Referees was wrong. I am going to read several passages showing that the opinion of the majority was that all through the burden was on the Commissioners of Inland Revenue to justify the charge of evasion which they had made, and that that burden at no stage was thrown on the company. LORD SIMON, L.C., ended his judgment with these three lines (*ibid.*, p. 348) :

There is no evidence on the matter to be found in the Case and in the absence of material adequate to support the conclusion, I think the House is bound to answer the question put in the negative and to allow the appeal.

So that he is clearly saying there must be material adequate to support the conclusion that the direction given was well-founded. That means that it is for the Inland Revenue Commissioners to provide the material to put before the Special Commissioners, material which is adequate to support the conclusion arrived at that the direction was well-founded. LORD ATKIN dealt with the point (*ibid.*, p. 351) :

It seems clear that the discussion must proceed *ab initio* on the footing that the action of the directors must be judged by considering what their conduct would reasonably be if no question of sur-tax influenced their decision. Withholding of distribution for the purpose of " avoidance of the payment of super-tax " by shareholders would, if found, obviously negative the reasonableness of any part so withheld. The other general point to be observed is that, as it seems to me, what has to be found is that the company acted unreasonably in withholding some part of its income from distribution. It is not enough to show that a part could reasonably be distributed, if at the same time it could be said, as it well might, that it was equally reasonable to withhold distribution. The section is highly penal, and I feel no doubt that the onus is originally, and remains, on the Revenue to show that the company acted unreasonably in withholding part of its income from distribution . . . From this point of view I am quite unable to agree that the fact that a company, even an investment company, during the year holds income producing investments, raises a *prima facie* case that the reasonable course for the company is so to manage its affairs as to provide for that income or any part of it to be distributed . . . But I also think that the facts stated by the Board disclose no evidence on which it could be found that the company failed to distribute a reasonable part of its income in the years in question.

He is saying that there must be evidence before the Board to justify the decision against the company. LORD WRIGHT was equally clear. Having read para. 24 of the Case, he says (*ibid.*, p. 355) :

I understand that paragraph to mean that the Board are treating the onus as of an ambulatory or shifting character, so that at a certain stage of the enquiry it finally shifts from the respondents to the appellant. I think that is wrong in law. The Crown set out to prove that the direction of the Board is justified because the appellant company has not distributed a reasonable part of its income within the meaning of the Finance Act, 1922, s. 21. It is obvious that the section is penal in character and in my opinion, the onus is finally on the Crown to prove its right to impose what is a very severe penalty. At the end of the day it is for the Crown to establish the facts necessary to show want of reasonableness on the part of the appellant. I cannot discover in the Case as stated that there are facts found sufficient to justify the conclusion. Nor do I think that the Board would have come to their conclusion if they had not taken the view as to onus expressed in para. 24.

LORD MACMILLAN said (*ibid.*, p. 355) :

It will be observed that the paragraph I have quoted [*i.e.*, para. 24] puts the matter as one of onus. Now it may well be that, when the Special Commissioners make a direction under s. 21 of the Act of 1922, it is for the company to put forward reasons and if necessary evidence to show why the direction is in the circumstances unjustified. Here the appellant put forward its contract with the bank as justifying its having made no distribution of its income in dividends. And the Crown admit that it was quite reasonable for the company to contract to apply its income as it did . . . But when the matter reaches the stage of a Stated Case, the question is not properly one of onus. It is simply a question of whether the facts found and stated afford evidence on which the Board could properly arrive at their conclusion.

It is a little difficult to know exactly what he means by saying, "It may well be," but I suppose there had been some argument about it, and he is saying, "it may or may not be so—I do not care a bit about that." The important passage is at the end—"whether the facts found and stated" afford evidence that the direction was well-founded.

Assuming for the moment that what is said in relation to appeals under that section applies to appeals under the provisions with which I have to deal—and there is no reason for supposing it does not—one asks oneself the question : Where are the facts stated in this Case which entitled the Special Commissioners to say that the direction was well-founded ? They knew no more about the case than the usher in this court. There was no evidence before them, yet they proceed to say the direction is a good one. LORD PORTER did not deal with this point in his judgment in the *Fattorini* case (1), but I have four Law Lords saying the Case has to state facts found by the commissioners sufficient to justify the direction.

Then there are two cases which refer specifically to the section with which I have to deal. The first is *Crown Bedding Co., Ltd. v. Commissioners of Inland Revenue* (2). That was a question affecting the acquisition of certain shares. The facts do not matter. I want to read a few lines from the judgment of LORD GREENE, M.R., after he had read the section ([1946] 1 All E.R. 453) :

The effect of that is this. Whereas under the original s. 35 of the Act of 1941, even with the amendments introduced by sub-s. 2 of s. 33 of the Act of 1944, it would have been necessary in such a case as this to prove to the satisfaction of the Commissioners of Inland Revenue, or, on appeal, to the satisfaction of the Special Commissioners, that the main purpose, or one of the main purposes, of the transaction, was in fact the avoidance or reduction of tax liability . . .

In other words, the Master of the Rolls is saying in such a case it is necessary to prove the facts to the satisfaction of the Special Commissioners—not that it is for the appellant to disprove anything, but it is for the Inland Revenue to prove the essential matters to the satisfaction of the Special Commissioners.

In *Marshall Castings, Ltd. v. Inland Revenue Commissioners* (3), where there was a question arising under these sections, WROTTESELEY, J., said ([1946] 2 All E.R. 21) :

Here the Finance Act, 1944, s. 33 (3), comes in and makes it unnecessary for the Commissioners to be satisfied or to satisfy the Special Commissioners that the main object was avoidance . . . It is no longer incumbent on the Commissioners of Inland Revenue to satisfy themselves or to prove to the Special Commissioners on appeal that tax avoidance was in fact a main purpose of the transaction. It is sufficient that a reasonable man with knowledge of the circumstances and the law should expect it to follow . . .

He is clearly treating the burden of proof as on the Commissioners of Inland Revenue. They have no longer to prove what they had to prove before the 1944 Act, but they have still to prove something.

Therefore, there is clear authority where the burden of proof rests. The Commissioners of Inland Revenue have to put before the Special Commissioners facts sufficient to justify the direction. The Solicitor-General agreed that, at the end of the day, the Special Commissioners must be satisfied affirmatively that the Commissioners of Inland Revenue are right and that the direction is well-founded, but he argued that the appellant must, at any rate, begin and must do something by calling somebody to say : "This charge is not true," or something of that sort. I cannot follow that. The "end of the day" may come quite early in the day. At the conclusion of this case were there any facts before the Special Commissioners to justify their conclusion ? There

- was none. It was not the fault of the taxpayers, because the duty was on the Commissioners of Inland Revenue to put the necessary facts before the tribunal. At common law, in the King's Bench Division, the question of the burden of proof and the right or duty to begin frequently arises. It does not mean that the plaintiff has always to begin. One asks the question: If no evidence is given who wins? That settles the question of the burden of proof. It seems to me, on these authorities, the answer to the question is clear, namely,
- A if no evidence is given the taxpayer must win, because the result of the giving of no evidence is that there are no facts before the Special Commissioners to enable them to form any view. In this case there was no material before them which could justify their confirming the direction. I think that covers the ground. The Special Commissioners had no evidence, and there must be sufficient evidence before they can act. They say they confirmed the direction because the companies would not accept the position that it was for them to prove the
- B Inland Revenue Commissioners were wrong. Supposing some evidence had been called and supposing on that evidence the Special Commissioners had confirmed the direction and there was an appeal, the question would still be: "Was there sufficient evidence upon which they could properly come to that decision?" *A fortiori*, if there is no evidence the result must be the same. Therefore, I think the appeal succeeds. I think the proper order to make is to send it back to the Special Commissioners to hear the appeal recognising
- C where the burden lies.

Order accordingly.

Solicitors: *Maxwell, Batley & Co.*, agents for *Lempears Curtis & Co.*, Leeds (for the taxpayers); *Solicitor of Inland Revenue* (for the Crown).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

D

Re BUENOS AYRES GREAT SOUTHERN RAILWAY CO., LTD.,
THE COMPANY v. PRESTON AND ANOTHER

[CHANCERY DIVISION (Romer, J.), March 11, 12, 28, 31, 1947.]

- E Companies—Dividends—Preference shareholders—Right to annual payment of fixed dividend "out of profits of company"—"Profits of the company"—Article authorising directors to carry profits, as required, to reserve fund—Right to carry profits to reserve before paying any dividend on preference shares.

- A company was formed in 1862 with a capital of £750,000 divided into 75,000 shares of £10 each. By art. 29 a reserve fund was to be set aside
- F "for the purpose of the equalisation of dividends and defraying any special or unusual expenditure," and the board was authorised to increase this fund as they should think fit, "and for that purpose to carry to such fund for each year such part of the undivided profits of the company from whatever source arising, as they may think fit." By art. 164, dividends were to be paid "only out of the clear profits of the company." The
- G capital was from time to time increased and, by special resolutions passed in 1889, some of the already existing shares and some new shares were constituted as preference shares, the rights attaching to them being embodied in the company's articles as art. 18A. By cl. 1 of this article, the preference shareholders were to be entitled to receive a fixed dividend of 5 per cent. per annum "out of the profits of the company for each year," on the amount paid up on the shares, "or so much of the said dividend as the said profits shall be sufficient to pay in preference to
- H and before payment of dividends for that year on the ordinary stock or shares of the company." Clause 2 was: "No resolution of a general meeting shall be required for the declaration of the dividend on the preference shares, but the board, if in their judgment the profits for the year are or will be sufficient for the payment of such dividend or some part thereof, shall pay the same by two half-yearly instalments." By cl. 10, the regulations of the company applicable to ordinary shares were to be applicable to the preference shares "except as otherwise provided by or to be reasonably inferred from this article and subject thereto."

For some years the company had made losses on revenue account, but in the year ended June 30, 1945, there had been some profits. The directors considered, however, that it would be imprudent to recommend payment of any dividend before the existing debit balance on revenue had been eliminated. The question was whether they had a right, in priority to the preference shareholders' right to dividend, to carry profits to reserve :—

HELD : (i) "the profits of the company" in cl. 1 of art. 18A were the same profits as would otherwise have been the source of dividend on ordinary shares and meant the profits available for dividend. A

(ii) since the reserve fund was applicable to purposes which were beneficial to the company as a whole, including the preference shares, the mention in art. 29 of one object (*i.e.*, the equalisation of dividends), which was not applicable to preference shares, was not a reason for excluding those objects which were applicable and did not prevent art. 29 from applying to preference shares. B

Bond v. Barrow Haematite Steel Co. ([1902] 1 Ch. 362) followed.

(iii) clause 2 of art. 18A did not dispense with the need for a declaration of a dividend on preference shares, but merely with the need for a declaration by the company in general meeting, and delegated the declaration, in respect of dividend on preference shares, to the board.

Bond v. Barrow Haematite Steel Co. (*supra*), applied. C

(iv) on the true construction of the company's articles, the rights conferred on the preference shareholders by art. 18A were not such as to displace the operation of art. 29, and the preference shareholders were given a contractual right to be paid a preference dividend, not out of the balance on profit and loss account in each year, but only out of the profits which were available for dividend, *i.e.*, the net profits after any deductions had been made which the directors could properly make for reserve. D

Dent v. London Tramways Co. ((1880), 16 Ch.D. 344); *Fisher v. Black & White Publishing Co.* ([1901] 1 Ch. 174), and *Long Acre Press, Ltd. v. Odhams Press, Ltd.* ([1930] 2 Ch. 196) applied. *Evling v. Israel & Oppenheimer, Ltd.* ([1918] 1 Ch. 101) distinguished.

[AS TO PROFITS AVAILABLE FOR DIVIDEND, see HALSBURY, Hailsham Edn., Vol. 5, pp. 393, 394, para. 648, and p. 398, para. 656; and FOR CASES, see DIGEST, Vol. 9, pp. 690-603, Nos. 4006-4024.] E

(1) *Long Acre Press, Ltd. v. Odhams Press, Ltd.*, [1930] 2 Ch. 196; 99 L.J.Ch. 479; 143 L.T. 562; Digest Supp.

(2) *Stewart v. Sashalite, Ltd.*, [1936] 2 All E.R. 1481; Digest Supp.

(3) *Dent v. London Tramways Co.* (1880), 16 Ch.D. 344; 50 L.J.Ch. 190; 44 L.T. 91; 9 Digest 601, 4012.

(4) *Davison v. Gillies* (1879), 16 Ch.D. 347, n; 50 L.J.Ch. 192, n; 44 L.T. 92, n; 9 Digest 595, 3978. F

(5) *Fisher v. Black & White Publishing Co.*, [1901] 1 Ch. 174; 71 L.J.Ch. 175; 84 L.T. 305; 9 Digest 602, 4021.

(6) *Evling v. Israel & Oppenheimer*, [1918] 1 Ch. 101; 87 L.J.Ch. 341; 118 L.T. 99; 9 Digest 591, 3959.

(7) *Bond v. Barrow Haematite Steel Co.*, [1902] 1 Ch. 353; 71 L.J.Ch. 246; 86 L.T. 10; 9 Digest 587, 3934. G

ADJOURNED SUMMONS to determine whether a company under its articles had a right to carry profits to reserve in priority to the preference shareholders' right to dividend. The facts and the relevant articles appear in the judgment.

T. D. D. Divine for the company.

Gerald R. Upjohn, K.C., and *W. Gordon Brown* for a preference stockholder. H

Andrew Clark, K.C., and *Charles R. Russell* for an ordinary stockholder.

ROMER, J. : This is an originating summons taken out by the Buenos Ayres Great Southern Railway Co., Ltd. There are two respondents. One is a representative of the holders of the 5 per cent. preference stock and the 6 per cent. preference stock which has been issued by the plaintiff company and the other respondent is a representative holder of ordinary stock. The summons raises certain questions of construction of the memorandum and articles of

association of the company and of certain special resolutions of the company which define the rights to be attached to each class of preference shares.

The first question which I have to decide—which has been elaborately and ably argued on both sides—is, in substance, whether the company or the board have a right, in priority to the preference shareholders' right to dividend, to carry profits to reserve. The facts which are relevant to an appreciation of the position are stated in the affidavit of Mr. Grey, secretary of the plaintiff company. He says :

The company was incorporated in 1862 under the Joint Stock Companies Acts, 1856 and 1857, and its present authorised capital is £50,000,000 divided into £32,000,000 ordinary stock, £8,000,000 5 per cent. preference stock, £8,000,000 6 per cent. preference stock and 200,000 shares of £10 each (all of which shares are at present unissued).

3. The original capital of the company was £750,000 divided into 75,000 shares of £10 each. The capital has been from time to time increased and all shares which have been issued and fully paid up have been converted into stock. Immediately before the passing of the first of the special resolutions hereinafter mentioned the capital was £9,500,000 divided into £3,600,000 stock and 590,000 shares of £10 each. 4. By special resolutions passed and confirmed on Oct. 10 and 25, 1889 : (a) The capital was increased by £2,500,000 divided into 250,000 shares of £10 each. (b) The said 250,000 shares and 50,000 of the already existing shares of £10 each (an aggregate of £3,000,000 in £10 shares) were constituted as preference shares. (c) The rights to be attached to such preference shares (being those hereinafter more particularly stated) were defined. 5. By special resolutions passed and confirmed on Apr. 20 and May 5, 1898, the capital was increased by £4,000,000 divided into 400,000 shares of £10 each of which 100,000 shares were preference shares (ranking *pari passu* with the existing preference shares) and 300,000 were ordinary shares. 6. By special resolution passed and confirmed on Apr. 18 and May 3, 1901, the capital was increased by £3,000,000 divided into 300,000 ordinary shares of £10 each. 7. By special resolutions passed and confirmed on Oct. 24 and Nov. 8, 1901, the above mentioned resolutions containing the definition of the rights of the preference shares were embodied in the articles of association of the company as art. 18A thereof and certain other alterations (not affecting the respective rights of the two classes of shares) were effected in the articles.

Then a print of the company's articles of association, as the same existed after the passing of the special resolution of 1901, was exhibited.

In para. 16 of the affidavit, Mr. Grey says :

For some years past the company made losses on revenue account and at June 30, 1944, the debit balance on that account amounted to £1,836,538. In the year ended June 30, 1945, the company made profits which enabled this debit balance to be slightly reduced and the debit balance at that date amounted to £1,627,846.

Then he exhibits prints of the company's accounts for the year ending June 30, 1945, with the directors' and auditors' report. Then he says, in para. 17 :

In the directors' opinion it would be imprudent at the present time (even assuming that it is permissible to do so before the existing debit balance on revenue account has been eliminated) to recommend payment of any dividend on any of the stock of the company. They are however advised that it is a matter of doubt whether they have any discretion to set aside profits of the company to reserve or carry the same forward in the accounts so long as dividends have not been paid at the full rate on both classes of preference stock in respect of the year in which such profits were earned and that if they have such a discretion whether such profits (or such amount thereof as is equivalent to any deficiency of such dividends) will be and remain earmarked for distribution exclusively amongst the holders of the preference stocks if and when a distribution thereof is resolved upon.

The resolutions under which the 5 per cent. preference stock was created in 1889, are, so far as material, as follows :

IX. That the holders of preference shares shall (subject to No. XIX of these resolutions), be entitled to receive in respect thereof, out of the profits of the company for each year a fixed dividend of 5 per cent. per annum on the amount from time to time paid up on such shares or so much of the said dividend as the said profits shall be sufficient to pay in preference to and before payment of dividends for that year on the ordinary stock or shares of the company ; but any deficiency in the profits of any year from the amount necessary to pay the preference dividend in respect of that year shall not be made good out of the profits of a subsequent year ; and no greater dividend than 5 per cent. on the amount from time to time paid up on the preference shares shall be paid in respect of them in respect of any year. X. That no resolution of a general meeting shall be required for the declaration of the dividend upon the preference shares, but the board, if in their judgment the profits for the year are or will be sufficient for the payment of such dividend or some part thereof, shall pay the same by two half-years

instalments, on such days as they shall appoint . . . XII. That the holders of preference shares shall not be entitled, in respect thereof, to attend or vote at the general meetings of the company, unless and until the preference dividend shall not be paid in full, in which case they shall until payment of the full preference dividend be resumed, be entitled to attend and vote in respect of the said shares in the same way as the holders of the ordinary stock or shares. XIII. That so long as the holders of the preference shares shall not be entitled to attend or vote at general meetings, no notice of the said meetings, nor any copy of the directors' report and accounts, shall be sent to them; but the same shall be sent to them, as to ordinary shareholders, if and so long as they shall be entitled so to attend and vote. XIV. That as soon as the full amount of the preference shares shall be paid up, they shall be converted into stock; and the holding of such stock shall confer similar rights to those conferred by the holding of the preference shares. XV. That the company shall have the right to create and issue further amounts of preference shares of the same kind and conferring the same rights . . . XVII. That any alterations of the rights of the holders of the preference shares in respect thereof may be made by special resolution, if consented to by a resolution passed by three-fourths of the votes given by such of the holders of the preference shares for the time being issued and outstanding as shall be present at a special meeting of such holders, to be convened and held by the board, and at which such holders shall have one vote for every preference share held by them. The regulations of the company for the time being as to general meetings of the holders of the ordinary stock and shares of the company shall apply, *mutatis mutandis*, to meetings of the holders of the preference shares held under this resolution. XVIII. That, except as otherwise provided by or to be reasonably inferred from the preceding resolutions, and subject thereto, the regulations of the company applicable to ordinary shares or stock shall apply to the preference shares or stock.

Those are the resolutions which defined the rights of the 5 per cent. preference shareholders.

I think it is convenient to refer now to certain of the articles of association of the company which were in force at the time when the 5 per cent. preference shares were created in 1889, at a time when, of course, the whole of the capital of the company was ordinary. By art. 29 it was provided as follows:

The amount not standing to the credit of the reserve fund, and such other portion (if any) of the revenues of the company as general meetings may from time to time determine, shall be set apart as a reserved fund for the purpose of the equalisation of dividends and defraying any special or unusual expenditure, to all or any of which purposes the board from time to time may apply any part of the reserve fund. The board are hereby authorised to increase the reserve fund from time to time to such amount as they shall think fit, and for that purpose to carry to such fund for each year such part of the undivided profits of the company from whatever source arising, as they may think fit.

Then there is a certain authority to the board which I need not read. Arts. 30, 31 and 59 are:

30. The board may establish out of the capital moneys of the company a fund, to be called the working capital fund, of such amount as they shall think fit, to provide for stores in hand and similar purposes. 31. The board may from time to time set apart out of the moneys of the company, such sums as in their judgment are necessary to meet claims on the company. 59. Any ordinary meeting, without any notice in that behalf, may elect directors and auditors, and (subject as to directors to the provisions of art. 113) may fix their remuneration; may receive, and either wholly or partially reject, or adopt and confirm, the accounts, balance-sheets and reports of the directors and auditors respectively; may decide on any recommendation of the directors of or relating to any dividend, and subject to the provisions of these presents, may generally discuss any affairs of or relating to the company.

Art. 61 provides, amongst other things, that the company shall, subject to the provisions of art. 62:

. . . be bound by all their special resolutions under which any shares were issued with special privileges.

Then art. 62 makes provision for resolutions altering the distinctions between the classes of shares. Arts. 164-166 are as follows:

164. Subject to the provisions of the last preceding article, and of arts. 58 and 166, all dividends on shares shall be declared by the first ordinary meeting in each year, and shall be made only out of the clear profits of the company, and (without prejudice to any preferential or guaranteed dividend) no dividend shall exceed the sum recommended to the meeting by the directors. 165. But, in order to provide for the equalisation of dividends, payments may from time to time be made according to these presents

out of the reserve fund. 166. When, in the opinion of the board, the profits of the company permit, there shall be a dividend every half-year, and, in order thereto, a dividend may be declared and paid by the board by way of dividend on account in the half year between June 30 and Dec. 31.

The words "in the half year between June 30 and Dec. 31" were deleted from that article by resolutions passed in 1901.

A Having regard to these articles, it is clear that the dividends on the ordinary capital were payable only out of the net profits of the company, in the sense that the powers of the company or the board to carry profits to reserve overrode the rights of the shareholders to dividend. The procedure would be that the board would consider the profits of the company, on the one hand, and its requirements as to maintenance and so on, on the other. Having decided the amount of profit, if any, which was available for dividend, the directors would make the necessary recommendation to the company and the company would consider the matter and decide on it under art. 59 and a dividend would be declared under art. 164. In other words, the dividend would be payable, and payable only, out of "profits available for dividend," in the sense attributed to that phrase in the modern cases, as for example, *Long Acre Press, Ltd. v. Odhams Press, Ltd.* (1). The express power to carry profits to reserve was originally, under art 29, vested in the company in general meeting and was applicable in relation to "the revenues" of the company. The words C there used, of course, are *prima facie* very wide. But the reference to the equalisation of dividends which immediately follows, considerably narrows the words, and it may be that they were intended to mean no more than "the undivided profits of the company" in the next part of the article, which was introduced in 1884 and which empowered the board to add to the reserve fund from that source.

D Such being the position, the preference capital was issued in 1889 on the terms laid down in the resolutions which I have read, and those resolutions were incorporated in the new art. 18A. I need not read art 18A. because it faithfully follows the resolutions, for all material purposes, except that, in place of resolution XVIII, which refers to the applicability of the regulations relating to the ordinary shares, cl. 10 of art. 18A was introduced, and is in the following terms :

E Except as otherwise provided by or to be reasonably inferred from this article and subject thereto, the regulations of the company applicable to ordinary shares or stock shall apply to the preference shares or stock.

In the light of that clause, the position would seem to be that the company's articles as a whole were to be applicable to the preference shareholders equally with the ordinary, and that the rights conferred on the preference shares by art. 18A, cl. 1 to 9, would override any regulations applicable to the ordinary shares, but, subject thereto, those regulations would apply. It F is, therefore, plain that the first thing to do is to discover what the rights conferred by cl. 1 to 9 of art. 18A on the 5 per cent. preference shares were. As to these, the arguments of counsel for the preference shareholders were in outline that the resolutions which were embodied in art. 18A contained the terms of the bargain on which the preference shareholders put up their

G money. They were to be entitled to a non-cumulative preference dividend of 5 per cent. out of the profits if the directors adjudged the profits sufficient, or a less dividend if such profits were insufficient. If the dividend was paid in full, they were not to be entitled to attend meetings or to receive accounts. He pointed out that, if the dividend for any reason through insufficiency of profits was not paid, it would never be paid and would be lost to the preference shareholders for ever. He said that those rights, as thus summarised, are clear

H down to cl. 10 and can be only diminished or altered under cl. 9 [see resolution No. XVII]. The question was whether such rights were qualified by cl. 10. Subject to cl. 1 to 9, he said, the company's regulations applicable to ordinary shares should apply to preference shares. Then, as examples of articles which were excluded by virtue of cl. 10, he referred to arts. 59, 164 and 166 (those relating, in effect, to the decision of the company as to and declaration of dividend and interim dividend) because cl. 2 of art. 18A expressly provides that no declaration is required for a preference dividend, and, therefore, those three articles, though applicable to ordinary shares, were

excluded from art. 18A by cl. 10. He posed the question whether the effect of art. 29, which is the reserve fund article, was to vary the clear bargain which is found in art. 18A. He said that art. 29 was applicable to the profits available for ordinary shares. With reference to art. 29, he said that the revenues of the company were the same thing as the undivided profits in the next part of the article and that they presumably meant profits available for division among the ordinary shareholders. He said that support for that view was to be found in the fact, first, that the fund contemplated as being carried to reserve was properly applicable for equalising dividends, by which ordinary dividends were indicated and not preference, and, secondly, that the company would normally consider the position of these revenues some months after the close of the trading year, during which year the directors would have been bound to pay the preference dividend out of profits, if any profits were available.

An essential part of the argument of counsel for the preference shareholders, as I have attempted briefly to summarise it, is that the right conferred by cl. 1 of art. 18A or, rather, by the resolution which was passed in the terms to be found there, is a right to receive 5 per cent. out of the credit balance on profit and loss account each year, and is not merely a limited right to receive payment out of profits made available for dividend. The other considerations which were mentioned are auxiliary to or explanatory of this main argument. The argument of counsel for the ordinary shareholders is two-fold. He says, first, that it is necessary to bear in mind that in 1889 a new class of shareholders, namely, the preference shareholders, were coming in for the first time, and one would expect their rights to be moulded in with the existing structure of the company's constitution so as not to disturb it more than necessary, and that this element is relevant when considering the construction of the new art. 18A. In this connection he points to the words "... in preference to and before payment of dividends for that year on the ordinary stock or shares of the company." He contends that those words show that the profits of the company which are referred to immediately before those words mean the same profits as would otherwise have been the source of dividend on the ordinary shares. Secondly, he says that, in any case, on the construction of the articles as a whole "the profits of the company" in cl. 1 of art. 18A mean the profits available for dividend.

On the first point counsel for the ordinary shareholders referred me to a decision of BRANSON, J., in *Stewart v. Sashalite, Ltd.* (2), the headnote in which is :

In consideration of services rendered and of the transfer of certain rights to the company by him, the company agreed as purchasers "to pay to [the plaintiff] out of the first profits of the purchasers and in priority to all dividends payable in respect of any shares in the purchasers' capital the sum of £1,000." The balance sheet of the company, for the year ending Mar. 31, 1935, showed a profit of £698 11s. 10d., which sum the directors used for writing off preliminary expenses and in making a transfer to certain reserve accounts. The plaintiff contended that the £698 11s. 10d., being the first profit of the defendant company, he was entitled to payment of that sum in part satisfaction of the £1,000; and that the company by the publication of the balance sheet were estopped from denying that the £698 11s. 10d. was a first profit :—
HELD : upon the true construction of the contract the words "the first profits in priority to all dividends" mean profits available for dividends; and the test is whether the purpose to which the directors have applied the sum in dispute is one to which the shareholders could not object if such application deprived them of what would otherwise have been a dividend.

BRANSON, J. stated the points and then said ([1936] 2 All E.R. 1482, 1483) :

The plaintiff says that £698 11s. 10d. has been earned as the first profits of the defendant company, and that he is entitled to payment of that sum as part of the £1,000. The defence is that the true construction of the agreement is not that the defendants shall pay over any sum which results as a profit balance on the profit and loss account, or even any sum which results in a balance taking the various profit and loss accounts which the company has made during its existence. They say that the intention of the agreement is that Mr. Stewart should be the first person to benefit by way of receipt of profits which would, if he were not there, have gone in dividends to the shareholders. Now, the question which I have to decide is, what does this agreement mean? and I find it very difficult to get any help out of the cases which have been cited to me. The actual dispute between these parties is whether the sum of £698 11s. 10d., which is

shown as the profit in the balance sheet of Mar. 31, 1935, has got to be paid to the plaintiff, or whether the directors can properly resolve to use it in writing off preliminary expenses and in making a transfer to certain reserve accounts. What is said on the part of the defence is: "This is a reasonable and prudent thing to do. The preliminary expenses are a bookkeeping asset of no value at all, and before one can really say that the company has made a profit they have got to be written off." Also it is said: "The patents and licences are wasting assets, and before it can be said that we have really made a profit, we ought to provide for replacing the waste of capital which is taking place year by year over that asset by effluxion of time." On the contrary, the plaintiff says: "You say in your balance sheet, and you cannot deny that you have in fact made a profit for the year ending in Mar., 1935, of £571, and your previous balance sheet said that you had made a profit of some £126 odd in the year before. That is the first profit that you have made, and I am entitled to have it, by virtue of the agreement."

BRANSON, J. then referred to certain authorities and came to the conclusion that he was driven back to the construction of the particular agreement. He then said (*ibid.*, 1484):

Now it is to be noted that there is a reference to the payment of dividends, which would be quite unnecessary if the contention urged by the plaintiff is correct. He has got to say: "That is merely *ex abundanti cautela*, or is merely an additional warning to the company that they are not to pay any dividends until they have paid this claim."

I think, in view of the fact that the question of what are the profits of a company or what may be the profits of a company is a question which involves so much difficulty and so many different answers according to the different circumstances in which the question is propounded, that it is essential in this case to look to all the language which the parties have used; and I do not think I can pass over the words "in priority to all dividends," as if they were merely an additional precaution, which was quite unnecessary in the circumstances. Reading the whole of the expression together, I think that the fair meaning to be given to it is that when the directors come to consider the payment of a dividend they have got to pay out of the money which they would otherwise have used for dividends, £1,000 to the plaintiff, before the shareholders get anything by way of dividend. It is said that that is not a fair construction to put upon it, because it would leave the plaintiff at the mercy of the majority of the board, who might postpone the payment of the £1,000 for an almost indefinite period. Mr. McNair would not say "to the Greek Kalends," but he said, "to the Ides of March"; but the answer to it is that this company was floated with the intention that the people who were subscribing money to it should get dividends, and the safeguard that Mr. Stewart was getting was that nobody could get a penny by way of dividend out of this company until the £1,000 had been paid. I think it is quite fair to read the whole clause as one, and to hold that its meaning is, as I think I have already said, that the directors, when they have got profits which they would otherwise distribute as dividends, have got first to pay £1,000 to Mr. Stewart. In other words, I think that the meaning of the words "the first profits in priority to all dividends" is that the profits should be profits available for dividends, in the sense in which that expression was construed in the case of the *Long Acre Press, Ltd. v. Odhams Press, Ltd.* (1).

Counsel for the preference shareholders says that that case is not decisive of the present case because the facts were different, and, indeed, so was the language. He points out that the funds indicated for payment of the sum which had to be paid to the plaintiff were to be paid from the first profits and he was merely to get a single payment, and not, as the preference shareholders are to have in the present case, a series of payments, and that he was in the position of a man who had got to be paid sooner or later, while the preference shareholders here, if they pass a dividend, lose it for ever. He said that that case does not govern the present case because of those and other considerations. That, of course, is perfectly true. The facts are different and the language is different, but it seems to me that the reasoning and decision of BRANSON, J., in that case are of some assistance to me. It is said that the words "in preference to and before payment of dividends" were merely put in to show that the ordinary shares were to be subordinate to the preference shares and that they were not intended to be indicative of a common fund. The fact that the new shares were to be superior in rights is, however, indicated by the use of the word "preference." I myself think that, following the approach which commended itself on similar words to BRANSON, J., the phrase "in preference to and before payment of dividends for that year on the ordinary stock or shares of the company," does indicate the conception of competition against a common fund, *i.e.*, the fund which was available for the payment of dividends on both classes of shares. It is not a point of construction which can in any sense be elaborated. This was a fund which up to that time was available

for payment of ordinary dividend to which the ordinary shareholders alone could look, and I think that, therefore, before that fund could be utilised for the payment of that dividend, this article says that it is to be utilised for the payment of preferential dividend.

If that view of the matter be right, it disposes of the question, because the funds applicable for the ordinary dividend were limited to profits available for dividend and were subject to the operation of art. 29, but I think it would be right, having regard to the argument which has been addressed to the question, for me to consider the second point which counsel for the ordinary shareholders relied on, and this again is a question of construction but of a rather wider scope. First, I should mention a point which, though small, seems to me not without significance. As I have already indicated, the dividends on the ordinary shares were, and are, payable out of profits available for dividend. Those profits were defined in art. 164 as being "the clear profits of the company." The word "clear" was omitted from art. 166, which relates to interim dividend, but by reason of the restriction in art. 164 the word "profits" in art. 166 obviously means the same thing as "clear profits" in art. 164, *i.e.*, profits available for the payment of dividend. Although it contained certain words which were subsequently deleted, art. 166 was for this purpose in being when the preference shares were created in 1889 and it formed part of the constitution of the company. The phrase "the profits of the company" in art. 166 was repeated in the new art. 18A, and, if the meaning of that phrase in art. 18A is doubtful, I should myself think that assistance in its interpretation would be forthcoming from art. 166, where the meaning is clear and would afford a strong indication in itself that in art. 18A "the profits of the company" meant the clear profits of the company or, in other words, the profits available for dividend.

Apart altogether from that point, however, counsel for the ordinary shareholders contends that, where an article provides that a dividend is to be paid out of profits, it does not mean out of any profits whatsoever but, *prima facie*, out of profits that are available for dividend. One case to which he referred me on that question was *Dent v. London Tramways Co.* (3). That was an action against the tramway company by the preference shareholders of the company and it came before SIR GEORGE JESSEL, M.R., in 1880. In the previous year there had been another action against the company on behalf of the general body of shareholders. That action (*Davison v. Gillies* (4)), came on by way of a motion for an injunction, in effect, to restrain the directors from paying dividends out of capital. SIR GEORGE JESSEL, M.R., said (16 Ch.D. 347, n., 348 n.):

The articles of association, which are binding on the directors and on the company, are very plain. Art. 107 is this: "No dividend shall be declared except out of the profits of the company." A general meeting cannot get over that. The dividend can never be declared but out of profits; and the allegation on the part of the plaintiffs is that this dividend is not declared out of profits at all—that there are no profits available. The right to declare a dividend depends on the facts. The word "profits," by itself, is a word which is certainly susceptible of more than one meaning, and one must ascertain what it means in these articles. Art. 103 says, "The directors shall, with the sanction of the company in general meeting, declare annual dividends, to be payable to the members out of the profits of the company, not exceeding the rate of 6 per centum per annum for each year, on the paid-up capital for the time being of the company, and of one-half the profits of the company above that amount, and they shall declare the other half of such surplus profits to be payable to the scripholders." Scripholders are another class who are not shareholders, who have subscribed moneys and are to be entitled to half the surplus profits. It is quite clear that, whatever these profits are, they are profits of the same kind; half the surplus is to go to the shareholders and the other half to the scripholders. Then the next article is this: "The directors shall, before recommending any dividend, set aside out of the profits of the company, but subject to the sanction of the company in general meeting, such sum as they think proper as a reserve fund for maintenance, repairs, depreciation, and renewals." It is plain that these "profits" mean something after payment of the expenses; because you do not get a reserve fund at all until you have paid your current expenses. It is obvious that the word "profits" means net profits. Then the next article is this: "The directors shall also, before recommending any dividend, set aside out of the profits of the company, a sum equivalent to one per centum per annum on the amount of the paid-up capital for the time being as a contingencies fund." There again "profits" obviously mean net profits. The result, therefore, of the articles,

as I read them, is that a dividend shall only be declared out of net profits. Then I have to consider the question, What are net profits? A tramway company lay down a new tramway. Of course the ordinary wear and tear of the rails and sleepers, and so on, causes a sum of money to be required from year to year in repairs. It may or may not be desirable to do the repairs all at once; but if at the end of the first year the line of tramway is still in so good a state of repair that it requires nothing to be laid out on it for repairs in that year, still, before you can ascertain the net profits, a sum of money ought to be set aside as representing the amount in which the wear and tear of the line has, I may say, so far depreciated it in value as that that sum will be required for the next year or next two years.

He then gave an illustration from the case of a warehouse-keeper and continued (*ibid.* 349 n.):

That being so, it appears to me that you can have no net profits unless this sum has been set aside. When you come to the next year, or the third or fourth year, what happens is this: as the line gets older the amount required for repairs increases.

If you had done what you ought to have done, that is, set aside every year the sum necessary to make good the wear and tear in that year, then in the following years you would have a fund sufficient to meet the extra cost. Now, when I come to look at these articles, I think that is what is intended, and that that is the meaning of the reserve fund. What the company intended to do was this: inasmuch as they knew that maintenance, repairs, depreciation and renewals would be wanted, and inasmuch as they knew that according to the ordinary commercial rules they ought not to calculate the net profits until they had provided for this which was sure to happen, they said,

"We will set aside a sum of money which we will call a reserve fund for this purpose."

Although not expended during the year, it is a reserve fund set aside for expenditure in the following years, taken out of profits before a dividend is made. It appears to me, therefore, that these articles do recognise what seem to me sound commercial principles. That being so, from year to year, as the line got older it would get worse, and would, no doubt, require a larger expenditure every year for repairs and renewals, as a general rule—I say as a general rule, because sometimes the repairs may be so

extensive as to make the renewal of a large portion of the line required in one year, and then the next year there might be a falling off in the amount required; but, as a general rule, as the line got older it would require more money.

Then he went into the figures which were in evidence on the motion and said (*ibid.* 350 n.):

That being so, on the present evidence I am satisfied that there are no profits at present available for division. It may happen that there would have been profits if the company had properly applied the surplus of former years. I must say, looking at the accounts of the company, it appears to be a flourishing company, and I hope nothing I say will damage its future success: but still, I am bound by the articles to say that no dividend is to be paid except out of profits; that there are no profits available, and therefore I grant the injunction asked. At the same time I wish to give the defendants every possible opportunity of shewing that there are profits available, and I also feel that my intervention is likely to be injurious to the company. If the defendants can show me at any time that there are profits available for the purpose of this dividend, I will give them an opportunity of doing so, and therefore I give them leave to move to dissolve the injunction I now grant.

In the following year, the preference shareholders sued the company [*Dent v. London Tramways Co.* (3)]. The headnote says:

The articles of association of a limited tramway company provided that no dividend should be declared except "out of profits"; that the directors should, with the sanction of the company, declare annual dividends "out of profits"; and that the directors should, before recommending a dividend, set aside "out of profits," subject to the sanction of the company, "a reserve fund for maintenance, repairs, depreciation, and renewals." The company had for several years carried on their business, paying a dividend half-yearly on their ordinary shares; but they failed to set apart a reserve fund adequate for the maintenance of their tramway, which eventually became worn out. The company having again declared a half-yearly dividend on their ordinary shares, and the total sum appropriated for the dividend being, as it appeared, much

less than the sum required to reinstate the tramway: HELD, that the company could only declare a dividend out of the net profits, and that the net profits could not be ascertained without first restoring the tramway to an efficient condition, or making due provision for that purpose out of the company's assets. An injunction was accordingly granted restraining the company from paying the half-yearly dividend they had declared, but leave was given them to move to dissolve the injunction, in the event of their being able to satisfy the court that there were profits available for the dividend: HELD, however, that the holders of preference shares, the dividend on which was "dependent upon the profits of the particular year only," were entitled to a dividend out of the profits of any year after setting aside a proportionate amount sufficient

for the maintenance of the tramway for that year only ; and were not to be deprived of that dividend in order to make good the sums which in previous years should have been set aside by the company for maintenance, but which had been improperly applied by them in paying dividends.

SIR GEORGE JESSEL, M.R., in his judgment, after referring to his decision on the motion which, he said, had apparently been misunderstood, said (16 Ch.D. 353, 354) :

However, the present question is, to my mind, a very simple one. There is a bargain made with the company that certain persons will advance their money as preference shareholders ; that is, that they shall be entitled to a preferential dividend of 6 per cent. over the ordinary shares of the company, " dependent upon the profits of the particular year only." That means this, that the preference shareholders only take a dividend if there are profits for that year sufficient to pay their dividend. If there are no profits for that year sufficient to pay their dividend they do not get it ; they lose it for ever ; and if there are no profits in one year, and 12 per cent. profit the next year, they only get 6 per cent., and the other 6 per cent. goes to the ordinary shareholders. So that they are, so to say, co-adventurers for each particular year, and can only look to the profits of that year. What happened was this. The company improperly allowed their tramways to get out of repair, and paid away their receipts to the ordinary shareholders in the shape of dividends. The result was that on Jan. 1, 1878, the tramways were very much out of repair, and wanted a large sum to put them in a proper state of efficiency. Notwithstanding that, the company did work, and they earned a good deal of money, the profits for the year 1878 being upwards of £14,000 ; and the dividend required being only 6 per cent. on £80,000, it is quite clear that they earned more than sufficient to pay the preference shareholders, supposing these were fairly-earned profits. To see that they were fairly-earned profits, I must look at the report, which I have before me, of an eminent accountant, Mr. Waddell, who says they were. He says, in effect, that, considering the state of the line on Jan. 1 and the state of the line on Dec. 31 in that year, after setting aside sufficient to make good the wear and tear for that particular year, and paying all expenses, there was a net balance of £14,932. That is admitted by para. 20 of the statement of defence, which says, " If a proper proportionate amount had been charged against the revenue of the year 1878 for such maintenance, etc., as aforesaid, the accounts would have shown, as the fact is, that there was a balance of revenue, and, in that sense a net profit in that year of only £14,932 5s. 4d." Therefore if " profits for the year " have any meaning at all, these were the profits for the year. " Profits for the year " of course mean the surplus in receipts, after paying expenses and restoring the capital to the position it was in on Jan. 1 in that year. I have had the advantage of having Mr. Waddell present in court, and ascertaining from him that his report in the sense I have stated is expressed according to his meaning, and that there is no mistake in the admission in the defence ; that is to say, there was an actual net profit for that year of upwards of £14,000. Then what is there to argue ? The argument for the company amounts to this, that inasmuch as they have improperly paid to their ordinary shareholders very large sums of money which did not belong to them, they, the company, are entitled to make good that deficiency by taking away the fund available for the preference shareholders to an amount required to put the tramway in proper order. When the argument is stated in that way, it is clear that it cannot be sustained. The company either have a right to recover back from the ordinary shareholders any sums over-paid or not. If they have a right, they must recover them ; if they have no right to recover them, *a fortiori* they have no right to recover them from the preference shareholders, and, of course, still less right to take away the dividends from the preference shareholders.

He then said that there appeared to be a misconception of what he was supposed to have decided on the former occasion. I think that case is of some interest, apart altogether from the fact that the undertaking of the company was of a similar character in some respects to the undertaking of the plaintiff company here, but it seems to me reasonably clear that SIR GEORGE JESSEL, M.R., both on the motion and in the action, decided that the profits of the company for dividend purposes meant profits after setting aside for depreciation, although, so far as the preference shareholders were concerned, not arrears of depreciation. I think it is clear that, in the first year, for example, of the company's business, the profits available for the preference shareholders, as for the ordinary shareholders, would have been only the profits of the first year less the amount required to meet the depreciation which the undertaking during that period had suffered.

In *Fisher v. Black and White Publishing Co.* (5), a question of construction arose, which, I think, sufficiently appears from the headnote :

The memorandum of association of a company provided that, as between the holders of the ordinary shares and the holders of the founders' shares, " the profits

from time to time available for dividend" should be applicable as follows: (1) to the payment of a non-cumulative preferential dividend of 15 per cent. per annum on the shares other than the founders' shares; (2) of the surplus, two-thirds should be applicable to the payment of a further dividend on the shares other than the founders' shares, and the remaining one-third should be applicable to the payment of dividend on the founders' shares. The articles of association provided (cl. 1) that, so far as they did not exclude or modify the regulations contained in Table A in sched. I to the Companies Act, 1862, those regulations should, so far as applicable, be deemed to be the regulations of the company. The articles expressly excluded some of the clauses of Table A, but did not expressly exclude cl. 74, which provides that "the directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserved fund to meet contingencies, or for equalising dividends": *Held*, that cl. 74 of Table A was not *in toto* excluded by implication, but that it must be taken to form part of the articles; that "profits available for dividend" meant the net profits after making any deductions which the directors could properly make before declaring a dividend, and that the directors were justified, after paying a dividend of 15 per cent. to the ordinary shareholders, in setting aside as a reserve fund to meet contingencies so much of the surplus of the profits of a year as they thought fit.

VAUGHAN WILLIAMS and ROMER, L.JJ., confined themselves to considering the proper meaning of the phrase "profits available for dividend," but RIGBY, L.J., in addition, after comparing the language used in the memorandum with the language used in the articles and noting their difference, said ([1901] 1 Ch. 179):

C It would be idle, I think, to suppose that there was a deliberate intention to lay down a rule for the division of profits different from that contained in cl. 5 of the memorandum. I should rather assume, and I do so without much difficulty, that it was intended to lay down the ordinary rule, and that when it is provided that a dividend of a specified amount shall be paid "out of the profits," that did not mean that it should be paid out of any profits whatsoever, but only out of those profits that were available for dividend.

D That view, although not repeated by the other Lords Justices, was not commented on by them and justifies me, in my view, in regarding it as an authority.

It is said that EVE, J., came to a different conclusion in *Ewing v. Israel & Oppenheimer, Ltd.* (6). By cl. 6 of the memorandum of association of the company in that case, it was provided ([1918] 1 Ch. 103):

E The profits of the company in each year shall be applicable as follows: First: in payment of a fixed cumulative preferential dividend at the rate of £7 per cent. per annum on the capital for the time being paid up on the said preference shares. Second: in payment of a cumulative dividend at a rate not exceeding 2s. per share on the capital for the time being paid up on the said ordinary and B shares rateably, without any preference or priority between such shares, and irrespective of the difference in the nominal value of such shares. Third: the surplus (if any) shall be carried and credited to a reserve fund until such reserve fund shall amount to the sum of £25,000. Fourth: subject as aforesaid, and to the provisions of art. 126 of the articles of association, the ordinary shares shall confer on the holders thereof the right to one moiety, and the B shares shall confer on the holders thereof the right to the other moiety of the profits, or other moneys of the company available for dividend, which it shall from time to time be determined to distribute.

F By art. 126 it was provided (*ibid.*):

G The directors shall set aside out of the profits of the company such sum as is provided for by sub-s. 3 of cl. 6 (3) of the memorandum of association of the company, and may, before recommending any further dividend under sub-s. 4 of the same clause, set aside out of the profits of the company such sum as they think proper as a further reserve fund, which shall at the discretion of the directors be applicable for meeting contingencies, for the gradual liquidation of any debt or liability of the company, or for repairing or maintaining any property of or works connected with the business of the company, or shall, with the sanction of the company in general meeting, be, as to the whole or in part, applicable for special dividends, or for equalising dividends, for distribution by way of bonus among the members of the company for the time being, on such terms and in such manner as the company in general meeting shall from time to time determine. . . . The directors may also from time to time carry forward such sums as may be deemed expedient in the interests of the company.

H It was in relation to those provisions that EVE, J. had to decide the rights of the holders of the ordinary and "B" shares. He said ([1918] 1 Ch. 109):

It is, I think, conceded by the company—but if not conceded I hold that the profits referred to in the opening sentence of cl. 6 of the memorandum are the profits arising from the carrying on of the company's business—in other words, the credit balance in each year's profit and loss account. Not only is this the primary meaning of the words,

but in the concluding paragraph of this very clause the words are repeated with the addition "available for dividend," a qualification which clearly shows that where the words are used without it they mean something more than profits available for dividend. The clause therefore deals with the application of the company's profits in the wider sense I have indicated: see *Fisher v. Black and White Publishing Co.* (5).

I thought at first that EVE, J., might be intending to lay down in general terms that, where you find the phrase "profits of the company" in conjunction with the payment of a dividend, the *prima facie* meaning of such words is the credit balance in each year's profit and loss account. On considering the matter further, however, I do not think that he intended to lay down any such principle, but was confining his observations to the question which arose before him and to the provisions of the memorandum and articles of association on which the question before him depended. Not only is there the contrast between the use of the words "the profits of the company" in one part of cl. 6 of the memorandum and "the moneys of the company available for dividend" in the other, but also there is the very noticeable fact that, by the provisions which he was construing, the third specified application of the profits was to carry to reserve under art. 126 up to a certain amount, and under art. 126 that power was extended so as to enable the directors to increase the stated amount before paying the final class of recipient any surplus of income. It would be difficult, I think, to arrive at any other conclusion than that expressed by EVE, J., on the meaning of the words "profits of the company" in that particular case and having regard to those particular provisions, namely, that it meant the credit balance to profit and loss account.

Therefore, up to that point, I should conclude that the "profits of the company" in cl. 1 of art. 18A meant profits available for dividend, in which case there would be no ground for excluding art. 29 by reason of cl. 10 of art. 18A. Counsel for the preference shareholders, however, relied on certain other indications in support of the wider meaning of profits for which he contends. First, he says that one of the purposes to which the reserve fund can be put is equalisation of dividends, and (as he said, with truth) such an application of profits would benefit only the ordinary shareholders. It is to be observed that in the *Black and White* case (5), where the preference shares which were under consideration were non-cumulative preference shares, ROMER, L.J., said ([1901] 1 Ch. 183):

But it is right to say that as at present advised I think that cl. 74 is modified to some extent, for in my view it could not be used for the purpose of creating a reserve fund to be applied in equalising dividends. That is my present view, though I do not express any concluded opinion about it, because the question is not now before us. But I point that out because otherwise it might be supposed that cl. 74 could be used so as to cause what might be an injustice as between the owners of the founders' shares and the owners of the ordinary shares.

Exactly the same point was taken for the same purposes, and was dealt with rather more succinctly by FARWELL, J. ([1902] 1 Ch. 362) in *Bond v. Barrow Haematite Steel Co.* (7):

It was urged that art. 97 providing for the reserve fund cannot apply to preference shares, because one of its objects is to equalise dividends; but I cannot see that the mention of one object which is not applicable is any reason for excluding those objects which are applicable, and which are really for the benefit of all the shareholders. On the articles as they stand, I have no doubt that the true construction is that which I have stated.

So here, also, the reserve fund is applicable to purposes which are beneficial to the company as a whole, including the preference shareholders, and it appears to me that the reasoning of FARWELL, J. is equally relevant to this point of objection (and I respectfully adopt it), the reason being that the mention of one object which is not applicable is not a reason for excluding those objects which are applicable.

The next point is this. It is said that arts. 59 and 164, which relate to decision and declaration by the company of dividend, are excluded by cl. 10 of art. 18A. That is quite true, they are. It is then argued that this shows that the payment of the 5 per cent. dividend is a matter of contractual right in that no declaration of dividend is required. I think an answer to that is that cl. 2 of art. 18A does not profess to dispense with a declaration of dividend, which is in relation to preference shares just as necessary, in general, as it is in

relation to ordinary shares. That that is so was also stated by FARWELL, J. ([1902] 1 Ch. 362), in *Bond v. Barrow Hæmatite Steel Co.* (7) :

A It is argued that the provisions as to the declaration of a dividend do not apply to shares on which a fixed preferential dividend is payable. In my opinion this is not so. The necessity for the declaration of a dividend as a condition precedent to an action to recover is stated in general terms in LINDLEY ON COMPANIES, 5th ed., p. 437, and, where the reserve fund article applies, it is obvious that such a declaration is essential, for the shareholder has no right to any payment until the corporate body has determined that the money can properly be paid away. It is urged that this puts the preference shareholders at the mercy of the company, but the preference shareholders came in on these terms, and this argument does not carry much weight in an action such as this, where *bona fides* is conceded. The opposite conclusion might enable the preference shareholders to ruin the company, and would certainly lead to great inconvenience in enabling them to compel the payment out of the last penny without carrying forward any balance.

B That, admittedly, was a case where preference shares were cumulative, but, as a question of construction, cl. 2 of art. 18A does not, in my view, dispense, at all events by express terms, with the declaration of a dividend. All that it does dispense with is the need for a declaration by the company in general meeting. The declaration, so far as the dividend on the preference shares is concerned, is delegated to the board. The language of cl. 2 of art. 18A is :

C No resolution of a general meeting shall be required for the declaration of the dividend upon the preference shares.

It is to be noted there that, apart from the fact that it says, not that "no declaration of a dividend shall be required," but that "no resolution of a general meeting shall be required," it is not in relation to a declaration of dividend, but the declaration of the dividend on the preference shares. I cannot myself attribute very much weight, therefore, to that argument. Then

D reliance is placed on the phrase :

... but the board, if in their judgment the profits for the year are or will be sufficient for the payment of such dividend or some part thereof, shall pay the same by two half-yearly instalments, on such days as they shall appoint.

It is said that this shows that the directors are only concerned with actual profit after necessary expenses and contingencies have been provided for, and that it is followed by the imperative words "shall pay." It is argued that it

E was the board's duty to have paid two half-yearly preference dividends long before the fund available for ordinary dividend is, or could be, ascertained. This argument is dependent on the view that art. 18A has already conferred on the preference shareholders the contractual right contended for, and as already stated I do not think it does confer such a right. In any case, I think the argument puts too much weight on the word "judgment," which means, I think, no more than the word "opinion" in the parallel art. 166.

F On the whole, and for the various reasons which I have indicated, I have come to the conclusion that the rights conferred by art. 18A are not such as to displace the operation of art. 29, that the two can quite consistently be read together, and that the preference shareholders were not given a contractual right to be paid a preference dividend, out of the balance on profit and loss account in each year, but only out of the profits which are available for

G dividend in the sense indicated in *Fisher v. Black and White Publishing Co.* (5) and *Long Acre Press v. Odhams Press* (1). As to the 6 per cent. preference shareholders, their rights to all intents and purposes are the same as the rights of the 5 per cent. shareholders to which they are subject, and it was, I think, conceded that, if I came to a conclusion adverse to the holders of the 5 per cent. preference shares on this question, that decision would be equally applicable to the 6 per cent. preference shares.

H Declaration that the fixed dividends for each year on the 5 per cent. preference stock and the 6 per cent. preference stock were payable only out of such part, if any, of the profits of such year as might be remaining and available for dividend after setting aside to reserve or carrying forward in the accounts such amounts as the directors of the company might think proper. Costs of all parties to be paid by the company as between solicitor and client.

Solicitors : *Bischoff & Co.* (for the company and the ordinary stockholder) ; *Linklaters & Paines* (for the preference stockholder).

Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

MANN, CROSSMAN & PAULIN, LTD. v. COMPTON (INSPECTOR OF TAXES). SAME v. INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Atkinson, J.), March 24, 25, 31, 1947.]

Income Tax—Deductions against profits—Repairs to premises—Premises kept open for business during rehabilitation work—Increased cost of work.

Revenue—National defence contribution—Deductions against profits—Repairs to premises—Premises kept open for business during rehabilitation work—Increased cost of work. A

A brewery company decided to rehabilitate a large number of their licensed houses. To avoid loss of trade, they refrained from closing the houses while the new work which was necessary was in progress, with the result that the duration of the work was extended and the cost increased. The company claimed to deduct this extra cost in computation of its trade profits for purposes of income tax and national defence contribution. It was agreed that the decision with regard to income tax should govern the position of the company with regard to national defence contribution.

HELD: (i) the question whether the additional expenditure was chargeable to capital and not to revenue was one of fact;

(ii) the immediate object of the additional payment was the acquisition of a capital asset for the enduring benefit of the trade, and the additional expenditure was, therefore, capital expenditure;

(iii) it was none the less so because the trade which was benefited included that being carried on during the process of the work.

[AS TO CAPITAL EXPENDITURE, see HALSBURY, Hailsham Edn., Vol. 17, pp. 158-161, paras. 325-327; and FOR CASES, see DIGEST, Vol. 28, pp. 47-49, Nos. 237-252.]

Cases referred to:

- (1) *British Insulated and Helsby Cables, Ltd. v. Atherton*, [1926] A.C. 205; 95 L.J.K.B. 336; 134 L.T. 289; 10 Tax Cas. 155; 28 Digest 52, 264. D
- (2) *Mitchell v. Noble (B. W.), Ltd.*, [1927] 1 K.B. 719; 96 L.J.K.B. 484; 137 L.T. 33; *sub nom. Noble (B. W.), Ltd. v. Mitchell, Mitchell v. Noble (B. W.), Ltd.*, 11 Tax Cas. 372, C.A.; Digest Supp.
- (3) *Mallett v. Staveley Coal and Iron Co., Ltd.*, [1928] 2 K.B. 405; 97 L.J.K.B. 475; 139 L.T. 241; 13 Tax Cas. 772, C.A.; Digest Supp.
- (4) *Anglo-Persian Oil Co., Ltd. v. Dale*, [1932] 1 K.B. 124; 100 L.J.K.B. 504; 145 L.T. 529; 16 Tax Cas. 253, C.A.; Digest Supp. E
- (5) *Henderson v. Meade-King, Robinson & Co.* (1938), 12 Tax Cas. 97; Digest Supp.
- (6) *Margrett v. Lowestoft Water and Gas Co.* (1935), 19 Tax Cas. 481; Digest Supp.

CASE STATED BY Special Commissioners of Income Tax.

The question for decision was whether the increased cost incurred by keeping open licensed houses during the progress of rehabilitation of those houses represented expenditure of a revenue nature to maintain the company's trade or whether it was expenditure of a capital nature to improve the houses.

Cyril King, K.C., and *Bucher* for the company.

The Solicitor-General (Sir Frank Soskice, K.C.) and *R. P. Hills* for the Crown.
Cur. adv. vult.

Mar. 31. ATKINSON, J.: The appellants, a brewery company, were assessed to income tax for the six years 1937-1938 to 1942-1943 in estimated sums amounting to very large figures and in three of the years amounting to £250,000. They appealed to the Special Commissioners, and the appeal raised an important and interesting question of law, if it be law and not fact. The Special Commissioners decided the point against the company, and the amounts of the assessments were agreed on the basis of the decision being right. A Case was obtained to test the principle on which the decision was based.

The company carries on the trade of brewers and owns a large number of licensed houses. Over a period of years 238 of these houses fell into decay, with adverse effects on the company's trade, and in 1938 the company decided to carry out a large scheme for their rehabilitation. This scheme involved alterations to meet the up-to-date demands of the public which had grown more exacting. The primary question for the company to consider was whether a house should be shut down or kept open during its rehabilitation. The Case states: "As a matter of policy the company had always aimed at getting

houses near the licensed premises of some other brewer or as far from one of its own as possible." If, therefore, one of its houses was shut down during rehabilitation no beer would be sold there, and the competing brewer would, consequently, gain an advantage. Against this had to be balanced the obvious fact that to keep the house open during the work on it would add considerably to the cost of the work which had to be arranged (and very often stopped entirely) so as not to interfere with the trade. If the houses had not been kept open for trade in this way, the additional cost would not have been incurred. The company decided it was to the best advantage of its trade to keep its houses open. The consequence was that in due course, the houses were rehabilitated at a greater cost than would otherwise have been incurred. The commissioners state :

The question of principle for our determination was whether the difference or excess cost represented expenditure of a revenue nature for the purpose of maintaining the company's trade, as contended for the company, or whether it was expenditure of a capital nature for the purpose of improving the houses, as was contended for the Crown. It was not contested that the money was laid out wholly and exclusively for the purposes of the company's trade.

To raise the question to be determined, the figures relating to nine houses were subjected to a minute analysis, and a table showing the results was agreed and is annexed to the Case. That table gives in relation to each of the nine houses in the first column the total expenditure which was incurred partly in repairs and partly on new work. There never has been any question but that the company were entitled to debit to revenue the cost of repairs. Part of the cost of the new work consisted of the additional expense in keeping the houses open to maintain the trade. That figure is agreed with regard to each of these nine cases. Under the heading : " Cost of keeping house open to maintain trade," it had nothing to do with repairs, but was merely the excess cost which was incurred through the new work, *i.e.*, the improvements, having to be done in a particular way.

The sums which are in dispute are arrived at in this way. Excavations for new work cost a certain percentage more than they otherwise would have cost, and so with concreting. The brickwork cost 15 per cent. more than it would otherwise have cost. The drainage, the carpenters' work and the finishers' work all cost more. The contention of the company is that the question whether expenditure incurred wholly and exclusively for the purposes of the trade is to be deemed of a capital nature or of a revenue nature depends on the purpose of the expenditure, and the purpose here was the maintaining of the company's trade and making profits during the period of the expenditure. The company argue that, if that principle is applied here, this extra cost of the new work ought to be allowed as a revenue expense.

I was referred to *Atherton v. British Insulated & Helsby Cables Ltd.* (1), where £31,000 had been set aside to form a nucleus of a pension fund, and the question was whether that was an admissible deduction in arriving at the company's assessable profits. It was held it was not. The following passage in the opinion of VISCOUNT CAVE, L.C., (10 Tax Cas. 192), was relied on :

But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital.

That is the test. Is the expenditure to bring into existence either an asset or an advantage for " the enduring benefit " of the trade ? It is argued that the expenditure in the present case was not bringing into existence an asset which was for " the enduring benefit " of the trade, but was merely for the temporary benefit of the trade then being carried on. It may be observed that the institution of the pension fund in the case referred to would incidentally benefit the trade then being carried on, because it would result in better work being obtained from more satisfied servants.

In *Mitchell v. Noble (B.W.), Ltd.* (2), a company made a payment of £19,000 to get rid of a director whom they thought it desirable to be rid of, and it was decided that that could be deducted as a revenue expenditure.

I think the passage mainly relied on by the company is where LORD HANWORTH said (11 Tax Cas. 420) :

It is a payment made in the course of business, dealing with a particular difficulty which arose in the course of the year, and was made not in order to secure an actual asset to the company but to enable them to continue, as they had in the past, to carry on the same type and high quality of business unfettered and unimpaired by the presence of one who, if the public had known about it, might have caused difficulty to their business and whom it was necessary to deal with and settle with at once.

The words emphasised were "a payment dealing with a particular difficulty which arose in the course of the year." It is said here that this expenditure was to deal with a difficulty arising in the year in which it was incurred, the difficulty of enabling the trade to be carried on. LAWRENCE, L.J. was not very happy about this. He said (*ibid.* p. 423) :

I agree that the sum in question was wholly and exclusively expended by the company for the purpose of its business, in the sense that the sole object with which the company made the payment was to enable the company to continue to carry on and earn profits in its business. On the question whether the sum is a capital or revenue expenditure, a point upon which the commissioners have given no express finding, I confess to having entertained doubts, which are not yet wholly resolved. I am not fully convinced that the payment was not made to secure "an advantage for the enduring benefit of a trade" within the meaning of that expression used by LORD CAVE . . .

In *Mallett v. Staveley Coal & Iron Co., Ltd.* (3), a sum was paid to secure the surrender of certain burdensome mining leases, and it was held that that was capital expenditure. Two passages are relied on. LORD HANWORTH M.R. said (13 Tax Cas. 785) :

The case is undoubtedly a difficult one, because one has to appreciate very exactly for what purpose the payment was made.

LAWRENCE, L.J. said (*ibid.* p. 788) :

Whatever may be the accurate description of the payment, it seems to me that it is a payment made in respect of the company's fixed capital and not a payment made for the purpose of its trade of winning and selling coal so as to form a proper debit item against the incomes of that trade.

Be it observed there that the trade actually being carried on was being benefited, but it was an enduring benefit, and, therefore, it was held to be a capital expenditure.

In *Atherton's* case (1) LORD CAVE said that the question was one of fact. In *Mallett's* case (3) it was said to be a question of mixed law and fact. In *Anglo-Persian Oil Co. v. Dale* (4), it is stated that the question is one of fact. There £300,000 was paid to get rid of a very expensive agency, and it was held that that was an admissible deduction. This case was strongly relied on here. ROWLATT, J. asked himself (16 Tax Cas. 261) :

Is what is got rid of an annual expense which is chargeable against revenue ? But it does not do quite to stop there, because one has to put in this cautionary observation that of course you must get rid of a charge against revenue simply by a payment, and not by the acquisition of a capital asset which puts your business on another footing and enables you to give the go-by to, or to do without, that sort of annual payment. In other words, you cannot charge against profits the cost of labour-saving machinery by showing that it reduces your annual labour bill. It is just necessary to state that, although it is so obvious that it is hardly necessary of course to state it.

ROMER, L.J. said (*ibid.* p. 274) (having quoted LORD CAVE, L.C. in the *Atherton* case (1), and read the passage which I have already read) :

It should be remembered, in connection with this passage, that the expenditure is to be attributed to capital if it be made "with a view" to bringing an asset or advantage into existence. It is not necessary that it should have that result. It is also to be observed that the asset or advantage is to be for the "enduring" benefit of the trade. I agree with ROWLATT, J., that by "enduring" is meant "enduring in the way that fixed capital endures." An expenditure on acquiring floating capital is not made with a view to acquiring an enduring asset. It is made with a view to acquiring an asset that may be turned over in the course of trade at a comparatively early date.

This being the test to be applied in such cases as the present, it is obvious that the question whether an expenditure made once and for all is to be treated as chargeable to capital and not to revenue is one of fact only. I do not

think one can get away from that. *Henderson's* case (5) was referred to, but I do not think that helps. It merely repeated that the question in each case is what is the object of the expenditure.

The expenditure in the present case was incurred to get the work done. True it was to get the work done in a particular way, but still it was part of the cost of work which was going to be "an enduring benefit to the trade." It resulted in the acquisition of an asset, albeit acquired in an expensive way.

A Suppose the price of a new machine for delivery in three months were X-pounds and the premium for immediate delivery Y-pounds, the total cost being, therefore, X plus Y, could Y be said to be a revenue expense because it was paid to enable profit to be made during the period of the three months? The immediate object of the extra payment would be the acquisition of a capital asset. It would be, in fact, part of the price. So, here, the expenditure was part and parcel of the expenditure incurred in bringing the improvements into existence.

B *Margrett v. Lowestoft Water & Gas Co.* (6), cited by the Crown, is, I think, helpful on the point. There the question was quite simple. The existing reservoir wanted considerable expenditure on repairs, but the water company thought it would be much wiser to build a new reservoir altogether, and they did so. It cost a large sum of money, and they claimed that they ought to be allowed to treat as revenue the cost that would have been incurred if they had merely repaired the old reservoir. They would, of course, have been entitled to bring into their revenue account for the year expenditure on such repair. The water company contended that part of the new expenditure had saved them that necessary revenue expenditure and claimed to be allowed to apportion the cost. FINLAY, J., however, did not take that view. He said (19 Tax Cas. 488):

D I think that the expenditure on the new reservoir was a perfectly simple example of capital expenditure and was not in any sense an expenditure upon repairs. If they had repaired the old reservoir they would have incurred a certain amount of expense, but it seems to me that that does not make it possible to dissect the capital sum which they spent upon the new reservoir and to say that that amount which would have been spent in repairing the old reservoir can notionally be treated as being a sum expended for repairs. The answer is that that is not what happened. They have chosen not to repair the old but to build a new reservoir, and that is just capital expenditure.

E It is not quite the same point, of course, but, still, the company here are seeking to do something very similar to what it was sought to do in that case. They spent this money on new work. It seems to me it is very difficult to say that they are entitled to dissect that and attribute part of it to some revenue purpose. If the question is one of fact, I think there was ample evidence to support the finding of fact. If it is a question of law for me, I have come to the conclusion that the extra expenditure, being part of the cost of bringing into existence an asset "for the enduring benefit of the trade", was a capital expenditure, and none the less a capital expenditure because the trade benefited included that being carried on during the process of the work. The expenditure was not incurred in the trading or in the earning of profits, but to make the trading and earning of profits possible, which, after all, is the object of all capital expenditure. That difference must be borne in mind. A company incurs expenditure on an enduring asset that profit may be made. That is capital expenditure. A company incurs expenditure in the making of profit. That normally would be revenue expenditure. The present expenditure was not incurred in the making of profit, but was incurred so that profit could be made. Further, the expenditure was clearly also "for the enduring benefit of the trade" in that it protected and prevented the loss of goodwill, which is, undoubtedly, a permanent asset. In protecting the trade something was protected which was of "enduring benefit to the trade"—the goodwill was maintained intact. In my judgment, the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Crossman, Block & Co.* (for the company); *Solicitor of Inland Revenue* (for the Crown).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

GUBERTINI AND ANOTHER v. WALLER

[KING'S BENCH DIVISION (Cassels, J.), March 19, 20, 21, 24, 25, 26, April 2, 1947.]

Theatres and Places of Entertainment—Professional contracts—“Run of play”—Right of owner or producer to determine—Custom of profession.

The plaintiffs, who were musicians, were engaged by the defendant, the producer of a play, under a written agreement in the following terms: “I engage and you agree to accept an engagement to play . . . for the production . . . for a salary of . . . per performance for the run of the play. It is also agreed that you will receive £2 per week as an allowance during the provincial tour prior to London production and commencing on or about (in the provinces) June 22, 1942 . . .” After an 11 weeks’ run in the provinces the defendant gave the plaintiffs fourteen days’ notice of the termination of the run of the play and of their engagements and sold the play to another producer who produced it in London without the services of the plaintiffs.

HELD: (i) in the absence of a term in the contract to the contrary, the producer or owner of a play could terminate the play by notice and the run then came to an end.

(ii) the custom of the profession provided for a fortnight’s notice of the termination of the run of a play, and the plaintiffs were, therefore, not entitled to succeed.

[FOR THEATRICAL CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 32, pp. 101-106, paras. 144-148; and FOR CASES, see DIGEST, Vol. 42, pp. 910-917, Nos. 61-127.] Cases referred to:

(1) *Clayton-Greene v. De Courville* (1920), 36 T.L.R. 790; 42 Digest 917, 126.

(2) *George Edwardes (Daly’s Theatre), Ltd. v. Comber* (1926), 42 T.L.R. 247; 42 Digest 917, 127.

ACTION for damages for breach of contract. The facts appear in the judgment.

A. M. Lyons, K.C., and W. B. Franklin for the plaintiffs.

Sir Valentine Holmes, K.C., and T. G. Roche for the defendant.

Cur. adv. vult.

CASSELS, J.: Involved in this case is the construction of a contract between the plaintiffs, as musicians, and the defendant, as the producer of a play. The main dispute has arisen about the meaning of the phrase “the run of the play.” The question is whether the plaintiffs are entitled to damages for breach of contract, the defendant having terminated the run of the play by a fortnight’s notice at the end of the provincial tour and sold the production to another producer for presentation in that producer’s London theatre.

The plaintiffs were engaged by the defendant by a document dated June 5, 1942. The document, in the case of the first plaintiff, reads as follows:

June, 1942. Dear Mr. Gubertini, I engage and you agree to accept an engagement to play drums for the production *Let’s Face It* for a salary of £1 10s. 0d. per performance for the run of the play. It is also agreed that you will receive £2 per week as an allowance during the provincial tour prior to London production and commencing on or about (in the provinces) June 22, 1942. It is understood that you are not to use a deputy. All other clauses to be subject to the rules of the Musicians’ Union. Yours sincerely, Jack Waller. Read and agreed. R. Gubertini.

The second plaintiff played the saxophone, and other instruments, and the engagement in his case was worded accordingly. The defendant, a producer of plays for 25 years, acquired this play in June, 1942, from the International Play Bureau, Ltd. Originally the play came from America. His agreement required him to produce, or cause the play to be produced, in a first-class theatre in the West End of London on or before Sept. 10, 1942, and, should a first-class theatre not then be available, the defendant might obtain a four weeks’ extension of time.

The play opened at Manchester on June 21, and went to a number of provincial towns. The defendant was trying to get a London theatre, but none suitable was available. Negotiations began early in September between the defendant and Mr. Black, of Moss Empires, Ltd. At that time there was being performed at the London Hippodrome a play entitled *Get a Load Of This*. Mr. Black and Moss Empires were not prepared to let the Hippodrome

to the defendant for the production of *Let's Face It*, but they were prepared to buy the defendant's rights in the play, with his dresses and his scenery, and to produce the play themselves. The defendant was faced with the alternative of selling his play or losing it under his agreement with International Play Bureau, Ltd. He sold for £6,000.

On Saturday, Sept. 5, 1942, the defendant caused to be posted the following notice at the Glasgow theatre, where the company was then playing :

Will the ladies and gents of *Let's Face It* company please note that the run of the play will terminate after the evening performance on Saturday, Sept. 19, 1942, when the engagements (unless otherwise arranged) will cease. For and on behalf of Jack Waller and Tom Arnold. Sydney Porter, general manager.

On Sept. 19, the play passed into the possession of George Black and Moss Empires, Ltd., for production, but they did not produce it until Nov. 19, and then it was with a cast which included some, but not all, of the defendant's artistes, and with musicians among whom were not included the plaintiffs and some others who had been on the provincial tour. The plaintiffs were out of employment on arriving in London. They did not apply for employment in the Hippodrome production. Claims are made in this action by the first named plaintiff for £370 15s. 0d., and by the second named plaintiff for £363, being the difference between what each did earn and what they would have earned if they had been employed at the Hippodrome during the 30 weeks that *Let's Face It* ran there. They base their claim on two grounds—damages for breach of contract and damages for fraud.

[HIS LORDSHIP held that fraud had not been established and continued] : The real issue in the case is whether the defendant has broken his contract with the plaintiffs by giving 14 days' notice on Sept. 5, to bring the run of the play to an end on Sept. 19, which had the effect of terminating the plaintiffs' employment. The defendant ran the play in the provinces from June 22 to Sept. 19, and Mr. Black and Moss Empires, Ltd. ran it in London from Nov. 19 for 30 weeks. The contention on behalf of the plaintiffs was that this was a continuous run of the play and that the defendant, having put it out of his power himself to run the play by selling it to another producer, was still liable to the plaintiffs under their contracts.

I have to deal with the contract of June 5, 1942, and no other. It is in writing. What does it mean ? It is true that it contains the phrase "provincial tour prior to London production," but only in reference to an extra payment of £2 a week during the provincial tour. I do not think that it is contended by the plaintiffs that the defendant was by contract bound in any event to produce in London. The play might have been a complete failure in the provinces. In fact, it was a success, but if it had been a failure in the provinces it would never have been produced in London. The plaintiffs say that the contract means that by whomsoever the play was produced in London they were entitled to be employed or to receive damages, and that the phrase "run of the play" involves that. This phrase is well-known and much used in the theatrical profession in contracts. I can repeat what MCCARDIE, J. said in *Clayton-Greene v. De Courville* (1) (36 T.L.R. 790), viz. :

The law has long recognized that the theatrical profession can possess its own customs and enforce its own established usages.

He found in that case, where an artiste was engaged for a part in a play at a West End theatre, that the engagement was for the run of the piece unless there was a stipulation to the contrary. That decision was followed in *George Edwardes (Daly's Theatre), Ltd. v. Comber* (2), where an injunction was granted restraining an actor from going elsewhere during the run of the play. These cases, however, are not particularly helpful in the present case, because here the play was passed from one producer to another.

The evidence for the plaintiffs and for the defendants on the meaning to be attached to the phrase "run of the play" was not in agreement. [HIS LORDSHIP reviewed the evidence and continued:] I find it established that where a musician is engaged for the run of the play the producer or owner can terminate the play by a fortnight's notice, and the run then comes to an end. I cannot see how it could be otherwise in practice. A producer or owner of a play who carries all the financial responsibility must be allowed to be the

judge of when he will bring the run of the play to an end. There may be a term in the contract which would have a contrary effect, but, in the absence of such a term, that is the rule. Further, the custom of the profession provides for a fortnight's notice of the termination of the run of the play, and that was given in this case. Many things may cause the producer or owner to bring the run of the play to an end, apart from failure. There may be national mourning, a spell of extraordinarily bad weather, a fire or a flood, or the refusal of the renewal of a lease of a theatre. In all these circumstances the producer must be the judge whether he can continue or must close down. The result is that this action fails, and there must be judgment for the defendant with costs.

Judgment for the defendant with costs.

Solicitors: *Hall, Brydon, Harvey & Egerton* (for the plaintiffs); *M. A. Jacobs & Sons* (for the defendant).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

HEALD v. MINISTER OF PENSIONS.

[KING'S BENCH DIVISION (Denning, J.), March 24, 1947.]

Royal Forces—Pensions—Appeal to High Court—Notification of leave—Retraction—Chairman of tribunal unable to state Case—Reasons of tribunal in lieu—Pensions Appeals Tribunals (England and Wales) Rules, 1943 (S.R. & O., 1943, No. 1757/L. 39), r. 23.

Once notification has been issued by the proper authority that leave has been granted to appeal to the High Court against a decision of a pensions appeal tribunal, such leave should not, in any circumstances, be retracted.

Where, owing to resignation, illness, or other reason, the chairman of an appeal tribunal is unable, as required by the Pensions Appeals Tribunal Rules, 1943, r. 23, to state a Case, the reasons of the tribunal, given orally or in writing, should be treated as the Case Stated. No persons other than those who constituted the tribunal and heard the evidence can find the facts so as to state a Case.

[FOR THE PENSIONS APPEALS TRIBUNALS (ENGLAND AND WALES) RULES, 1943, r. 23, see HALSBURY'S STATUTES, Vol. 36, p. 747.]

APPEAL from a decision of a pensions appeal tribunal.

G. H. Crispin for the appellant.

H. L. Parker for the Minister of Pensions.

DENNING, J.: In this case the appellant appeals on the ground of an error in law by the tribunal.

The case has a curious history. The appellant was notified by the proper officer of the tribunal that leave to appeal had been given. Subsequently, however, after the chairman of the tribunal had resigned owing to ill-health, it was said that that notification of leave had been issued in error since the other two members were unwilling to grant leave. I desire to say that, in my opinion, once notification has been issued by the proper authority that leave has been granted, it would not be right that that leave should subsequently be retracted, whatever the reasons underlying the retraction. The question arose as to the stating of a Case. The chairman had resigned owing to illness, and so he could not deal with it. The Pensions Appeals Tribunals Rules, 1943, r. 23, provides that the chairman is to state a Case. In the circumstances, the President of the Pensions Appeals Tribunals himself stated a Case as best he could from the materials available to him. Although the document may be useful as a summary, it cannot be considered properly as a Case Stated because only those persons who constituted the tribunal can find the facts so as to state the Case. No person other than those who heard the evidence can do so. So, in this case I have adopted the same course as that which I have said should be applied in other cases where there is a difficulty owing to a chairman of a tribunal being ill or resigning, *viz.*, that the reasons of the tribunal given orally or in writing in accordance with the rules should be treated as the Case Stated, and I deal with the case on that footing.

His Lordship then dealt with the case and allowed the appeal.

Appeal allowed.

Solicitors: *Culross & Trelawny* (for the appellant); *Treasury Solicitor* (for the Minister of Pensions).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

LEDINGHAM AND OTHERS v. BERMEJO ESTANCIA CO., LTD.
 AGAR AND OTHERS v. SAME.

[KING'S BENCH DIVISION (Atkinson, J.), March 5, 6, 7, 10, 21, 1947.]

Contract—Construction—Loan to company—Waiver of interest—“Until such time as the company is in the position to pay”—Company induced to continue business—Consideration.

A

Limitation of Actions—When time begins to run—Simple contract debts—Company—Contract depending on contingency—Acknowledgment in balance sheet—Acknowledgment by board of debt owed to themselves as trustees.

A, the chairman of a company, and his wife, who was not a director of the company, lent money to the company at various times from 1924 when it was in financial difficulties, and in 1930, to induce it to carry on business, they agreed to waive the interest thereon “due . . . since July 31, 1927, until such time as the company is in the position to pay the interest.” The minutes of the company recorded the undertaking and also that “this offer was accepted and the secretary was instructed in the meantime to cancel the amounts credited to their accounts for interest since July 31, 1927.” The loans were recorded in the balance sheet annually with a note: “Interest is in arrear since July 31, 1927,” a copy being sent to each lender. A died on Aug. 22, 1932, and Mrs. A died on Mar. 29, 1941. In the events which happened, certain members of the board of the company became entitled to a share of the accrued interest as trustees for beneficiaries under A's will. The company ultimately ceased to carry on business, and, liability for the capital having been admitted, the personal representatives claimed payment of the interest.

B

C

D

Held: (i) the effect of the agreement was that payment of interest should be postponed until the company was in a position to pay the interest out of income, so long as it carried on, but, as soon as it ceased business the agreement terminated and the whole of the interest became due.

(ii) as the interest did not become due and payable until the condition of ability to pay was fulfilled, the Limitation Act began to run only when the company ceased to carry on.

E

(iii) the agreement was a binding contract since the offer contemplated legal relations, and the consideration for it was the company continuing to carrying on.

Re Porter (William) & Co., Ltd., [1937] 2 All E.R. 361 and *Central London Property Trust, Ltd. v. High Tree House, Ltd.*, [1947] 1 K.B. 130, applied.

F

(iv) a note in the balance sheet of Dec. 15, 1939, sent to Mrs. A indicating that a certain sum (which included interest accrued prior to 1927), was due to her, was sufficient acknowledgment to take the pre-1927 interest out of the operation of the Limitation Act.

G

(v) as regards the interest accrued due to A before 1927, in view of the fact that the amount outstanding as shown in the accounts included such interest, and as those accounts had been passed by the company annually since 1927, it was impossible to say that, because during the last six years the acknowledgments had been made by a board to estates of which they were trustees, the board was acting without the authority of the company.

Re Coliseum (Barrow), Ltd., ([1930] 2 Ch. 44), distinguished.

[AS TO BY WHOM ACKNOWLEDGMENT MUST BE MADE AND WHAT ACKNOWLEDGMENTS ARE SUFFICIENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 628-636, paras. 796-805; and FOR CASES, see DIGEST, Vol. 32, pp. 352, 353, 357-377, Nos. 350-358, 409-607.]

H

Cases referred to:

(1) *Re Porter (William) & Co., Ltd.*, [1937] 2 All E.R. 361; Digest Supp.

(2) *Cairncross v. Lorimer* (1860), 3 L.T. 130; 21 Digest 328, 1227, H.L.

(3) *Central London Property Trust, Ltd. v. High Trees House, Ltd.*, [1947] 1 K.B. 130; [1947] L.J.R. 77; 175 L.T. 332.

(4) *Jorden v. Money* (1854), 5 H.L. Cas. 185; 23 L.J.Ch. 865; 24 L.T.O.S. 160; 21 Digest 292, 1041.

(5) *Re Coliseum (Barrow), Ltd.*, [1930] 2 Ch. 44; 99 L.J.Ch. 423; 143 L.T. 423; Digest Supp.

ACTION for the recovery of money lent and interest thereon. The defendants paid the capital sum and the action was tried on the issue of liability for the interest. The facts appear in the judgment.

J. C. Leonard for the plaintiffs, Ledingham and others.

Van Oss for the plaintiffs, Agar and others.

J. P. Ashworth for the defendants.

Cur. adv. vult.

Mar. 21. ATKINSON, J.: In 1910 the defendant company was formed to carry on business by way of running a cattle ranch in the Argentine. A Mr. T. F. Agar was a founder, and he was the chairman, of the company until his death. In 1920 nearly £20,000 profit was made, and £10,000 was distributed by way of dividend. Then the company began to lose money, and for ten years it did very badly. In 1923 and 1924 it lost over £12,000 in each year. Mr. Agar and his wife came to the rescue. On Jan. 3, 1924, the wife, Mrs. Clara Agar, lent to the company £5,500, and on June 19 in the same year another £2,000, making £7,500 in all. Those sums were lent on the terms that 7 per cent. interest was paid. I doubt whether any interest was ever, in fact, paid. She was credited with the interest in the company's books, and by July 31, 1927, besides the capital there was a sum of £1,538 14s. 8d. owing for interest after deduction of tax. On Feb. 25, 1925, Mr. Agar advanced £800, and by July 31, 1927, there was £94 5s. 11d. due to him for interest after deduction of tax. On Apr. 2, 1928, Mr. Agar advanced £4,000, making him a creditor at that moment for £4,800. In Oct., 1930, to encourage the company to go on, and as a condition of their going on, Mr. and Mrs. Agar each signed a document in the same terms:

With reference to my loan to you, which carries interest at 7 per cent. per annum, less income tax. I hereby waive my payment of interest due me since July 31, 1927, until such time as the company is in the position to pay the interest.

On Oct. 21, 1930, there is a resolution of the company:

The secretary laid on the table letters from Mr. Thomas F. Agar and Mrs. Clara Agar, waiving payment of interest on their respective loan accounts since July 31, 1927, until such time as the company were in a position to pay the interest. This offer was accepted and the secretary was instructed in the meantime to cancel the amounts credited to their accounts for interest since July 31, 1927.

Interest up to that date seems to have been capitalised and treated as part of the capital debt owing.

The company carried on. Mr. Agar had to come to their help twice to a small extent. On Nov. 14, 1930, another £100 was lent on the same terms as the previous loan and on Jan. 22, 1931, £300 was lent. The accounts of the company showed these debts year after year. Looking at the accounts at July 31, 1930, which are in evidence, we see in an abstract from the profit and loss account this entry: "Interest paid on loans in London not meantime provided for." In the balance sheet one sees, "Mr. and Mrs. Agar, £13,933 0s. 7d. Note: Interest is in arrear since July 31, 1927"; and, in the third document, which seems to be a "combined abstract balance sheet"—I do not know what the difference is—"Loans, London, £13,933 0s. 7d. Note: Interest is in arrear since July 31, 1927." We find, when we come to 1939, that these loans are being treated in the same way, and I draw the inference that throughout this period the debts had appeared with words indicating that the interest was in arrear.

Mr. Agar senior died on Aug. 22, 1932, and his executors were his wife, Clara; and his son, Mr. Agar junior; his daughter, Mrs. Keith; her husband, Mr. Keith; and a Mr. Brookes. Clara died on Mar. 29, 1941. Her executors were Mr. Agar junior and Mr. and Mrs. Keith. I should point out that Mrs. Keith was a shareholder, but that Mr. Keith and Mr. Brookes were not. The next thing that happened was that on Nov. 9, 1941, Mr. Agar junior died. He appointed the first set of plaintiffs, Mr. Ledingham, Mr. Brookes and Mr. Patrick Agar, his executors. These executors began to press for the settlement of these debts. To enable them to bring pressure to bear on the company, they insisted on an assignment to them of Mr. Agar junior's third share in his father's and mother's estate. His trustees were then in the position of being creditors of the company. They began to press for their money, and, no doubt, as a

result, the company realised that they could not go on, and on Mar. 12, 1945, they came to a decision to sell their Argentine assets. On Apr. 20, 1946, the cattle were sold to the government for a large sum which was remitted here, and by July, 1945, over £20,000 was in this country available for distribution. The requisite demands for payment were made, and this action was then brought.

A The trustees of Mr. Agar, junior, issued their writ on Mar. 14, 1946. It will be observed that that was after the resolution to cease to carry on, but before the actual cessation of business. After the sale, on July 10, 1946, the executors of Clara and Mr. Agar, senior, issued their writs, claiming the money due to them, and interest up to date. After the proceedings started the money that had been actually advanced was paid by the company, but the question arose what was the company's position with regard to the interest. The plaintiffs claimed that this interest was all due and payable. The company contended B that the interest had been completely waived. Alternatively, they pleaded the Statute of Limitations.

The first question to decide is: What was the bargain? The plaintiffs say the bargain was that payment was merely to be postponed until a certain event. The company say: "No; interest was altogether waived until the happening of that event." We are driven back to the two letters of Oct. 1930, because that C is the only bargain that was made, and it is agreed that, whatever this bargain means, the further loan must be deemed to have been on the same basis. When one reads it carefully, it is difficult to see that there can be any doubt about what it means.

With reference to my loan to you, which carries interest at 7 per cent. per annum, less income tax. I hereby waive my payment of interest due to me since July 31, 1927, until such time as the company is in the position to pay the interest.

D I quite agree that if it was: "I waive payment of interest on my loan until the company is in a position to pay" it would be very arguable that that meant: "I am going to cancel the interest until that date," but that is not what it says. The contract is dealing with the particular interest which has accrued since July, 1927, and it waives payment of that interest, not altogether, but "until such time as the company is in a position to pay." It is not wiped out. It is not waived in that sense. It is merely postponed until such time as the company E is in a position to pay the interest. Then it was asked: "What is the condition of postponement? What does the document mean when it says 'until such time as the company is in the position to pay the interest'?" I have no doubt that that meant was, "until the company is in a position to pay it out of income." If it merely meant "until the company is in a position to pay it out of their capital assets," they were in a position to pay it that day if they had proceeded to sell. So it is quite clear—especially when one bears in mind that F the whole object of the loan was to enable and induce the company to carry on—that what is meant is "until the company can pay this out of its receipts, out of its income." The further point then arises: What is the position when the company ceases to carry on? My interpretation of the agreement is that it is a waiver until the company is in a position to pay the interest so long as the company carries on, but, if it ceases to carry on, then, treating the G carrying on as the consideration for the promise, the whole basis of the bargain has gone, the reason for it has gone, the consideration for it has gone. Therefore, when the company ceases to carry on, the bargain ends and payment becomes due. That is my interpretation of this agreement, and I have no doubt that this is consistent with what everybody understood. [His LORDSHIP examined the accounts and correspondence and continued:—] H The accounts are all consistent only with the view that the interest was not waived in the sense of being struck out altogether. There it was, year after year. The shareholders were all told: "There is this interest still to be paid or to be dealt with at some time." The importance of this is that the Statute of Limitations cannot begin to run until the happening of one of the events upon which interest would become due and payable. Everybody agrees that the company never was in a position to pay interest out of income, and, therefore, no action could have been brought and the interest did not become due and payable until the company ceased to carry on. It was contended that that meant until "the resolution to cease to carry on." I think it meant "ceased to carry

on," and that all this interest became due when the sale was made on Apr. 20, 1946, the result being that the statute cannot arise in connection with this interest until that date.

The next question to deal with is whether or not this agreement had any legal effect, because the point was raised that it was only a voluntary promise which created no legal bar to proceedings, and, therefore, the money could have been sued for at any moment and, the statute applied. There are two cases which seem to me to make it quite clear that this bargain had a legal effect. The first case I refer to is *Re William Porter & Co. Ltd.* (1). There, in Feb., 1934, at the suggestion of the governing director of a limited company, a resolution was passed by the directors that no fees should be paid to the directors from Oct. 1, 1933, until it should be resolved otherwise. A minute of this resolution was read and confirmed on May 7, 1934, and it was acted on by the company. F. having subsequently become bankrupt, and the company having passed a resolution that it be voluntarily wound up, the trustee in F.'s bankruptcy sought to prove in the liquidation for F.'s fees as a director subsequent to Oct. 1, 1933. It was argued that there was a purely voluntary promise to forego the fees, there being no consideration for it. SIMONDS, J., said that the resolution was intended to induce the company to carry on its business, and, the company having carried on its business in reliance on the resolution, no claim could be made by a director in respect of his fees. In other words, he said that a bargain of that sort, if it was intended to induce the other side to do something and they did that something, was a promise to which they must be held. He says ([1937] 2 All E.R. 363):

That resolution was a resolution necessarily brought to the notice of all persons in the company who were concerned with the conduct of the company's business. In fact, Mr. Fontannaz himself was the governing director. Nothing could have been done without his assent, and he could veto anything of which he disapproved. That resolution was intended to induce the company to take a certain course of action. Waiving their remuneration was not an act of benevolence on the part of the directors. It was an act intended to induce the company to take a certain course of action, to carry on its business, to enter into transactions and to incur obligations which, but for that resolution, it might not have done. It appears to me that there is some direct evidence here, and, in my judgment, I am entitled to apply the rule, stated nowhere better than in the old case of *Cairncross v. Lorimer* (2). . . . [And he comes to the conclusion] upon the materials before me that the directors, by assenting to the postponement or abrogation of their legal right to claim remuneration due to them under the articles, did induce the company to a course of conduct from which it might have abstained, and the trustee is not now entitled to assert his claim.

That seems to me to be exactly this case—a promise made to induce the company to carry on. It did carry on, and incurred liabilities and the like, and on that decision Agar and his wife would be held bound by it.

Then there is *Central London Property Trust, Ltd. v. High Trees House, Ltd.* (3), where DENNING, J., was dealing with this position. In 1937 a lease was created of a block of flats for 99 years at £2,500 a year. In the early part of 1940, owing to the war conditions, very few of the flats were let and the defendants could not pay the rent. Discussions took place, and the lessors wrote a letter saying that the rent of the premises would be reduced from £2,500 to £1,250 as from the beginning of the term, and thereafter the reduced rent was paid. When the war ended and all the flats were let at good rents, the lessors said: "The basis of our bargain has now gone. The whole idea was to enable you to carry on when you had got empty flats. Now they are full again, you have got to pay" The lessors further took up the position that it was only a voluntary promise for which there was no consideration, that they were not bound by it, and, therefore, they could recover on the basis of the old rents. DENNING, J. said ([1947] 1 K.B. 134):

But what is the position in view of developments in the law in recent years? The law has not been standing still since *Jorden v. Money* (4). There has been a series of decisions over the last fifty years which, although they are said to be cases of estoppel are not really such. They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on. In such cases the courts have said that the promise must be honoured [and he cited a number of cases, one of which was *Porter's case* (1)]. As I have said

they are not cases of estoppel in the strict sense. They are really promises—promises intended to be binding, intended to be acted on, and in fact acted on . . . In each case the court held the promise to be binding on the party making it, even though under the old common law it might be difficult to find any consideration for it. The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it. It is in that sense, and that sense only, that such a promise gives rise to an estoppel.

- A He went on to hold that the obvious intention of the letter was that it was merely to assist the lessees while their rents were very low or did not exist and that, when the basis or the reason for the promise disappeared, there was nothing to justify the lessees refusing to pay the old rent. It seems to me that those two cases really settle this point, and that this was a promise to which the company could be held in law and, therefore, as I say, the statute could not arise at all.
- B [HIS LORDSHIP said that, as to the interest which accrued due up to July 31, 1927, and which was not within the bargain, the accounts of the company for 1939 (within the material period of six years) included the following acknowledgments of the debts: "Loans. The executors of the late Thomas F. Agar, £5,294" and "Mrs. Clara Agar, £9,038 14s. 8d." a sum which includes this £1,500 odd of interest in dispute. HIS LORDSHIP continued :—] That acknowledgment gets rid of the difficulty as regards Clara.
- C That leaves me to consider the matter in connection with the £94 interest in respect of Mr. Agar's debt. I have been referred to *Re Coliseum (Barrow), Ltd.* What is the point of that decision? I think the point of the decision is correctly stated in HALSBURY'S LAWS OF ENGLAND (2nd ed., vol. 5, p. 309, note (b)). Thus, a balance sheet of a company which shows that fees are due to the directors and which is signed by those directors does not amount to an acknowledgment by the company, as the directors have no authority in such circumstances to bind the company. The directors there were making an acknowledgment of fees due to themselves, and MAUGHAM, J., said that that could not be relied upon because they could not make a bargain with themselves for their own benefit. There are a good many distinctions between that case and this, but the ground on which I think that case cannot be relied on here is that it is impossible to say that the directors who made the acknowledgments in the balance sheets in 1940, 1941, 1942 and 1943, had no authority to make them so as to bind the company. The company had passed accounts year after year acknowledging this very interest as being a debt due, and, merely because the acknowledgments in the last six years have been made by a board of directors to themselves as trustees of the creditor estate, it is, in my opinion, impossible to say that the board were acting without the authority of the company. I, therefore, hold that there was an acknowledgment in all these various accounts, and that at the end of the company's career these acknowledgments can be relied on by the plaintiffs.
- F There is this further point. It is said that MAUGHAM, J., was dealing with an acknowledgment that had to be one from which a promise to pay could be inferred. The Limitation Act, 1939, has made a mere acknowledgment sufficient, and it is said: "There is a difference now because all you want now is an acknowledgment and you have not to consider whether the circumstances are such as to amount to a promise to pay. You do not need the promise to pay. It is only an acknowledgment, an acknowledgment made to the creditor, and upon that the principle of that decision ought not to apply." I have difficulty in seeing the distinction there. I think that, if a trustee cannot rely on a promise to himself, it would be difficult to say he could rely on an acknowledgment which he makes to himself. So I am not disposed to draw that distinction, but these acknowledgments have been made in balance sheets and accounts. They clearly were made to the creditors because they received the accounts. I think it is impossible to say they were not made with the authority of the company, and, therefore, they are binding. The first plaintiffs are thus entitled to a declaration that they are entitled to interest on the principal sum owing to Mr. Agar junior's estate—I say a declaration because they issued their writ before the actual cessation of the carrying on of business—and the plaintiffs in the second and third claims are entitled to judgment for the proper amount. The loans have been paid, so

they are entitled to simple interest at 7 per cent. from the date of the loans until Apr. 20, 1946, when the interest became payable.

Declaration and judgment for the plaintiffs with costs.

Solicitors : *J. N. Nabarro & Sons* (for the plaintiffs, Ledingham and others) ; *Neish, Howell & Haldane* (for the plaintiffs, Agar and others) ; *McKenna & Co.* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

A

Re 36, 38, 40 & 42, JAMAICA STREET, STEPNEY.

[COURT OF APPEAL (Lord Greene, M.R., Cohen and Asquith, L.JJ.),
March 17, 18, April 25, 1947.]

Emergency Legislation—War damage—Cost of works—"Direct result" of enemy action—Structural damage to defective walls—War Damage Act, 1943 (c. 21), ss. 2 (1) (a), 6, 8 (2), 10 (1), sched. III, 3 (1). B

In 1940, after the explosion of an enemy bomb the stability of the front walls of certain houses was found to be seriously affected. The houses were old, and, before the bomb fell, the front walls were in bad condition, due mainly to the inherent nature of the brickwork. These pre-existing defects were accentuated by the blast of the bomb, but there was no evidence that they occasioned the instability or were such as to render the walls unsound. No repairs were effected at the time, but in 1943 the walls were condemned as dangerous structures and it became necessary to rebuild them either wholly or in part :—

C

HELD : the rebuilding was the direct result of the explosion of the bomb, and, therefore, "the direct result of action taken by the enemy" within s. 2 (1) (a) of the War Damage Act, 1943, and the War Damage Commission was responsible for 100 per cent. of the cost thereof.

D

Decision of VAISEY, J. ([1946] 2 All E.R. 658), affirmed.

[EDITORIAL NOTE. It should be noted that this decision is confined to the particular case. On the facts proved here, the War Damage Commission is held responsible for 100 per cent. of the cost of the rebuilding, but the court specifically keep open the point whether in some other case the facts may not justify an apportionment.]

E

FOR THE WAR DAMAGE ACT, 1943, see HALSBURY'S STATUTES, Vol. 36, p. 334.]
Cases referred to :

- (1) *Yorkshire Dale Steamship Co. v. Minister of War Transport*, [1942] 2 All E.R. 6 ; [1942] A.C. 691 ; 111 L.J.K.B. 512 ; 167 L.T. 349 ; Digest Supp.
- (2) *Wilson v. Chatterton*, [1946] 1 All E.R. 431 ; [1946] K.B. 360 ; 115 L.J.K.B. 381 ; 175 L.T. 325.

APPEAL by the War Damage Commission from a decision of VAISEY, J., dated Nov. 22, 1946, and reported [1946] 2 All E.R. 658.

F

The Commission determined that, as the walls of certain buildings damaged by a bomb were defective before the bombing, the proportion of the cost of rebuilding to be borne by the Commission should be 40 per cent. (subsequently reduced to 33½ per cent.). On an appeal by the claimant under the War Damage Act, 1943, s. 32 (2), VAISEY, J., held that where works were made necessary by war damage to reinstate a building in its pre-existing form, the whole cost of such works must be borne by the Commission, except where the building would, at the time of the war damage, have had to be reinstated (not repaired) in any case, and, as the rebuilding in the present case was the direct result of the explosion, the Commission was responsible for 100 per cent. of the cost. The Commission appealed.

G

The Attorney-General (Sir Hartley Shawcross, K.C.), Rowe, K.C., and H. O. Danckwerts, for the War Damage Commission.

H

Ewen Montague, K.C., and Michael Hoare for the claimants.

Cur. adv. vult.

Apr. 25. COHEN, L.J., read the following judgment of the court. This appeal raises a question as to the true construction of the War Damage Act, 1943. We were told that it is the first case under that Act and is intended to be in the nature of a test case, but for reasons which will appear later in our judgment, we think the decision of it turns on its own facts.

It will be convenient first to refer to the relevant provisions of the Act. Section 1 (1) provides that there shall be made, subject to and in accordance with the provisions of pt. I of the Act, payments by the Commission out of the moneys provided by Parliament in respect of war damage to land occurring during the risk period therein mentioned. Section 2 defines war damage. So far as material to this case it is in the following terms :

A (1) In this Act the expression "war damage" means (a) damage occurring (whether accidentally or not) as the direct result of action taken by the enemy, or action taken in combating the enemy or in repelling an imagined attack by the enemy. . . .

I turn to pt. I of the Act. Section 5 defines the hereditaments that are to be units for payment in respect of damage to land and distinguishes in sub-s. (2) between (a) buildings (excluding certain classes of buildings) or parts thereof and the sites of such buildings or of part thereof and (b) other land. It defines B a hereditament that comprises a building falling within para. (a) of the subsection or a part of such a building as a "developed hereditament". Section 6 defines the nature of payments to be made in respect of damage to land and distinguishes between a cost of works payment and a value payment. So far as material it is in the following terms :

C (1) Subject to the provisions of this Part of this Act, a payment to be made thereunder shall be of one or other of the following kinds, that is to say, (a) a payment of costs of works, being a payment of an amount determined by reference to the cost of works executed for making good the damage, as provided by s. 8 of this Act ; or (b) a value payment, being a payment of an amount determined by reference to the depreciation in the value of the hereditament caused by the damage, as provided by s. 10 of this Act.

D Section 7 lays down rules for the determination of the question whether a payment to be made shall be a cost of works payment or a value payment. Sub-section (1) (a) provides that in the case of a developed hereditament (and the hereditaments with which we are dealing are developed hereditaments) the payment shall be a payment of cost of works unless the war damage involved total loss. Sub-section (2) lays down the rules for determining whether the war damage involves a total loss and is in the following terms :

E War damage to a developed hereditament shall be deemed to involve total loss if, and only if, it is such that the proper cost, ascertained as at the thirty-first day of March, nineteen hundred and thirty-nine, of such works as would be required for reinstating the hereditament in the form in which it existed immediately before the occurrence of the damage would be likely to be more than the difference between the amounts respectively, ascertained by reference to prices current at that day, which the fee simple in the hereditament might have been expected to realise—(a) on a sale thereof in the state in which it would be after the execution of those works, and (b) on F a sale thereof as a site and with the damage not made good, being in each case a sale such as is specified in paragraph 1 of sched. II to this Act made on that day.

Then follows a proviso which it is unnecessary to read. Section 8 lays down rules as to the calculation of the amount of the cost of works payment. Sub-sections (2), (3) and (4) are in the following terms :

G (2) If the war damage is made good by reinstating the hereditament in the form in which it existed immediately before the occurrence of the damage, the amount of the payment shall be an amount equal to the proper cost of the works executed for the making good thereof : Provided that if the reinstatement of any part of the hereditament could have been omitted without detracting from the value of the hereditament, or the omission thereof would have increased its value, the amount of the payment shall be reduced to what it would have been if that part had not been reinstated. In this Part of this Act the expression "the permissible amount" means, in relation to a payment of cost of works, the amount that is payable by virtue of this subsection or that would have been payable if this subsection had had effect in relation to the payment. (3) If the war damage is made good by works, which include H alterations or additions to the hereditament, the amount of the payment shall be an amount equal to so much of the proper cost of the works executed for the making good of the damage as falls within the permissible amount. (4) The preceding provisions of this section shall have effect subject to the provisions of sched. III to this Act as to deductions in respect of the value of materials, of failure to take steps to minimise war damage, of physical changes not directly attributable to war damage occurring between the occurrence and the making good of war damage, and of the cost of works which contribute to the making good of war damage occurring on two or more occasions.

It will be convenient here to refer to sched. III to the Act. It is divided under three heads. The first head is not material. The second head deals with deductions from payments for failure to minimize the damage after the happening of the event. The third head deals with the deductions where damage other than war damage or repeated war damage is sustained. Paragraph 3 (1) is in the following terms :

The amount of a payment of cost of works shall be reduced by any amount by which the proper cost of the works executed for making good the war damage is increased by reason of any physical change in the hereditament not directly attributable to war damage (other than ordinary wear and tear) occurring between the time of the occurrence of the damage and the time when it is made good. A

It is to be observed that neither here nor in s. 8 is there any provision for a deduction in respect of damage already existing at the time of the occurrence of the event which caused the war damage.

Section 10 lays down rules for the calculation of the amount of a value payment. Sub-section (1) is in the following terms : B

Subject to the provisions of this Part of this Act, the amount of a value payment shall be an amount equal to the amount of the depreciation in the value of the hereditament caused by the war damage, that is to say, the amount by which the value of the hereditament in the state in which it was immediately after the occurrence of the damage is less than its value in the state in which it was immediately before the occurrence of the damage. C

It is to be noted that in this section an express reference is made to the state, as distinct from the form, in which the building was before and after the accident. The only other section to which we need refer is s. 32, under which the claimants brought the matter before the court. Section 32 is to the effect that any question arising in carrying out the provisions of ss. 6 to 8 or s. 10 and certain other sections and provisions of the Act, shall be determined by the Commission with a right (under sub-s. (3)) for any person aggrieved by any such determination—with certain exceptions—to appeal therefrom on any question of law to the High Court. The making of rules of court is authorized by the same section and this has been done by R.S.C., Ord. 55c. This case came before VAISEY, J., as a nominated judge within the meaning of s. 4 of the Act. D

I turn to the circumstances which led to this appeal. The claimants owned, with a large number of neighbouring properties, four houses in the metropolitan borough of Stepney, known as 36, 38, 40 and 42, Jamaica Street. During the Battle of Britain a bomb fell in the neighbourhood of these houses and damaged, among other things the front walls. No repairs were effected at the time, but in 1943 these walls were condemned as dangerous structures and it became necessary to rebuild them either wholly or in part. The claimants sought to recover from the Commission the cost of such repair as a "cost of works payment" under the Act. Prolonged negotiations took place between the claimants and the Commission. On Oct. 30, 1945, the claimants' solicitors wrote to the Commission a letter in which they claimed to be entitled to receive from the Commission the whole of the cost of the repair works and intimated that, unless their contention was admitted, an appeal would be lodged. Further correspondence ensued, and on Feb. 14, 1946, the Commission notified the claimants that, after careful consideration, they were still of the opinion that the whole of the repair works to the properties in question were not made necessary by war damage, and the Commission could not, therefore, agree to the claimants' contention as set out in the letter of Oct. 30, 1945. The claimants, considering themselves aggrieved by the determination thus expressed, decided to appeal therefrom pursuant to s. 32 (3) of the Act, and in accordance with the rules contained in Ord. 55c served an originating notice of motion on Mar. 24, 1946. In that notice of motion they alleged that the said determination was wrong in law on grounds which may be summarised as follows : (1) there was no evidence to support the findings of fact on which the Commission sought to avoid payment to the claimants of the full cost of the works done to the front walls ; (2) the cause and the sole cause of the said walls being condemned as dangerous structures was the explosion of the bomb, and, accordingly, the Commission misdirected themselves in finding that the works were more than was necessary to make good the damage. That notice having been served, it became the duty of the Commission under Ord. 55c, r. 2 (4), to state a Case, E F G H

setting forth the facts on which their determination was based and to file the case in the action department of the Central Office. The Commission complied with this obligation on May 24, 1946.

The relevant facts are found by the Commission in para. 3 (h) of the Case, where they set forth and adopted a report by one of their technical officers dated May 27, 1943. So far as material that report is in the following terms :

A Jamaica Street, E.1. In response to Messrs. Rawlence & Squarey's letter of the 10th inst., I met Mr. Yeo and inspected 13 houses which have been structurally damaged. A bomb fell on the opposite side of the road demolishing several houses, and has seriously affected the stability of the front walls of the houses inspected, in varying degrees. These houses are old, and the front walls are in a bad condition due mainly to the inherent nature of the brickwork. However, these defects have been accentuated by blast effect, and the front wall will have to be rebuilt, as scheduled below. As the walls were defective prior to the bombing, the proportion of the proper cost to be borne by the Commission has been agreed by me as detailed in the schedule.

B The schedule indicated that three-quarters of the fronts of Nos. 36 and 38 and the whole of the fronts of Nos. 40 and 42 required rebuilding. It also indicated that in the view of the writer, the proper percentage of the cost of such rebuilding to be borne by the Commission was 40 per cent., but gave no indication of how that percentage was calculated. As we read this statement, it is saying that

C (1) the bomb seriously affected the stability of the front walls of the houses, (2) the houses were old and before the bomb fell the front walls were in bad condition due mainly to the inherent nature of the brickwork, (3) the defects thus existing in the front walls were accentuated by the blast of the bomb, (4) as a result of the bomb, the front walls will have to be rebuilt to the extent indicated in the schedule. We are unable to read into the technical officer's report a statement that the pre-existing defects occasioned the instability or

D were such as to render the walls unsound, nor can we find any statement to this effect in any other part of the Case. This was clearly the view taken by VAISEY, J., where he said ([1946] 2 All E.R. 661) :

E In the present case, three-quarters of two of the walls and the whole of the other two, have had to be pulled down and rebuilt, and for myself I cannot see how it could ever be known whether the same or a less amount of work would have had to be done if the four walls had just previously to the time when the bomb exploded, been free from all structural defects. There is no finding to the effect that the walls would have fallen down within any measurable distance of time if no enemy action had injured them.

F In the result, VAISEY, J., found that the Commission was responsible for 100 per cent. of the cost of the works in respect of the rebuilding of the walls since the rebuilding was the "direct result" of the explosion. With this conclusion we entirely agree.

The Attorney-General suggested that this conclusion was not open to VAISEY, J., nor to us, in view of the purported finding of fact in para. 5 of the Stated Case, where the Commission say :

The Commission were of opinion and decided that, as a matter of fact, the whole of the works executed to the four properties were not necessary to make good war damage.

G He is, however, we think, in a dilemma since either, as VAISEY, J., said (*ibid.*, 660), this purported finding of fact is not a pure finding of fact, but involves a question of law, *viz.*, the construction of the Act itself, or, if it is a finding of fact, there is no evidence to support it. VAISEY, J., did not, however, base his decision purely on the finding of fact, for he went on to say (*ibid.*, 662) :

H . . . the explosion was (in other words) the proximate or immediate cause of the damage, and not merely a contributory cause acting in conjunction with the structural defects as another contributory cause ; and even if (which is by no means shown to be the case) those defects constituted a *causa sine qua non*, the enemy action was none the less the sole *causa proxima*, which is to my mind only another way of saying that the damage occurred as its direct result.

The Attorney-General at one stage in his argument accepted the view that the *causa proxima* is the sole governing factor and suggested that the true analogy was to be found in certain marine insurance cases : see e.g., *Yorkshire Dale Steamship Co. v. Minister of Transport* (1). Mr. Montagu, on the other hand, argued that a better analogy was to be found in workmen's compensation cases :

see *Wilson v. Chatterton* (2); and that, accordingly, the claimants would be entitled to recover the full costs of the work unless enemy action was to no extent responsible for the works having to be carried out. We think it better not to decide this point until a case comes before us in which it arises for direct decision. We must, however, point out that neither argument leads to an equitable result, for the Attorney-General was compelled to admit that, if this argument of his was well founded, the Commission should have rejected *in toto* the claimants' claim, although their expert attributed one-third of the cost to enemy action, while Mr. Montagu admitted that, if his argument was well-founded, the claimants would have been entitled to succeed had the walls been condemned as dangerous structures before the bomb fell. The Attorney-General, realising that his first argument carried him too far in view of the determination of the Commission, abandoned it so far as this case was concerned, and argued in the alternative that the cost of works should be apportioned. This argument is conveniently stated by VAISEY, J., where he says ([1946] 2 All E.R. 661):

If the unsoundness of the building was of such a character that the war damage was greater than it would have been if the building had previously been perfectly sound, then the Commission should not be called on to pay more towards the cost of reinstatement than they would have had to pay to reinstate the hypothetically sound building.

VAISEY, J., rejected this argument, saying (*ibid.*):

My difficulty in accepting that is two-fold: first, I cannot find that the Commission have ever applied any such formula to the present case, and secondly, it would be impossible to apply it to any case without some sort of inquiry which could rarely, if ever, be satisfactorily answered, for it is well known that a well-built rigid structure may suffer greater damage from "blast" than an old building possessing qualities of suppleness, resilience and flexibility.

The first reason given by VAISEY, J., for rejecting this argument is, in our opinion, conclusive. The facts as found do not afford a basis on which the argument can stand. We desire, however, to keep open the point whether in some other case the facts may not justify an apportionment, for instance, to take one of the hypothetical cases propounded by the Attorney-General, suppose the only visible damage due to enemy action was broken windows, but when it was sought to replace the broken windows, it was found that, owing to the defective condition of the frames and surrounding brickwork, the glass could not be put back without fitting new frames and making good the defective brickwork. If the defects in the frames and brickwork were not due to any extent to the enemy action, there would be strong ground for the argument that the claimant could not recover the cost of repairing the brickwork or fitting new frames. For these reasons, we are of opinion that the appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Treasury Solicitor* (for the Commission); *M. T. Turner & Co.* (for the claimants).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

lowed. JENKINS v. REDD. [1948]
11 E.R. 471.

ROUTH v. JONES.

[COURT OF APPEAL (Lord Greene, M.R., Cohen and Wrottesley, L.JJ.), April 15, 16, 17, 18, 1947.]

Trade—Restraint of trade—Reasonableness—Covenant by doctor in "assistant-ship" agreement—Covenantees general practitioners—Covenant not to "practise . . . in any department of medicine surgery or midwifery nor accept nor fill any professional appointment" within 10 miles for 5 years—Onus of proof—Special circumstances justifying restraint.

The plaintiffs, who were general medical practitioners in partnership in Okehampton, engaged the defendant as their medical assistant, the agreement providing: "The assistant agrees . . . that he will not during this contract of service save in the employ of the principals nor within the space of 5 years thereafter practise or cause or assist any other person

to practise in any department of medicine surgery or midwifery nor accept nor fill any professional appointment whether whole time or otherwise whether paid by fees salary or otherwise or whether honorary within a radius of 10 miles from 11, East Street, Okehampton . . ."

HELD : the covenant was invalid as being in restraint of trade because (i) the restriction that the defendant was not to "practice . . . in any department of medicine surgery or midwifery" was wider than was justified for the protection of the plaintiffs' business because it covered, *inter alia*, practice as a consultant which could not reasonably be considered likely to cause detriment to the plaintiffs' practice.

(ii) the stipulation against accepting "any professional appointment" was also wider than was justified for the protection of the plaintiffs' practice, since it would cover such an appointment as medical officer of health which could not affect the plaintiffs.

(iii) all restraints on trade, if there is nothing more, are contrary to public policy, and, therefore, void, unless there are special circumstances to justify them, and the onus of proving such special circumstances must rest on the party alleging them.

Dicta of LORD PARKER OF WADDINGTON, in *Herbert Morris, Ltd. v. Sazelby* ([1916] 1 A.C. 706), and of YOUNGER, L.J., in *Attwood v. Lamont* ([1920] 3 K.B. 587), *applied*. *Dictum* of LORD BIRKENHEAD, L.C., in *Fitch v. Dewes* ([1921] 2 A.C. 162), *not applied*.

Decision of EVERSHERD, J. ([1947] 1 All E.R. 179), *affirmed*.

[AS TO RESTRAINT OF TRADE IN CONTRACTS OF EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 32, pp. 408-418, paras. 683-698; and FOR CASES, see DIGEST, Vol. 43, pp. 21-26, Nos. 135-173, and pp. 63-65, Nos. 657-675.]

Cases referred to :

- (1) *Fitch v. Dewes*, [1921] 2 A.C. 158; 90 L.J.Ch. 436; 125 L.T. 744; 43 Digest 34, 276.
- (2) *Herbert Morris, Ltd. v. Sazelby*, [1916] 1 A.C. 688; 85 L.J.Ch. 210; 114 L.T. 618; 43 Digest 24, 154.
- (3) *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A.C. 535; 63 L.J.Ch. 908; 71 L.T. 489; 43 Digest 22, 139.
- (4) *Attwood v. Lamont*, [1920] 3 K.B. 571; 90 L.J.K.B. 121; 124 L.T. 108; 43 Digest 20, 131.

APPEAL by plaintiffs from a decision of EVERSHERD, J., dated Dec. 21, 1946, and reported *ante*, p. 179.

The plaintiffs, general medical practitioners, sought an interlocutory injunction to restrain the defendant, formerly employed as an assistant in their partnership business, from committing breaches of a covenant contained in the agreement under which he had been employed. At the hearing of the motion the parties requested the court to treat the motion as the trial of the action and EVERSHERD, J., held that the covenant was wider than was necessary to protect the plaintiffs' practice and was an illegal restraint of trade. The facts appear in the judgment of LORD GREENE, M.R.

Montgomery White, K.C., and *H. C. Dickens* for the plaintiffs.
Salt, K.C., and *Lindner* for the defendant.

LORD GREENE, M.R. : This is an appeal from a judgment of EVERSHERD, J., On the view I take of the case, the matter is comparatively simple. The plaintiffs were two medical men carrying on their profession in partnership in Okehampton and district. They engaged the defendant as their medical assistant, and the terms of the engagement were set out in a written agreement dated Dec. 31, 1943, the plaintiffs being described as the principals and the defendant as the assistant. All three of them are described as registered medical practitioners and the practice of the plaintiffs was described in the recital as follows :

Whereas the principals are now engaged in general medical practice in partnership together at Okehampton aforesaid under the style or firm of "Routh & Wilson . . ." The defendant was engaged "to assist them in the said practice," and cl. 12 of the agreement provided :

The assistant agrees with the principals that he will not during this contract of service save in the employ of the principals nor within the space of 5 years thereafter

practise or cause or assist any other person to practise in any department of medicine surgery or midwifery nor accept nor fill any professional appointment whether whole time or otherwise whether paid by fees salary or otherwise or whether honorary within a radius of 10 miles from 11 East Street Okehampton aforesaid. And if the assistant shall so practise or cause or assist any other person to practise within the radius aforesaid or in any way violate this provision he shall forthwith pay to the principals or as they shall direct or to their successors in title the sum of £100 for every month or part of a month during which he shall violate or continue to violate this provision as ascertained and liquidated damages and not by way of penalty and without prejudice to the rights of the principals . . . to obtain an injunction . . .

The employment was terminated and after an interval the defendant who, according to his evidence, had not been able to set himself up in practice elsewhere or obtain a position as an assistant, decided to set up in practice in Okehampton as a general medical practitioner. He informed the plaintiffs that it was his intention so to do. It is curious that the one thing against which the plaintiffs were, undoubtedly, entitled to protect themselves by a properly framed covenant is the one thing which the defendant was proposing to do. The plaintiffs issued their writ and served their notice of motion claiming an injunction to restrain the breach of the covenant. The defendant obtained from EVERSHED, J., the dismissal of the action on the ground that the covenant, as framed, was in illegal restraint of trade. EVERSHED, J., took the view that the covenant could be severed into two branches, one the branch against practising, or causing or assisting any other person to practise in any department of medicine, surgery or midwifery, and the other the restriction against accepting professional appointments, but he found that in both those branches there was a vital defect in that each of them involved a restriction which went further than was reasonably necessary for the protection of the practice which the plaintiffs were entitled to protect by a properly framed covenant.

A good deal of argument has been put before us on the familiar question of the severability of covenants. On the assumption that vice was to be found in this covenant, it was said that the vicious part could be severed from the good part. I do not find it necessary to decide that question. From that it must not be taken that I am expressing any view favourable or unfavourable to the opinion of EVERSHED, J., on the question of severability. The two branches of the covenant to which I have referred I shall continue to describe for convenience of reference as being, respectively, the first branch and the second branch without thereby by implication making any suggestion on the question of severability.

There is one small point which I may mention on the construction of this covenant. It arises in this way. The covenant refers to space and to time. The reference to space appears at the beginning, the reference to time appears at the end. It was suggested that the covenant might be bad because the reference to space only refers to the first branch of the covenant leaving that branch unlimited as to time, and the reference to time only refers to the second branch leaving that branch unlimited as to space. I do not think that is the true construction. The covenant is not artistically drawn and the grammar leaves something to be desired, but, in my opinion, the whole of the covenant in both its branches is restricted by the space and time limits which are specified.

I turn to the principal point in the case—whether either or both of the branches of the covenant are bad as going beyond what is reasonably necessary for the protection of that goodwill—it is sometimes referred to as “goodwill” as a useful word to use, though, perhaps, not always quite accurately—which the plaintiffs were entitled to protect by a properly framed covenant. It is not disputed that the type of professional activity in which they were engaged was one of those in which the association in that activity of an assistant gives him the opportunity of obtaining a knowledge of the patients and so forth which, if used by him thereafter, would detrimentally affect the plaintiffs, and it is not suggested that they were not entitled to protect themselves against it. The ground on which that principle is founded is stated in many cases, but I have before me the words of LORD BIRKENHEAD in *Fitch v. Dewes* (1) where he says ([1921] 2 A.C. 164) of a solicitor’s managing clerk :

Such a covenantee [i.e., the employer] is taking into his employment in his firm a young man in circumstances which make it certain that the latter will acquire a close

personal acquaintance with the clients from whom, and from whom alone, the business of the firm arises . . . What was it that in such a case the protection of the covenant rendered reasonable? He might claim, in my judgment, for his protection, that that business which was his, and to which he had admitted the appellant in the manner defined by the successive agreements, should continue to be his, and that if at any time the contract of employment between himself and his employee came to an end, on such determination the latter should not be in a position to use the intimacies and the knowledge which he had acquired in the course of his employment in order to create a practice of his own in that same place and by doing so undermine the business and the connection of the respondent.

- The judge there uses the phrase "intimacies and knowledge." The knowledge is not, in my opinion, the professional skill that he has acquired, nor, in my opinion, does it cover his reputation as a skilful professional man. The knowledge there referred to is the knowledge of the clients of the practice, their peculiarities, and so forth. It may well be that one cannot effectively give adequate protection in a case of that kind without at the same time giving the employer the benefit of a measure of protection against competition. Protection against competition as such is the one thing which an employer is not entitled to stipulate for, but the fact that a legitimate covenant may also operate to prevent competition does not mean that the covenant is a bad one. The essential thing against which protection can be claimed is what I have mentioned.
- The first step is to ascertain what is the particular business or professional activity which the covenantee is carrying on at the time of the covenant. That does not mean what particular things he has done, but what is the general scope of his business, even although at the moment the covenant was entered into he has not embarked on some of the ordinary branches of it. Here the plaintiffs' activity was that of general medical practitioners. There is no evidence of what that phrase comprises. The definition which counsel for the plaintiffs asks us to accept he formulated in this way: A general medical practitioner is one who holds himself out as prepared to treat any patient for any disease, ailment or injury normally to be met with in the country where he practises.
- I cannot accept that in the absence of evidence, and counsel invited us to apply our own personal knowledge of what a general medical practitioner is normally thought to be. I think it very inconvenient that the court, on a question of that kind, should have to fall back on some knowledge which may not necessarily be the same for each member of the court, but I should have thought it is notorious that the phrase "general medical practitioner" by itself excludes a consultant. It may also exclude a specialist in some particular treatment, but is not a consultant in that he accepts patients who come to him direct, whereas a consultant, in the strict sense of the term, only accepts a patient who is brought to him for consultation with the patient's own medical attendant.
- The covenant here is not confined to prohibition against general medical practice. A covenant confined to that would, I think, unquestionably be good. Counsel for the plaintiffs argued with great force that the covenant would not enable the plaintiffs to protect their general medical practice if it was in terms so limited. The language of the covenant is wide enough to shut out the defendant from any practice of any branch of the medical art. He could not use his medical knowledge in any way whatsoever. The plaintiffs maintained that anything short of that could not effectively protect the goodwill, or the *quasi* goodwill, of their general medical practice.

- Without going into the question of highly specialised forms of medical practice, such as deep ray therapy, I am quite prepared to think that the protection of a general medical practice might require a prohibition against the carrying on of a specialised practice in cases where the patient could go to the specialist direct and not through another medical man. I can quite see the force of the argument that a specialist who was prepared to accept a patient direct might, by the knowledge and intimacy he acquired with the plaintiff's patients, attract them by his specialised form of treatment as against their less specialised form of treatment, and it may well be that they could be shown to be entitled to that measure of protection. I need not go into that. I am simply saying this by way of caution, and I am not in any way holding that the covenant is bad merely because it might prevent the defendant from setting up as a specialist. EVERSLED, J. gave a list of specialised forms of medical practice which he thought would be prohibited by the covenant as,

indeed, they would be, and he thought that the prohibition, so far as it prevented such forms of specialised practice, would be bad. On that I am not prepared without further consideration in a proper case with proper evidence to express an opinion, save what I have already said. I confine myself to the one case of the consultant in the true sense. Can it be said that, if the defendant set up as a consultant in the prohibited district or practised as a consultant by going there two days a week, he would be doing something which would be likely to damage the general medical practice of the plaintiffs? It seems to me that such a prohibition is not reasonably necessary to protect their general medical practice. If a patient were brought to the defendant while he was practising as such a consultant, *ex hypothesi* he would be brought by another doctor. If he were brought by the plaintiffs, no harm would be suffered by them. If he were brought by another doctor whose patient he was, how could that affect the general medical practice of the plaintiffs?

It was suggested that, if the defendant was not practising as a consultant there, the plaintiffs might be called in by another doctor as consultants with him. That seems to me to be a far-fetched idea, and I cannot myself see on the evidence, at any rate, as it stands, and it would require very strong evidence to displace the view I have formed, how practice as a consultant could injure the general medical practice of the plaintiffs. In my view, a restriction which extends to a consultant's practice is one which is not reasonably necessary for the protection of the plaintiffs' practice. If that be right, it is sufficient to vitiate the whole of the relevant part of the first branch of the covenant. It would be impossible to suggest (and it has not been argued) that the first branch of the covenant could be so severed as to divide medical practice into two branches—consultant practice and general practice—so as to leave the covenant good so far as general practice was concerned, but bad so far as regards a consultant's practice. Therefore, if the view I have suggested is right, the whole of that part of the covenant goes.

I now turn to the second branch of the covenant which covers every professional appointment, and that I read as meaning a professional appointment of a medical man for medical purposes. The covenant prohibits the defendant from accepting any professional appointment whether whole time or otherwise, and whether paid or honorary. Of course, both parts of the covenant apply, not merely when the engagement has come to an end, but during the time when it is alive, and while the engagement is alive such a covenant is quite unobjectionable because the assistant is engaged to give his services to his employers and they are entitled to stipulate that he shall not take other work which would interfere with the fulfilment of his duties. Therefore, during the engagement itself, such a covenant cannot be assailed, but when the engagement comes to an end, can it be said that such a restriction as is contained in the second part of the covenant is reasonably necessary to protect the goodwill of the practice of a general medical practitioner? It would prevent the defendant from becoming medical officer of health. I ask myself how could the defendant, if he were the medical officer of health, use his knowledge to injure the goodwill of the plaintiffs' general medical practice? The only suggestion that counsel for the plaintiffs could make was that, so long as the defendant is there in the neighbourhood occupying a post of a medical nature, he would be keeping himself before the public and at the end of the five-years period would be able to use his particular knowledge of the patients of the plaintiffs. Therefore, what is contemplated is that use of that knowledge at the end of the time stipulated for would operate to the detriment of the plaintiffs. That, of course, is really giving to the covenant an extent in point of time longer than the covenant itself specifies, but, apart from that, it seems to me hopelessly far-fetched to suggest that because a general medical officer of health holds that office in this neighbourhood he would be keeping himself before the public in a manner which would enable him when the five years restriction comes to an end to set up as a general practitioner and take away patients from the plaintiffs. Counsel for the plaintiffs suggested that the defendant might accept some sort of ostensible appointment of that kind and simply use it to keep up his popularity in the neighbourhood with a view to seducing away the patients of the plaintiffs. I think myself that goes far beyond anything reasonably necessary for the protection of that which the

plaintiffs are entitled to have protected. I have taken the case of a whole time appointment, but the same point seems to me to apply with regard to a part-time appointment. Suppose the defendant only took a part-time appointment in a hospital, how would that enable him to get away from the plaintiffs' patients of theirs? I cannot see it. That part of the covenant also appears to me to be bad. If I am right in my view as to both branches of the covenant, the whole covenant fails, and, as I have said, there is no necessity to go into the question of severability.

A There was, however, one point which was mentioned, and I think it desirable to express an opinion about it, namely, what is called the onus of proof. It was suggested that it was for the defendant to produce grounds for showing that the covenant was a bad one and not for the plaintiffs to produce grounds for showing that it was a good one. On that point there has been a difference of judicial opinion. Counsel for the plaintiffs relied on a passage ([1921] 2 A.C. 162) in a speech of LORD BIRKENHEAD, L.C., in *Fitch v. Dewes* (1) :

The agreement then into which he entered, and in respect of which he has accepted for a lengthy period the consideration which was to move from the covenantee towards himself, will naturally stand unless he satisfies your Lordships that it is bad as being in restraint of trade.

C There are other observations in other cases to the same effect. On the other hand, when I come to *Herbert Morris, Ltd. v. Saeleby* (2), I find in the speech of LORD PARKER of WADDINGTON, this passage ([1916] 1 A.C. 706), referring to what LORD MACNAGHTEN said in the *Nordenfjelt* (3) case :

D As I read LORD MACNAGHTEN's judgment, he was of opinion that all restraints on trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. It is not that such restraints must of themselves necessarily operate to the public injury, but that it is against the policy of the common law to enforce them except in cases where there are special circumstances to justify them. The onus of proving such special circumstances must, of course, rest on the party alleging them. When once they are proved, it is a question of law for the decision of the judge whether they do or do not justify the restraint. There is no question of onus one way or another.

E I think there are other passages to the same effect in the House of Lords in other cases. I am not sure that LORD HALDANE did not express the same opinion. It is clearly being said there that, if the covenantee alleges that a covenant in restraint of trade is good owing to special circumstances, he must prove the special circumstances on which he relies. It is then for the judge, as a matter of law, to decide whether those special circumstances are sufficient to justify the restraint. In *Attwood v. Lamont* (4), YOUNGER, L.J., in a judgment in which ATKIN, L.J. concurred, said ([1920] 3 K.B. 587) :

F First, it is the covenantee, the respondent here, who has to show that the restriction sought to be imposed upon the covenantor goes no further than is reasonable for the protection of his business.

G If it is open to me to choose between the two views, I choose that of LORD PARKER accepted as being good law by YOUNGER, L.J. and ATKIN, L.J. The paucity of the evidence in the present case, in so far as it fails to prove special circumstances justifying a restraint as extended as this restraint, must penalise the plaintiffs and not the defendant. It was for them to prove the special circumstances which would justify a restraint as wide as this. They have failed to do so, and in saying that I do not in any way resile from what I said before, that it would require evidence of the very strongest character to my mind to justify a restraint which would cover a consultant's practice or the case of the acceptance of such an appointment as that of a medical officer of health. There is no such evidence here, and, in my opinion, the appeal must fail and be dismissed with costs.

H COHEN, L.J. : I agree. The plaintiffs cannot succeed unless they can satisfy us that the covenant by the defendant not to practise in any department of medicine, surgery or midwifery was reasonable for the protection of their general medical practice, and it was frankly admitted by counsel for the plaintiffs that the ban imposed on the defendant by cl. 12 went beyond a ban on practising as a general practitioner. Indeed, counsel agreed it was intended to bar the defendant from practising the medical art in any capacity whatever. Counsel argued, and I think he may well be right in his argument, that to

secure reasonable protection for a general medical practice some fringe extending beyond the walls of general medical practice is reasonably required for the protection of the practice, but I agree with the MASTER OF THE ROLLS that the onus of proving the necessity of the particular fringe which it is desired to justify rests on the plaintiffs seeking to enforce the covenant. I also agree with the MASTER OF THE ROLLS that the plaintiffs have completely failed to bring before us any evidence which would justify us in holding that this covenant restraining, as it would, the defendant from acting as a consultant, in the strict sense of the word, was reasonably required for their protection. I would only add that, supposing the onus was the other way, in my view, the defendant has discharged that onus, for, admittedly, the restriction would debar the defendant from practising in the strict sense of that word, and such a restriction is, in my view, *prima facie* unreasonable and the onus would be shifted on to the plaintiffs. For the reasons I have already given they have, in my opinion, failed to discharge that onus. On the second branch of the covenant I desire to add nothing to what has been said by the MASTER OF THE ROLLS. In conclusion I would only like to say that, while not expressing any opinion on the question of severability, I am not sure, as at present advised, that I should be prepared to agree that the covenant was severable even to the extent allowed by EVERSHED, J. For these reasons, I agree that this appeal must be dismissed.

WROTTESELEY, L.J.: I agree. It is not enough to put forward a contract of this kind and prove the breach. Such contracts are, *prima facie*, not enforceable at common law, as LORD PARKER pointed out in the passage in *Herbert Morris, Ltd. v. Saxelby* (2), already referred to by the MASTER OF THE ROLLS. Therefore, if the legality is challenged, and here it was challenged, the plaintiff must show that, although in restraint of trade, it is not void because in the circumstances it is necessary for the protection of his business and does not go beyond what is reasonable for that purpose. Regarding this covenant as a whole, there was not before the trial judge, as I think, anything to justify a covenant so wide that it would prevent the defendant, *inter alia*, from acting as a consultant in the prescribed area, that is to say, advising other doctors as to patients in the area. On this ground alone, if the covenant is regarded as a whole, the plaintiffs fail to discharge the onus on them. If considered in its two parts, the first part is bad, or, at any rate, not proved to be good. As to the second part, there was, in my judgment, nothing to show that it was necessary to protect the practice of the plaintiffs that the defendant should be prevented from holding a whole time appointment in the area for five years. On this narrow ground I agree that the appeal fails.

Appeal dismissed with costs.

Solicitors: *Hempsons* (for the plaintiffs); *Biddle, Thorne, Welsford & Barnes* (for the defendant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re DONALD (deceased). ROYAL EXCHANGE ASSURANCE v. DONALD.

(Donald, M.R., Morton and Asquith, L.JJ.), March

DONALD, Re. ([1947] 1 All E.R.
764). *Applied. Re BURDEN* [194.

critical use of tense and inaccurate references to the death of J., of nephews and nieces who shall live."—Nephew dying before J. born leaving issue living at death of J.—Intention of testator.

The testator gave the residue of his property to J. for life, and, after his death without issue, to all or any his (the testator's) nephews and nieces living at the death of J., and to all or any of the children, living at the death of J., of any of the nephews or nieces "who shall have died in the lifetime of J." One of the nephews had died six months before J. was born, leaving issue living at the death of J. :—

HELD: (i) apart from and beyond the general rule that ambiguous phrases must be construed in accordance with the context, the courts are

ready to discover that a testator has fallen into a trap of using tenses ungrammatically and making references to time inaccurately, the question in such a case being whether there is a sufficient indication of intention to be found in the will as to justify the court in saying that the testator has inaccurately used a tense or made some reference to time which fails to carry out his real intention.

(ii) the intention of the testator was that living nephews and nieces should take under the will and that the children of dead nephews and nieces should also take, irrespective of whether the nephews or nieces who predeceased J. had died before or after he was born. The phrase "who shall have died in the lifetime of J." should, therefore, be read as "who shall not be living at the death of J."

[AS TO CONSIDERATION OF SCOPE OF WILL IN DOUBTFUL CASES, see HALSBURY, Hailsham Edn., Vol. 34, pp. 190-192, paras. 243-245; and for CASES, see DIGEST, Vol. 44, pp. 546-550, Nos. 3630-3675].

Cases referred to :

- (1) *Re Birchall, Re Valentine, Kennedy & Birchall*, [1940] 1 All E.R. 545; [1940] Ch. 424; 109 L.J.Ch. 129; 162 L.T. 261; Digest Supp.
- (2) *Davies v. Davies* (1882), 47 L.T. 40; 30 W.R. 918; 44 Digest 1159, 10037.

APPEAL of the defendant, Edith Constance Daoust, from a decision of EVERSHED, J., dated Nov. 20, 1946.

The testator, by his will, gave the residue of his property to an adopted son, John Abbott Donald, for life, and, in the event of the death of John Abbott Donald without issue, to all or any of his [the testator's] nephews or nieces living at the death of John Abbott Donald, and to all or any of the children, living at the death of John Abbott Donald, of any of the nephews or nieces "who shall have died in the lifetime of John Abbott Donald." Edith

Constance Daoust, a daughter of William Donald, a nephew of the testator, who had died six months before John Abbott Donald was born, claimed to be entitled to take under the will. Other defendants were David Hepburn, a living nephew of the testator, and Winifred Isabella Handy, a daughter of a niece who had died during the lifetime of John Abbott Donald. EVERSHED, J., giving the phrase "who shall have died in the lifetime of John Abbott Donald" its natural, *prima facie* meaning, held that the defendant, Edith Constance Daoust, was not entitled to take under the will, since her father died, not during the lifetime of John Abbott Donald, but before he was born. Edith Constance Daoust appealed.

Michael Albery for the defendant, Edith Constance Daoust.

B. S. Tatham for the defendants, David Hepburn and Winifred Isabella Handy.

Donald Cohen for the plaintiffs, the trustees.

LORD GREENE, M.R. : This case is not without difficulty, but, in my opinion, the learned judge did not come to the right conclusion. I sympathise with him because, to come to a contrary conclusion, it is necessary to find in this will a sufficient context to justify the court in reading its language in something different from its ordinary meaning.

The testator had an adopted son, John Abbott Donald, who was born on June 10, 1919, and is presumed, by an order of the learned judge, to have died on or shortly after June 21, 1941. The testator also had a number of nephews and nieces. He made his will on Mar. 14, 1930, and died on Apr. 26, 1930. Among his nephews and nieces was one William Donald, who was the father of the present appellant. William Donald died on Jan. 6, 1919, that was, about six months before John Abbott Donald was born. William Donald, therefore, was a nephew of the testator who died before the birth of John Abbott Donald. By his will the testator gave a life interest in his residuary estate to John Abbott Donald and made provision for the children of John Abbott Donald after his death, should he have any. He had no children. By cl. 14 of the will the testator provided as follows :

In the event of the said John Abbott Donald dying without leaving any issue surviving him then subject to any life or lesser interest he may have appointed to his wife if he shall have married and also to payment of the said annuities and the income tax thereon my trustee shall under such circumstances from and after his death hold my residuary estate and the income thereof or so much thereof as shall

not have been applied under any of the trusts or powers herein contained In trust in equal shares for all or any of my nephews and nieces children of my brother Thomas Donald and of my sister Isabella Hepburn living at the death of the said John Abbott Donald who being male attain the age of twenty-one years or being female attain that age or marry and for all or any of the children or child living at the death of the said John Abbott Donald who being male attain the age of twenty-one years or being female attain that age or marry of any of my said nephews and nieces who shall have died in the lifetime of the said John Abbott Donald but so that the children of any of my said nephews and nieces who shall have died as aforesaid shall take equally between them only the share which their parent would have taken if he or she had survived the said John Abbott Donald and attained a vested interest.

The defendant, Edith Constance Daoust, being a daughter of William Donald, who died before John Abbott Donald was born, would not appear to take under the natural, *prima facie* meaning of the words used, because the children of nephews and nieces who are to benefit are confined to the children of nephews and nieces who shall have died in the lifetime of John Abbott Donald. The question, therefore, is whether, on the true construction of this will, a child of William Donald who died before John Abbott Donald was born can take. A number of cases have been cited. I find no assistance in scrutinising the exact language of those cases and comparing it with the language used in this case. In cases dealing with the construction of wills a comparison in, so to speak, parallel columns between the language used in wills which have been the subject of decided cases and that used in the will before the court does not often lead to a useful result. On the contrary, it very often tends to confuse, but I do find in those cases a principle, if I may so call it, and it is this. Quite apart from and beyond the ordinary rule that ambiguous phrases must be construed in accordance with the context, I find that the court has been ready to discover that testators have fallen into a trap, which it is quite easy to fall into, of using tenses ungrammatically and making references to time inaccurately. The question, of course, always is, in any case where such a question arises, whether there is a sufficient indication of intention to be found in the will as to justify the court in saying that the testator has inaccurately used a tense or made some reference to time which fails to carry out his real intention. One thing one is not entitled to do and that is to guess, but there are some matters in this will which I think the court is bound to take into consideration, and it is not, I think, guessing to say that the exclusion of the children of one of the testator's nephews or nieces who happened to die shortly before and not shortly after the birth of John Abbott Donald would, on the face of it, be curious and unexpected. It is true that a testator may desire to exclude certain persons, or he may have used language which is too strong to be overcome, but I think I am entitled to start my examination of this will with the *prima facie* impression, at any rate, that a provision of that kind is not the sort of provision that one would have expected to find in a comprehensive class gift of this character.

The next thing which strikes me about this will is this. The testator has, first, given the residue, in the event contemplated, *viz.*, of John Abbott Donald having no children, to nephews and nieces of his own living at the death of John Abbott Donald. That is the class. When one reaches that point anyone familiar with wills naturally expects to find that the testator is going presently to deal with a class which does not fulfil that description, namely, children not living at the death of the *praepositus*. One would expect that that was the division in his mind—those who are living at a particular date and those who are not living at a particular date. When he comes to deal with the contrasting class he alters his phraseology. He goes on to say :

... all or any of the children or child living at the death of the said John Abbott Donald who being male attain the age of twenty-one years or being female attain that age or marry of any of my said nephews and nieces who shall have died in the lifetime of the said John Abbott Donald.

He, therefore, describes the first class as those "living at the death of the said John Abbott Donald," but, when he comes to describe the next generation, he says : "who shall have died in the lifetime of the said John Abbott Donald."

If the words be read in an absolutely literal sense, the clear result is that the precise contrast which one would expect the testator to have been contemplating and which the words "living at the death of the said John Abbott Donald" prepared one to anticipate has not been expressed in the way that one would have expected. In those circumstances, unless the words are moulded so as to provide the proper pendant in the latter clause to the phrase "living at the death" in the former clause, there is a gap in the testator's thoughts. He has not provided an exhaustive alternative. If that be right, and if the principle I find in the cases cited to us entitles me to give effect to it, I think I can find a sufficient context to justify me in giving to the phrase in question a meaning which will carry out what my impression tells me is the probable intention of the testator—an impression which I am not entitled to follow unless it is properly supported. If a complete contrast between the two phrases I have mentioned had been clearly used by the testator, when he came to the second phrase he would have said "children . . . of my said nephews and nieces who shall not be living at the death of the said John Abbott Donald." That, of course, would have included William, who died before John Abbott Donald was born.

The submission of counsel for the defendant, Edith Constance Daoust, was that the phrase "who shall have died" ought to be read in this context as meaning "who shall be dead," and he said that a nephew or niece "who shall be dead" in the lifetime of William Donald was a nephew or niece of the testator of whom it might properly be said that he or she was dead in the lifetime of John Abbott Donald. I do not myself very much like that way of putting it, because it is not a very happy use of the English language to speak of a person, A., who pre-deceased another person, B, by saying that he was dead in the lifetime of B. If the phrase be read as I have suggested it should be read, as equivalent to "who shall not be living at the death"—and if I should be justified in so reading it—the difficulty is cleared away. Counsel for the other defendants pointed out that there is a difference between "dying" and "being dead"—that "dying" is, so to speak, an act and "being dead" is, so to speak, a state, and that the testator has used a phrase much more appropriate to the act of dying than to the state of being dead. I have given, I hope, full force to that argument in considering this case, but, in my opinion, it is really calling for a greater accuracy in the use of phrases such as these than the court is compelled to look for. As I have said, these references to time are traps in which a very small error of draftsmanship can produce a totally different result. One must not speculate. One must construe, and I find here sufficient context to produce the result which I have stated. In my opinion, the appeal succeeds and the appropriate declaration should be made.

MORTON, L.J.: I agree. Having studied this will carefully, I feel a conviction that the testator did not intend to exclude from the class of beneficiaries the children of his nephew, William Donald. Now, is that conviction based on guesswork as to the testator's intention, or is it based on the language which he has used? I think the latter. It is based on the scheme of the will as a whole and, in particular, on the joint effect of cl. 13 and 14. Clause 14 has already been read by my Lord and I shall not read it again. Clause 13 immediately follows a clause which confers a power of appointment on John Abbott Donald, and it is as follows:

And in default of and subject to any such appointment as aforesaid my trustee shall on the death of the said John Abbott Donald stand possessed of the capital and future income of my residuary estate subject to payment of the said annuities in trust for all or any of the children or child of the said John Abbott Donald who shall be living at his death and being male attain the age of twenty-one years or die under that age leaving issue or being female attain that age or marry and any child or children of the said John Abbott Donald who may have died in his lifetime leaving issue living at his death if more than one in equal shares and so that the share hereby expressed to be given to any such deceased child as aforesaid shall vest in his or her representatives as part of his or her personal estate in the same manner as if he or she had survived the said John Abbott Donald and died immediately after him having attained a vested interest.

The contrast in that clause is between the children of John living at John's death and the children of John dying before John's death. There could not,

of course, be a child of John who died before John was born. In my view, when we come to cl. 14 the testator intended the same contrast as regards his nephews and nieces, although he employed some inept words. I would, of course, agree that in its more natural meaning the phrase "who shall have died in the lifetime of the said John Abbott Donald" applies only to those nephews and nieces who (a) were living when John was born, and (b) died before John died. But, in my view, what the testator really had in mind was (a) nephews and nieces who survived John and (b) nephews and nieces who predeceased John, quite irrespective of whether the nephews and nieces who predeceased John died before or after John was born. That latter point is wholly irrelevant to what the testator, in my view, had in mind. He is looking to the death of John and he intends that living nephews and nieces shall take and the children of dead nephews and nieces shall also take. He echoes in cl. 14 the phrase "who shall have died in the lifetime," intending to produce by these words the same contrast in cl. 14 as was produced in cl. 13. I feel that, if the testator had intended to cut out William's children, he would have used some such phrase as was used in *Re Birchall* (1), and expressly excepted William Donald from the class of nephews and nieces whose children he intended to benefit. I do not believe that the testator used the words which he has used in cl. 14 as a method of excluding William's children from taking. I think that this case is one to which the observation in THEOBALD ON WILLS, 9th ed., p. 544, is applicable:

There is another class of cases in which, though the contingency is penned in such a way as not in terms to include the events which happens, yet the court will consider what was the contingency really contemplated by the testator, and will give effect to the will if that contingency happens.

I agree that it serves no useful purpose to compare the facts of other cases with the facts of the present case and to scrutinise narrowly the words of other wills and compare them with the words of this will, but I think I might usefully quote some observations of FRY, J., in *Davies v. Davies* (2). In that case the relevant words of the will were "in case of my wife dying within twelve months of my own decease." FRY, J. said this (30 W.R. 919):

That undoubtedly, in my judgment, contemplates two things: first, the wife surviving the testator, and, secondly, her dying within the twelve months. I come to that conclusion because, according to my understanding of the words, a person dying within the twelve months does not literally mean a person dying at some time before the end of the twelve months, but it means being alive at the beginning and dead at the end of the period.

The wife, in fact, died before the testator. FRY, J. goes on:

That observation does not conclude the matter because in all these cases the court has to enquire what is the real meaning and object of the clause—what, as has been said in several cases, is the contingency guarded against. Now what, I ask myself, is the contingency guarded against here: is it the contingency of the wife living after the testator and then dying within that period or is it the contingency of the wife not being alive at the expiration of that period?

In the present case I think the contingency contemplated is that of a nephew and niece not being alive at the time when John Abbott Donald died. In my opinion, by allowing this appeal, we shall be giving effect to the real intention of the testator manifested, although somewhat imperfectly expressed, in the words which he has used.

ASQUITH, L.J.: I also agree. During much of the argument I doubted whether there was anything in the context of this will sufficient to displace the plain primary meaning of the disputed words, which seem to me in themselves to be quite unambiguous, but the judgments that my Lords have delivered have, to my relief, dispelled these doubts. I say "my relief" because the literal construction of the words creates an utterly capricious dichotomy between the children of a nephew who died before John Abbott Donald was born and the children of a nephew who died after that date. I entirely concur with the reasoning of my Lords.

Appeal allowed.

Solicitors: Oppenheimer (Herbert), Nathan, & Vandyk (for the defendants); H. F. K. Ireland (for the plaintiffs).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re SMITH.

[COURT OF APPEAL (Lord Greene, M.R., Cohen and Asquith, L.J.J.), March 19, 20, 1947.]

Bankruptcy — Discharge — Suspension — Jurisdiction — Exercise of discretion — Bankruptcy Act, 1914, (c. 59), ss. 26, 108.

On July 11, 1939, the application for discharge by a bankrupt, whose adjudication had taken place on Dec. 8, 1938, was refused. On Jan. 14, 1947, on a further application, the registrar ordered that the discharge be suspended for 3 years from Oct. 22, 1946. The bankrupt's assets were not of a value equal to 10s. in the £ on the amount of his unsecured liabilities; he had contracted debts provable in the bankruptcy without, at the time of contracting them, having any reasonable or probable ground of expectation of being able to pay them; he had brought on or contributed to his bankruptcy by rash and hazardous speculation and unjustifiable extravagance in living; and he had on a previous occasion been adjudged bankrupt:—

HELD: the decision of the registrar violated no principle, there was no misdirection of law, and the suspension ordered was not so excessive or severe as to justify the court in interfering with the registrar's exercise of his discretion.

Per curiam: (i) In spite of the language of the Bankruptcy Act, s. 26, which requires the court, in the circumstances therein stated, either to refuse or suspend the discharge for a period or deal with it in other certain specified ways, the registrar, who had refused the discharge on the original application, would have had ample jurisdiction on the second application, had he thought proper, to order an immediate discharge under s. 108.

(ii) The Court of Appeal will always be alive to the fact that bankruptcy registrars have great experience in bankruptcy matters and have before them continuously a great variety of cases in which circumstances differ. They are pre-eminently a tribunal whose discretion will not be interfered with unless there exists some good ground. The protection of the public is a matter to be taken into account when the length of suspension of a bankrupt's discharge is being considered, but no rule can be laid down regarding the length of suspension which would be applicable to every class of case. The whole circumstances of the bankruptcy must be regarded to see whether the date to which the discharge of the bankrupt is ultimately remitted is excessively remote. The court will interfere only where it comes to the conclusion that the discretion has been unconscionably exercised in the matter of the length of suspension of discharge, but no court has jurisdiction to bind the [discretion of its successors in bankruptcy jurisdiction in any way.

[AS TO EXERCISE OF COURT'S DISCRETION WITHIN STATUTORY LIMITATIONS, see HALSBURY, Hailsham Edn., Vol. 2, pp. 345-348, paras. 464-467; and FOR CASES, see DIGEST, Vol. 4, pp. 544-546, Nos. 5010-5028.]

Cases referred to:

- (1) *Re Swabey, Ex p. Swabey* (1897), 76 L.T. 534; 4 Digest 569, 5240.
- (2) *Re Gaskell*, [1904] 2 K.B. 478; 73 L.J.K.B. 656; 91 L.T. 221; 4 Digest 575, 5284.
- (3) *Re Tobias & Co., Ex p. Tobias*, [1891] 1 Q.B. 463; 60 L.J.Q.B. 244; 64 L.T. 115; 4 Digest 578, 5311.

APPEAL by a bankrupt from an order of a registrar suspending his discharge for 3 years. The facts appear in the judgment of LORD GREENE, M.R.

Andrew Clark, K.C., and *G. F. Kingham* for the bankrupt.

R. E. Seaton for the trustee.

LORD GREENE, M.R.: This is an appeal by the bankrupt from an order of the registrar dated Jan. 14, 1947, whereby he ordered that the discharge of the bankrupt be suspended for 3 years from Oct. 22, 1946. The application was made under s. 108 of the Bankruptcy Act, 1914, under which the court has power to review its previous orders. The adjudication took place as long ago as Dec. 8, 1938. The bankrupt applied for his discharge soon after the adjudication. The registrar refused that application for discharge by an order dated July 11, 1939. At that time the trustee had not completed his investi-

gations, but it is clear to me that, even if those investigations had been completed, the registrar would have regarded the facts as sufficient to justify him in refusing the discharge. The facts as found are very serious. They were these :

That the bankrupt's assets are not of a value equal to 10s. in the £ on the amount of his unsecured liabilities ; that the bankrupt has contracted debts provable in the bankruptcy without having at the time of contracting them any reasonable or probable ground of expectation of being able to pay them ; that the bankrupt has brought on or contributed to his bankruptcy by rash and hazardous speculation and by unjustifiable extravagance in living ; that the bankrupt has on a previous occasion been adjudged bankrupt.

When the present application came before the registrar, he referred to his previous order, and in his judgment there is a suggestion that it might not be open to him under s. 108 to grant an immediate discharge. He doubted whether he would have power to grant an immediate discharge, having regard to the language of s. 26, which requires the court, in the circumstances stated, either to refuse or suspend the discharge for a period or deal with it in other certain specified ways. I do not think that that doubt which he expressed about his powers to grant an immediate discharge is justified by the language of the statute. I think he would have had ample jurisdiction on this application, had he thought proper, to order an immediate discharge. That, however, is not the reason on which his decision is grounded. He does not ground it on lack of jurisdiction, about which he expresses no more than a doubt. He grounds it on the facts of the case. His language with regard to those facts is very strong, but I do not think it is the least bit too strong. He said that the conduct of the bankrupt had been unsatisfactory throughout the whole of the case and that in his public examination and possibly at other times he had not shown the frankness that he ought to have shown. That is a minor point, but the registrar describes the bankrupt in these words :

I think he is an adventurer. He has been bankrupt before. I think he entered into this speculation with a view to saving the shares of the three companies in which he and his family were interested and took over these liabilities without the slightest prospect of being able to meet them. That is the essence of the bankruptcy offence, taking over liabilities without any reasonable or probable ground of expectation of being able to meet them. It did not matter that he did not expect to be called upon. The point was that, if he were called on, could he meet them ? He could not. It is a bad case in that respect.

The registrar said—and it does not surprise me—that, in his opinion, the bankrupt wanted teaching a thorough lesson. The salient points on which the registrar based his judgment were, first, the previous bankruptcy, and, second, the bankruptcy offence of contracting debts which the bankrupt had no reasonable or probable ground of expectation of being able to pay. That particular charge is linked up with, and, indeed, is based on the same set of facts as, the charge of rash and hazardous speculation. I do not propose to go into the question of what those speculations were. They are set out in the Official Receiver's report, and I am bound to say for myself that the description of them is amply justified. The speculations were undoubtedly rash and hazardous. He had no reasonable or probable ground of expectation of being able to pay the liabilities he had contracted which are referred to and the figures are very large. By these operations he has brought financial disaster on a number of innocent people, and the position of his other creditors is grievously affected by his liabilities having been so enormously increased by his taking on his shoulders the burden which is derived from these operations. It is sufficient to say that the charges are entirely proved and the case is, in my opinion, a very bad one. The partly secured creditors are going to be left under a very heavy loss ; the unsecured creditors are going to get not one penny. The previous bankruptcy has a very important bearing on the question that we have to decide. The bankrupt had been adjudicated bankrupt on Jan. 3, 1922. In that bankruptcy it was found that he had been guilty of the same conduct as he was found guilty of in this bankruptcy, *viz.*, rash and hazardous speculation. He obtained his discharge on Nov. 28, 1922, subject to a 3 years' suspension. In so far as suspension of discharge on that occasion was to be looked on as a curative medicine, it seems to have had very little effect, because here he is again, on a very much increased scale, indulging in rash and

hazardous speculations. It was perfectly legitimate, and, indeed, I think, necessary, for the registrar, when deciding what suspension, if any, he should impose on this occasion, to bear in mind that the curative effect of a 3 years' suspension in the previous bankruptcy appears to have been *nil*.

A The statute has given to the registrar a discretion and this court will always be alive to the fact that the bankruptcy registrars have great experience in bankruptcy matters and have before them continuously a great variety of cases in which circumstances differ. They are pre-eminently a tribunal whose discretion will not be interfered with by this court unless there exists some good ground. The principles affecting that question of good ground, of course, are well known.

B Counsel for the bankrupt urged that the length of the suspension is unconscionably severe, because it would result in 10 years elapsing between the adjudication and the final discharge. He referred to one case in which a Divisional Court had, on an appeal from a county court, reduced a suspension of 5 years to 2 years and had expressed the view that suspension for 5 years should be reserved for very bad cases. No rule as to length of period, for the purpose of judging its severity, can, I think, be laid down so as to be applicable to every class of case. One has to look at the whole circumstances of the bankruptcy and see whether the date to which the discharge of the bankrupt is ultimately remitted is excessively remote. There, C again, I think it is a question of discretion, subject to this, that the court will always interfere where it comes to the conclusion that the discretion has been unconscionably exercised in the matter of the length of the suspension. I do not take the remarks of the Divisional Court in *Re Swabey* (1), which counsel relies on, as laying down any sort of rule to bind the discretion of the court on future occasions. The court had no jurisdiction, if I may respectfully say D so, to bind the discretion of its successors in bankruptcy jurisdiction in any such way. Every case has to be decided on its merits. Whether or not I personally should have imposed such a long period is neither here nor there. It is sufficient for me to say that the period which the registrar thought fit is not one that, in my opinion, is so unconscionable as to justify us in interfering with his discretion.

E The other point on which counsel relied was this. He said there are certain general principles laid down by the judges in the past on which the discretion ought to be exercised. I myself always hesitate to extract from observations on the exercise of a discretion general principles which will operate to fetter that discretion in the future. We have been warned many times, especially in recent years, of the impropriety of attempting to lay down principles which would fetter a discretion in dealing with the facts of some individual case. Counsel took as the starting point of his general principles F some observations in *Re Gaskell* (2), a case in this court, in which VAUGHAN WILLIAMS, L.J., said ([1904] 2 K.B. 482) :

G After all, the overriding intention of the legislature in all Bankruptcy Acts is that the debtor on giving up the whole of his property shall be a free man again, able to earn his livelihood, and having the ordinary inducements to industry. Sometimes it is not right that the bankrupt should be free immediately ; he must pass through a period of probation ; and theoretically there may be cases in which he ought not to be free at all, but *prima facie* he is to give up everything he has, and on doing that he is to be made a free man.

H It may well be that that was a helpful angle from which to regard the facts of that case, but, with all respect, it gives me no great assistance in dealing with the facts of this case, because when one says that the overriding intention of the legislature is that the bankrupt shall become a free man again when he gives up his property, one is really saying no more than that, subject to anything which the Act may provide, that is what the court has got to do, *viz.*, set him free. The question then is : Do the qualifying provisions in the Act apply in the present case, and how ought they to apply ? In solving that problem, the reference to overriding intention, however helpful it may have been in that case, does not appear to me to lay down any general rule by which we are helped in this case, nor do I see how it could be applied to such a case as the present.

The other matters of principle which counsel says were laid down were that

the jurisdiction to suspend a discharge is a penal jurisdiction, that the refusal to grant a discharge operates as a punishment, that there is no reason to continue the punishment after its object has been effected, and that to continue it after the necessity for it has ceased is unnecessary from the point of view of the bankrupt and detrimental to the public. I put all those together, although counsel divided them into separate propositions, but they are all based on what was said by a Divisional Court in *Re Tobias* (3). There CAVE, J., with whose judgment VAUGHAN WILLIAMS, J., concurred, said this in reference to the facts of that case ([1891] 1 Q.B. 465):

In such a case as this, however, where the refusal of the discharge operates as a punishment on the bankrupt, there can be no reason why the punishment should not be remitted at any distance of time, if it can be shown that the object of the punishment has been effected. No one is affected by the modification or rescission of such an order except the bankrupt himself, and to some extent society at large, which is benefited by the infliction of a punishment just in proportion to its justice and necessity, and is therefore injured and not benefited by the continuance of a punishment after the necessity for it has ceased.

The first question one asks oneself in reference to that language is: How is it shown in the present case that the object of the punishment has been effected? The object of the punishment of refusal of discharge is, looked at from that angle, to reform the bankrupt. How can we say that this bankrupt has given up his tendency to rash and hazardous speculation when we find that precisely the same offence as on the previous bankruptcy, punished by a 3 years' suspension, has cropped up again in his subsequent transactions? In fact, the task of discovering whether the object of the punishment has been effected in the sense of reforming the bankrupt may in many cases be almost impossible, and whether or not it has had that effect must be a matter very largely of speculation. It stands out here that the habits of this bankrupt were not affected for the better by his previous experience.

Then the observations of CAVE, J. deal with the position of the public. It is, I think, a little misleading to concentrate too much on the penal aspect of the power to refuse or postpone discharge. It has several aspects. The committal of any of the various misdeeds referred to in s. 26 qualifies the right of the bankrupt to obtain the full advantage which bankruptcy legislation has conferred on him, *viz.*, the right, in proper circumstances and subject to the proper conditions, to rid himself of the burden of debt which is weighing him down. There is another aspect of it which is, as COHEN, L.J., pointed out during the argument, inherent in what CAVE, J. said, that, if a bankrupt has become to a greater or less extent a danger to the public, that would be a very good reason for extending the period of suspension. That, I think, is to be found in the reference to the benefit to the public by the infliction of a punishment in proportion to its necessity. It seems to me that that is a matter which ought to be taken into consideration by the tribunal in deciding whether or not the bankrupt should be kept away from the public for an extended period of time. I can quite imagine cases where the tribunal would be justified in saying: "This man shall never have a discharge, because he is an incorrigible public danger and it is necessary for the protection of the public to see that he never has the opportunity again." That, of course, would be a very extreme and rare case. I am not sufficiently familiar with what happens in these cases to know whether in practice it ever does happen, but in theory it would be a perfectly proper thing to do in a suitable case.

In my opinion, the decision of the registrar does not violate any principle. I can find no misdirection by him of himself in law. The suspension which he has ordered does not appear to me to be so excessive and severe as to justify this court in interfering with what he has done. In the result, the appeal must be dismissed.

COHEN, L.J.: I agree so entirely both with the conclusion which LORD GREENE, M.R., has reached and with the reasons he has given for it that I do not desire to add any words of my own.

ASQUITH, L.J.: I also entirely agree.

Appeal dismissed.

Solicitors: *Kenneth Brown, Baker, Baker* (for the bankrupt); *Cohen & Cohen* (for the trustees).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

TWYFORD v. PUNTSCHART AND OTHERS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Atkinson and Oliver, JJ.),
April 18, 1947.]

Medicine and Pharmacy—Dentist—Practice of dentistry by unregistered person
—“Advice . . . in connection with the fitting . . . of artificial teeth”—
Alteration to denture—Dentists Act, 1921 (c. 21), ss. 1, 14 (2).

A By the Dentists Act, 1921, s. 1, it is an offence for any person not registered as a dentist under the Dentists Act, 1878, to practice dentistry, and by s. 14 (2) the practice of dentistry includes “the performance of any such operation and the giving of any such treatment, advice, or attendance as is usually performed or given by dentists, and any person who performs any operation or gives any treatment, advice, or attendance on or to any person as preparatory to or for the purpose of or in connection with the fitting, insertion, or fixing of artificial teeth shall be deemed to have practised dentistry within the meaning of this Act.” A shop assistant, who was not a registered dentist, told a customer that her teeth were all the same size and looked too artificial and could be improved. She suggested that the customer should exchange the teeth and offered to supply six plastic teeth for £3 3s. and gold fillings to take away the artificial look. On an appeal from a decision of justices that this was not the practice of dentistry,

C HELD: “advice . . . in connection with the fitting, insertion, or fixing of artificial teeth” meant in connection with the fitting to the mouth itself and did not cover an alteration to an existing denture, and the shop assistant was not, therefore, carrying on the practice of dentistry as defined in s. 14 (2).

D [AS TO UNQUALIFIED PERSONS PRACTISING AS DENTISTS, see HALSBURY, Hailsham Edn., Vol. 22, p. 344, para. 676; and FOR CASES, see DIGEST, Vol. 34, pp. 562-564, Nos. 211-221.]

FOR THE DENTISTS ACT, 1921, ss. 1 and 14 (2), see HALSBURY'S STATUTES, Vol. 11, pp. 763-770.]

Case referred to:

(1) *Hennan & Co., Ltd. v. Duckworth* (1904), 90 L.T. 546; 20 T.L.R. 436; 48 Sol. Jo. 436; 34 Digest 564, 222.

E CASE STATED by Southport justices.

The first respondent was charged under an information that she, not being registered as a dentist under the Dentists Act, 1878, unlawfully did practise dentistry, and the second respondents, her employers, Jay & Pariser, Ltd., were charged with aiding and abetting her in the practise of dentistry. The magistrates dismissed the information and the appellant, a solicitor acting on behalf of the Dental Board of the United Kingdom appealed. The facts appear in the judgment of LORD GODDARD, C.J.

F

J. D. Casswell, K.C., and D. C. Bartley for the appellant.

D. J. Brabin for the respondents.

LORD GODDARD, C.J.: The Dentists Act, 1921, s. 14 (2) provides:

G For the purposes of this Act, the practice of dentistry shall be deemed to include the performance of any such operation and the giving of any such treatment, advice, or attendance as is usually performed or given by dentists, and any person who performs any operation or gives any treatment, advice, or attendance on or to any person as preparatory to or for the purpose of or in connection with the fitting, insertion, or fixing of artificial teeth shall be deemed to have practised dentistry within the meaning of this Act.

The magistrates' finding was:

H Puntschart told Dunn her teeth were all the same size and looked too artificial and could be improved. Puntschart suggested that Dunn should exchange the teeth and offered to supply Dunn with six plastic teeth for £3 3s. 0d. and gold fillings for others of her teeth to take away the artificial look.

It is admitted on behalf of the appellant that a dental mechanic may, without committing any offence, repair a denture which is brought to him. If he may repair a denture that is brought to him, it is obvious he may make a repair which involves replacement of teeth affixed to the denture. There is no reference to a denture in the sub-section. When we find the facts that are found

by the magistrates here—and in every case it must be largely a question of fact whether what was done amounted to “treatment, advice, or attendance on or to any person as preparatory to or for the purpose of or in connection with the fitting, insertion, or fixing of artificial teeth”—I cannot think that because a dental mechanic says to a person who comes into the shop in which she is employed that the customer’s looks could be improved if her teeth were not all of the same size and offers to fix some teeth—not to make a denture, nor to interfere with the existing denture, but to replace one, two or more teeth on the denture with others which are of different colour or size—that that is in any sense an offence against this section. I think the magistrates’ conclusion was a perfectly proper conclusion on the facts they found and that this appeal fails.

ATKINSON, J. : I agree. In *Hennan & Co., Ltd., v. Duckworth* (1), a man who was not a dentist sued for the price of a set of teeth which he had supplied to the defendant. In that case he had actually made a set of teeth and fitted them, and the defence was that the fee could not be recovered because it was for the performance of a dental operation or for dental attendance or advice. LORD ALVERSTONE said (90 L.T. 548) :

The language used in s. 5 [of the Dentists Act, 1878] is that the unregistered person shall not be entitled to recover any fee or charge “for the performance of any dental operation, or for any dental attendance or advice.” In my opinion, *prima facie* certainly, the words in that section “dental operation” mean operation upon the person—on the mouth of the patient; “dental attendance” would mean advising in respect of the condition of the mouth, or as to what should be done, and “advice” would, of course, mean something of the same character. If it had been intended by the legislature that the section should go on and say: “And nothing supplied by the dentist in pursuance or in consequence of such advice shall be charged for”; I think we should expect to find those words there.

WILLS, J., said (*ibid.*, p. 548) :

I do not think that it is possible to say that making the teeth can come under “dental attendance or advice.” Therefore, we are really driven to the question whether the words “dental operation” are sufficiently large to include such work as this. It seems to me that a dental operation—an operation in respect of the teeth—really means an operation in a surgical sense, something that is to be done, not upon the false teeth, but upon the living person, and that what really is charged for here is that which was not done upon the person, but was done upon the incomplete set of false teeth, in order to make them fit . . .

Since then, the definition of the offence has been enlarged, but there are no words which extend the meaning of “advice.” The legislature must be presumed to have known what the law was at that time, and if it had been intended to make it an offence to do work on an existing denture, something would have been put in the section to make that clear. There is no extension of the word “operation,” which is one of the dominant words in the section. Therefore, we are not entitled to give a different meaning to the word “operation” than that attributed to it in the case I have mentioned, and when one comes to the words: “in connection with the fitting, insertion, or fixing of artificial teeth,” I can see no reason why the argument which prevailed in that case should not prevail here, *viz.*, that these words mean the fitting, insertion or fixing of artificial teeth in connection with the mouth itself. Merely altering an existing denture seems to me to be something which is not covered by the section, but, apart from that, it must be a question of fact in each case, dependent on the circumstances, whether an offence has been committed. The justices here did not find that “advice” had been given. What the first respondent did was merely to suggest that there should be an alteration in the denture. I think there is evidence to justify their conclusion, and the appeal fails.

OLIVER, J. : I agree that on the facts found in this case, the magistrates came to a correct conclusion. Had there been any finding of fact that any part of the fitting to the patient’s mouth was to be affected by the advice given, I would have come to a different conclusion, but there is no such finding.

Appeal dismissed with costs.

Solicitors : *Waterhouse & Co.* (for the applicant) ; *Field, Roscoe & Co.*, agents for *Berkson & Berkson*, Birkenhead (for the respondents).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

R. v. ESSEX JJ., *Ex p.* EAST HAM BOROUGH COUNCIL
[KING'S BENCH DIVISION (Lord Goddard, C.J., Atkinson and Oliver, JJ.),
April 17, 1947.]

Highways—Diversion—Powers of quarter sessions—No appeal against diversion order—Highways Act, 1835 (c. 50), ss. 84, 85.

A A certificate in relation to the diversion of a highway lodged with the clerk of the peace in accordance with s. 85 of the Highways Act, 1835, showed that all formalities with regard to notices, view by the justices, etc., had been complied with, but, in the view of quarter sessions, the proposed new road was less commodious than the old one because it contained two new right-angled turns and debouched into another road in an unsatisfactory way. Quarter sessions, accordingly, held that the certificate was bad on the face of it, and refused to enrol it. On an application by the local authority for an order of *mandamus* directing quarter sessions to enrol the certificate and make the necessary order :—

B HELD : Quarter sessions had no jurisdiction to go into the question of the convenience or adequacy of the proposed new highway ; their duty, if there was no appeal, was to satisfy themselves that the statutory provisions had been complied with, and, that on the face of the certificate, the proceedings were in order, and, if satisfied, to enrol the certificate and make the necessary order ; and, therefore, an order for *mandamus* would be made.

C [AS TO STOPPING UP AND DIVERSION OF HIGHWAYS UNDER THE HIGHWAYS ACTS, see HALSBURY, Hailsham Edn., Vol. 16, pp. 264-273, paras. 323-336 ; and FOR CASES, see DIGEST, Vol. 26, pp. 477-487, Nos. 1898-1991.]

Cases referred to :

- D (1) *R. v. Worcestershire JJ.* (1854), 3 E. & B. 477 ; 2 C.L.R. 1333 ; 23 L.J.M.C. 113 ; 22 L.T.O.S. 332 ; 18 Jur. 424 ; 18 J.P. Jo. 263 ; 118 E.R. 1221 ; 33 Digest 439, 1484.
(2) *R. v. Surrey JJ.*, [1908] 1 K.B. 374 ; 77 L.J.K.B. 167 ; 98 L.T. 42 ; 72 J.P. 53 ; 33 Digest 439, 1488.

MOTION for an order of *mandamus* directing the Essex Quarter Sessions to enrol a certificate of justices diverting a highway under the Highways Act, 1835, ss 84-85. The facts appear in the judgment of LORD GODDARD, C.J.

E *H. C. Leon* and *I. H. Jacob* for the applicant.

The respondents were not represented.

LORD GODDARD, C.J. : The applicants move for an order of *mandamus* directed to the quarter sessions for the county of Essex directing them to enrol a certificate of justices diverting a highway under ss. 84 and 85 of the Highways Act, 1835. The road in question is in the county borough of East Ham, and when the matter came before the quarter sessions, the court said they were satisfied that all formalities with regard to the notices, view by the justices, etc., had been complied with, but they declined to enrol the certificate, because, in their opinion, the new highway was not more commodious than the old highway, for reasons which they gave. These reasons were that the new highway set out on the plan involved two right-angle turns instead of a straight road through, and they thought that where the traffic taking those turns would debouch into another road the position was unsatisfactory as compared with that afforded by the old road. On those grounds they expressed the opinion that the certificate was bad on its face, and, accordingly, they refused to enrol it, at the same time saying they would welcome the guidance of the High Court on the matter.

H The Highways Act, 1835, provides what is to be done where it is proposed either to stop up or divert a highway, I need not go through all its various provisions, but, if two justices, who have to view the highway under ss. 84 and 85, approve the application, a certificate is prepared which must show that the justices have been satisfied and all the various steps and conditions precedent to quarter sessions enrolling the certificate have been properly carried out. Provision is also made for the depositing with the clerk of the peace of the certificate and the plan before the application comes to quarter sessions, so that any person who is aggrieved may appeal to the sessions. The only ground on which, apparently, the quarter sessions can refuse to enrol the certificate, where there is no appeal, is if they see on the face of the certificate that the proceedings have not been in order.

It is their duty, as pointed out by COLERIDGE, J. in *R. v. Worcestershire, JJ.* (1), to satisfy themselves that the provisions of the statute have been complied with, and, if they are satisfied that the provisions of the statute have been complied with, it is not for this court or any other court to question their decision on those matters. The only way in which the certificate can be attacked is by a notice of appeal being served, and the quarter sessions have then to empanel a jury to decide whether or not the road is equally convenient, or more or less convenient, and generally whether or not it is desirable in the public interest that the closing order or diversion order should be made. The matters on which the quarter sessions acted in this case are matters on which they would have had to have taken the opinion of a jury, if anybody had appealed, but, in fact, nobody did appeal. One point that occurred to me in the course of the case, and about which I felt considerable doubt, was that it seems to me, that the plan which has been deposited and has to be enrolled in the county records along with the certificate in certain respects does not comply with the section. If the quarter sessions had taken that point and refused to enrol the plan, I do not think this court could have interfered, but a statement of the decision of quarter sessions which has been submitted to the chairman shows that quarter sessions declared themselves satisfied with the plan and that all necessary preliminaries and conditions precedent had been complied with.

That being so, the only question that is left is whether it was a good ground on which quarter sessions refused to enrol the certificate. For the reasons I have given, it seems to me it is not, because the quarter sessions cannot decide the question of convenience or adequacy. That is a question which can only be decided by the jury. I have had some doubt whether we ought to order a plan which, in my opinion, does not comply with the provisions of the statute, to be enrolled, but the matters in which the plan does not comply with the statute are trifling, and no point has been taken by quarter sessions. It appears that the plan adequately represents that which is proposed to be done, and gives adequate information to the public who choose to investigate it, though I do not suppose they will. In those circumstances, an order of *mandamus* will go.

ATKINSON, J.: I agree. The duty of the justices when a certificate is lodged with the clerk of the peace is clearly defined in *R. v. Worcestershire, JJ.* (1) where COLERIDGE, J., said (3 E. & B. 489, 490):

This certificate, when lodged with the clerk of the peace in order to inspection (*sic.*) and subsequent enrolment, may be either appealed against or not. If the latter, s. 91 of the statute comes into operation, and the justices at sessions must make their order for diverting or stopping up as the case may be.

Then he proceeded to deal with the position if the certificate did not clearly cover all the ground—for instance, if the plan did not contain the necessary measurements—and he goes on:

These consequences are so serious, that we conclude that it is the duty of the sessions, where there is no appeal, to be satisfied that the certificate comes before them correct on its face, and accompanied by plan and proof, such as the statute requires. Unless this be done, neither the public, nor interested individuals, will have the protection which the statute intended. But, if this be the duty of the justices at sessions and within their competence, when there is no appeal, how can it be maintained that, when there is an appeal, it is less a part of their duty, and not within their competence, to decide upon the very same questions if presented to them by the appellant. It must be trusted to the court to determine what apparent defects are merely formal and no grievance, and what are substantial . . .

In *R. v. Surrey JJ.* (2), CHANNELL, J. said ([1908] 1 K.B. 377):

Moreover the question whether the certificate and plan, which they are asked to enrol, comply with the requirements of the section is a matter which the magistrates have to inquire into. And therefore, even if in our opinion they had been wrong, the case would not be one for a *mandamus*.

That means that the view of quarter sessions is final in matters of that sort. It seems to me that, once quarter sessions had expressed the view that the certificate and plan were in accordance with the requirements of the Act, their duty was to order the enrolment of the certificate and they had no power to consider whether or not they agreed with the opinion formed by the two justices who had viewed the highway. I agree that this *mandamus* ought to go.

OLIVER, J. : I agree. Once it is established that the certificate, the plan and the notice which came before quarter sessions are in order, then, if there is no appeal, by virtue of s. 91 of the Act, quarter sessions have no option to do anything else except enrol the certificate. I agree that the *mandamus* should go.

Order for mandamus.

Solicitors : *Duthie, Hart & Duthie* (for the applicants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

ANDREWS v. CORDINER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Atkinson and Oliver, JJ.), April 16, 1947.]

Evidence—Admissibility—Documentary evidence—Regimental record—Bastardy proceedings by married woman—Evidence of non-access by husband—Evidence Act, 1938 (c. 28), s. 1.

A married woman in bastardy proceedings brought by her, sought to give as evidence her husband's regimental record to prove that there was no possibility of access by him during the period of gestation.

HELD : a regimental record, produced from the proper custody and by the officer in custody of it, was admissible evidence under the Evidence Act, 1938, s. 1.

[**EDITORIAL NOTE.** It is interesting to compare the present case (which is a civil matter to which the Evidence Act, 1938, applies) and the decision in *Pettit v. Lilley* ([1946] 1 All E.R. 593; 110 J.P. 218), which was a criminal case, and so not affected by the Act of 1938. In *Pettit v. Lilley*, in registering the birth of a child, the respondent had given her husband's name as the father. She was convicted by a court of summary jurisdiction of having made a false statement, contrary to the Perjury Act, 1911, s. 4, on the ground that her husband was overseas on military service at the time that the child was conceived. She appealed to quarter sessions, and at the hearing of the appeal, to prove non-access the prosecution sought to put in evidence certain regimental records relating to the husband, and the officer in charge of the records was called as a witness. He stated that the records in question were official records and documents, kept by a government department and preserved at the Regimental Records Office, but they were not documents to which the public had access, nor were they kept for the use or information of the public. The recorder of Cambridge held that the records were not admissible under the common law, and, since there was no other evidence, he found that the case was not proved and quashed the conviction. On appeal to the High Court, it was held that regimental records were not public documents because they were not documents to which the public could have access and were kept, not for the use and information of the public, but for the information of the Crown and the Executive. They were, therefore, confidential documents which the Crown could refuse to produce, and so not admissible as evidence. In an Editorial Note to *Pettit v. Lilley* it was pointed out that it was clear on authority that it was essential for the admissibility of public documents as such, that the public should have access to them and they had no such right in the case of Army records. The present case illustrates how the Evidence Act, 1938, has changed the common law in civil cases.

FOR THE EVIDENCE ACT, 1938, s. 1, see HALSBURY'S STATUTES, Vol. 31, pp. 145, 146].

CASE STATED by East Coquetdale Ward, Northumberland, justices.

In bastardy proceedings by a married woman, the justices held that the husband's regimental record was admissible evidence under the Evidence Act, 1938, s. 1, and was sufficient evidence of non-access by the husband to enable them to make the bastardy order. The facts appear in the judgment of the court delivered by OLIVER, J.

John Charlesworth for the appellant.

The respondent did not appear, and was not represented.

OLIVER, J., delivered the following judgment of the court. This case raises the question whether in bastardy proceedings the justices were entitled to treat as admissible in evidence a certain regimental record, which purported to show that the husband of the respondent, a woman who was taking bastardy proceedings against the appellant in this case, had had no chance of access to her during the period of her gestation preceding the birth of the child in

question. I may mention in passing that, where a married woman brings bastardy proceedings, she cannot succeed unless she proves affirmatively that there was no possibility of access by her husband during the period of gestation. To satisfy the justices of non-access, one James Scringeur was called, who deposed that he was a warrant officer in the records office of the Royal Air Force at Gloucester, that it was part of his duty as such to take charge of the service records of various personnel in the Royal Air Force, and that those records showed (*inter alia*) the dates of departure from and return to the United Kingdom of members of the Royal Air Force. He produced the permanent record relating to Corporal David Cordiner, the husband of the respondent. The record disclosed that Corporal Cordiner proceeded to the Middle East on May 17, 1943, and served continuously overseas until Nov. 19, 1945, and that at no time during that period of service was he granted leave to the United Kingdom. The child was born on March 10, 1945. The record produced by the witness was said to be the property of the Air Ministry and a Crown privileged document. The question for our decision is whether the justices were entitled to take that evidence of Scringeur into consideration in coming to their decision. They decided that it was admissible and was sufficient evidence of non-access to enable them to make the bastardy order.

There is no direct authority on this matter, but the point argued by counsel for the appellant was that the justices were wrong in holding that that evidence was admissible under the Evidence Act, 1938. It is conceded by counsel for the appellant that the document in question, the regimental record, falls within the definition in s. 1 (1) (i) of the Act of 1938 :

... if the maker of the statement either—(a) had personal knowledge of the matters dealt with by the statement ; or (b) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters . . .

Counsel for the appellant agrees that this regimental record is such a document as that. The sub-section proceeds :

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

Not much of the proviso applies to this case, except that there is certainly a reasonable inference that one or more of the presumably numerous makers of entries in this regimental record are, or have been at material times, abroad.

Section 1 (2) provides :

In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in sub-s. (1) of this section shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence.

That gives an exceedingly wide power, and it is on that power, certainly in part, that the justices appear to have acted :

... if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused. . .

If everyone who had made an entry in a regimental record of this sort must be brought from abroad to give evidence about it, it would be difficult to imagine a case in which more undue delay and expense would probably be caused.

Counsel for the appellant relied mainly on s. 1 (4) which provides :

For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognised by him in writing as one for the accuracy of which he is responsible,

and said that there was no evidence that any of those matters existed in this case, but my Lord pointed out the following sub-section as extricating the matter from difficulty :

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the foregoing provisions [including sub-s. (4)] the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances . . .

A How could any document have greater probability of accuracy—and that is, after all, the reason for which it is relied on—and how could any evidence come from a more compelling source than a regimental record of this nature? There is the nature of the document, the fact that it comes from the proper custody, the fact that it is produced by the officer in custody of it, the fact that there is no temptation on anyone's part to record entries falsely, and the consequent probability that the entries are true. In these circumstances, the court thinks that the justices acted very properly in this matter, and the appeal is dismissed.

Appeal dismissed.

Solicitors: *Hyde, Mahon & Pascall*, agents for *Frank J. Lambert & Co.*, Gateshead (for the appellant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

R. v. WEYMOUTH CORPORATION, *Ex parte* TELETAX (WEYMOUTH), LTD.

C [KING'S BENCH DIVISION (Lord Goddard, C.J., Atkinson and Oliver, JJ.), April 16, 1947.]

Street and Aerial Traffic—Hackney carriage—Licence—Change of ownership of licensed hackney carriage—New owner's right to amendment of licence and register—Town Police Clauses Act, 1847 (c.89), s. 37.

D The licence in respect of a hackney carriage granted under the Town Police Clauses Act, 1847, s. 37, is granted to the carriage and not to the owner of the carriage, and, therefore, if a change of ownership takes place during the time for which the licence is valid, the new owner is entitled to have his name entered on the licence and the register of licences in place of that of the former owner.

E [AS TO LICENCES FOR HACKNEY CARRIAGES, see HALSBURY, Vol. 31, pp. 705, 706, paras. 1055, 1056.

FOR THE TOWN POLICE CLAUSES ACT, 1847, ss. 37-45, see HALSBURY'S STATUTES, Vol. 19, pp. 43-47.]

MOTION for order of *mandamus*.

F The applicants had acquired five taxicabs which were licensed by the Weymouth Corporation under the Town Police Clauses Act, 1847, s. 37, the licences being current. They applied to the corporation to recognise and give effect to the change of ownership by substituting their name for the names of the former owners on the licences and the register of licences, but the corporation refused the application. The facts appear in the judgment of LORD GODDARD, C.J.

J. T. Molony for the applicants.

Vernon Gattie for the respondents.

G LORD GODDARD, C.J.: In my opinion, this *mandamus* must go. The question that is raised is one of considerable importance to local authorities who are entrusted with the duty of granting licences in respect of hackney carriages under the Town Police Clauses Act, 1847, and it is, apparently, a question which has never yet been the subject of a decision in this court.

H The facts necessary to be stated are few. Some time in the summer of 1946, the applicants for this *mandamus*, a company called Teletax, Ltd., acquired five taxicabs from different persons in the borough of Weymouth, which taxicabs at that time had been licensed for one year at the general licensing meeting held for that purpose by the corporation of Weymouth. The licences would not expire until April 30, 1947. Having acquired those taxicabs, the applicants applied to the town council for the licences which had been granted in respect of those taxicabs to be transferred to them.

The matter was the subject of several debates. The watch committee, to whom these applications go in the first instance, reported to the council against the application, and the council affirmed the watch committee. At a later date,

the watch committee advised that licences should be issued to the applicants, but the council declined to adopt that recommendation and refused the application. The precise nature of the application which the applicants desired to make was put forward in a letter from their solicitors, dated Dec. 16, 1946, saying :

We think it well, therefore, for you to know that our clients' counsel has advised that your council, under the Town Police Clauses Act, 1847, are bound, by necessary implication to consider and give effect to changes in owners of licensed vehicles, and that *mandamus* will lie to compel them so to act and to exclude irrelevant matters from their consideration. A

When the application for leave to move was made, the relief that was claimed was :

... an order for *mandamus* to the Weymouth Borough Council to hear and determine according to law the application of the applicants to recognise and give effect to the change of ownership of the said 5 hackney carriages by amendment of the licences and the council's register of licences, or, alternatively, the issue of new licences in the name of the applicants. B

The matter depends on the true construction of certain sections in the Town Police Clauses Act, 1847, for it is under that Act that local authorities grant hackney carriage licences. In my opinion, the sole question is whether or not licences are granted in respect of cabs or in respect of proprietors of cabs. Before a vehicle can be on the road to ply for hire a licence must be obtained, no matter who the driver is, whether he is a licensed driver or not, because I shall show that by s. 46 of the Act of 1847 the licensing of drivers is with regard to the driving of licensed cabs. C

Section 37 of the Act is :

The commissioners may from time to time licence to ply for hire within the prescribed distance, or if no distance is prescribed, within 5 miles from the general post office of the city, town, or place to which the special Act refers, (which in that case shall be deemed the prescribed distance,) such number of hackney coaches or carriages of any kind or description adapted to the carriage of persons as they think fit. D

That seems to be a reasonably clear section, and, if we give it the ordinary meaning which the English language bears, it is clear that the commissioners are to license a vehicle as a hackney carriage. It seems plain that Parliament had in mind that it was desirable that the commissioners should be able to control the number of carriages which plied for hire in a given area and should also be entitled to prescribe the kind and the description of the carriages. No doubt, the local authority would have power to refuse to grant a licence if they thought that the construction of the cab, to use the common expression, was not satisfactory. I have no doubt that they could take that matter into consideration just as they could take into consideration the number of cabs which were already licensed, so that there would not be an undue number. E F

Section 38 provides what vehicles are to be considered hackney carriages. By s. 40 :

Before any such licence is granted a requisition for the same, in such form as the commissioners from time to time provide for that purpose, shall be made and signed by the proprietor or one of the proprietors of the hackney carriage in respect of which such licence is applied for ... G

Observe here that there is no direction in this section that the proprietor has to make an application for a licence for himself. The requisition is to be filled in and signed "by the proprietor of the hackney carriage in respect of which such licence is applied for." That appears to show that it is the vehicle which is licensed, and not the person owning the vehicle. Section 40 continues :

... and in every such requisition shall be truly stated the name and surname and place of abode of the person applying for such licence, and of every proprietor or part proprietor of such carriage, or person concerned, either solely or in partnership with any other person, in the keeping, employing, or letting to hire of such carriage ... H

Section 41 seems to be also of considerable importance :

In every such licence shall be specified the name and surname and place of abode of every person who is a proprietor or part proprietor of the hackney carriage in respect of which such licence is granted, or who is concerned, either solely or in partnership with any other person, in the keeping, employing, or letting to hire of

any such carriage, and also the number of such licence which shall correspond with the number to be painted or marked on the plates to be fixed on such carriage, together with such other particulars as the commissioners think fit.

There, again, the section contains a clear statement that it is the hackney carriage that is licensed. It would have been simple in that section (as, indeed, in s. 37 or in any other section of this part of the Act) to refer to the licensing of the proprietor to keep a particular carriage if Parliament had so intended.

- A Parliament, however, seems to have emphasised in the sections I have read that the licensing is the licensing of a carriage, and not of any particular person.

Section 42 is :

Every licence shall be made out by the clerk of the commissioners, and duly entered in a book to be provided by him for that purpose ; and in such book shall be contained columns or places for entries to be made of every offence committed by any proprietor or driver or person attending such carriage ; and any person may

- B at any reasonable time inspect such book, without fee or reward.

The object of this section seems clear. It gives the public a right to inspect the register of hackney carriages which must state who the proprietor is, so that, if the public have reason to bring an action for personal injury or otherwise, they may see who the proprietor is who can be sued. By s. 43 :

- C Every licence so to be granted shall be under the common seal of the commissioners . . . or . . . be signed by . . . the commissioners . . . and shall be in force for one year only from the day of the date of such licence, or until the next general licensing meeting, in case any general licensing day be appointed by the commissioners.

Section 44 provides that notice shall be given by the proprietors of hackney carriages of any change of abode. I think s. 45 ought to be noted :

- D If the proprietor or part proprietor of any carriage, or any person so concerned as aforesaid, permits the same to be used as a hackney carriage plying for hire within the prescribed distance without having obtained a licence as aforesaid for such carriage, or during the time that such licence is suspended as hereinafter provided, or if any person be found driving, standing, or plying for hire with any carriage within the prescribed distance, for which such licence as aforesaid has not been previously obtained. . .

- E he shall be liable to a penalty. Contrast these sections with s. 46 :

No person shall act as driver of any hackney carriage licensed in pursuance of this or the special Act to ply for hire within the prescribed distance without first obtaining a licence from the commissioners . . .

- F In my opinion, the effect of the sections clearly shows that the licence is granted to the carriage and that it remains in force for a year from the time when it is granted or until the next annual licensing meeting of the commissioners. What then is to happen if during that year a change of proprietorship takes place ? There is the vehicle, which has its licence attached to it. There is nothing in this Act which provides that the vehicle may not be sold, or may only be sold with the consent of the council. There is no provision here to say that, if a person has obtained a licence for a cab and disposes of it, or dies, he must surrender his licence. What is necessary is that the register should be kept in order and kept up to date. Therefore, it seems to me that, by necessary implication, a person who buys a cab which has been licensed is under a duty to go to the authority and say : " I am now the proprietor of this cab which you licensed for a year. Please, therefore, enter me in the register as the proprietor, and enter my name on the licence granted in respect of the cab, instead of that of the earlier proprietor." We are not concerned to consider
- G whether or not Parliament might have made different provisions. Parliament seems to have said that a licence to a cab, if the commissioners grant it, is to be given for a year. I cannot think it was meant—and I think the necessary implication is the other way—that, if that cab is sold during the year, the person who buys it is not to be allowed to use it during that year. He may not get his licence renewed, but that raises entirely different questions. Once the licence expires, as it will do, at the end of the year, then he will have to put in a requisition in respect of the cab which he wishes to use as a hackney carriage.
- H

In my opinion, the council have viewed this matter from a wrong angle. One of the councillors, I noticed, did raise this question in an acute form at one of the meetings. He said he wanted to be advised whether the licence was to the cab or the man with the cab. Had it been pointed out then, or had this court given a decision then, that the licence attached to the cab and not to the man, I think it is possible that the council might have come to a different conclusion. I think also the council had probably been misled to some extent by the form of the licence which they had been in the habit of issuing. It is to be noted that the section in the statute does not prescribe any particular form of licence, nor, indeed, does it prescribe any particular form of requisition for a licence, Section 40, as I have already said, provides that the requisition is to be in such form as the commissioners shall from time to time provide for that purpose, but the form of licence which is used in the borough of Weymouth reads in this way :

We, the corporation of the borough of Weymouth and Melcombe Regis, in the county of Dorset, by virtue of the provisions in that behalf of the Public Health Act, 1875, and all other powers enabling us in that behalf do hereby licence — of Weymouth, the owner of the hackney carriage numbered — to stand and ply for hire with the said carriage, within the said borough, subject to the provisions of the said Acts, and to such by-laws relating to hackney carriages as are, or may from time to time be, in force in the said borough.

We are also told in a note to the form of licence set out above : " This licence is not transferable." Merely stated in that way, I think it is right. If a licence is granted in respect of cab A., it cannot be transferred to cab B. That is clear, but what we have to consider is quite a different matter, and that is whether or not, when cab A, which has been licensed, is sold to another owner, that other owner is entitled to have his name substituted for that of the previous owner, and, in my opinion, he clearly is.

Certain other questions have been raised by counsel for the applicants in support of his application for a rule. It is said here that the *mandamus* ought to go because persons took part in the debate—although they did not vote—who were interested parties. The court does not propose to give any decision on how far the mere fact that persons who were interested took part in the debate would vitiate a decision of the council, if it were otherwise unobjectionable, because we have already said enough to decide this case on different lines, but I think it desirable that the councillors of the borough of Weymouth should be reminded of the express words of the Local Government Act, 1933, s. 76 (1), which says :

If a member of a local authority has any pecuniary interest, direct or indirect, in any contract or proposed contract or other matter, and is present at a meeting of the local authority at which the contract or other matter is the subject of consideration, he shall at the meeting, as soon as practicable after the commencement thereof, disclose the fact, and shall not take part in the consideration or discussion of, or vote on any question with respect to, the contract or other matter.

The court observes with concern that two members who did disclose that they had an interest, in that they were, apparently, (or desired to be), competing owners of taxicabs, nevertheless took part in this discussion, one of them taking a very prominent part and using arguments and language which we can only say should be strongly deprecated. The result is that this *mandamus* will go, with the usual results as to costs.

ATKINSON, J. : I agree. There is one consideration, however, which I think assists the applicants here, and that is the position of the proprietor who has sold his hackney carriage. He must be entitled to have his name removed from the register, and, I imagine, from the licence which has been granted. If he gave notice to the commissioners, similar to the notice required by s. 44, I should have thought that, if they refused to remove his name from the register, he could come here for *mandamus* to make them do so. That seems to indicate that they must be bound to take notice of changes of ownership and to keep their register accurate in accordance with the true position, and, if the old proprietor has a right to have his name removed, I should have thought it was equally clear that the new proprietor has a right to have his name inserted in place of that of the old proprietor.

OLIVER, J. : I agree with every word that has fallen from my Lords. I only wish to add that I am in the fullest agreement with the strictures which have been passed on the behaviour of two of the councillors concerned in the debate, one of them, in particular, a man openly interested and openly advocating his own financial interest in the debate on a public matter.

Order for mandamus.

Solicitors : *Brash, Wheeler, Chambers, Davies & Co.*, agents for *Glanvilles*,
 A Portsmouth (for the applicants) ; *Sharpe, Pritchard & Co.*, agents for *Percy Smallman*, Town Clerk, Weymouth (for the respondents).

[*Reported by F. A. AMES, Esq., Barrister-at-Law.*]

MARTIN v. LONDON COUNTY COUNCIL

B [KING'S BENCH DIVISION (Henn Collins, J.), April 15, 16, 17, 1947.]

Negligence—Bailee—Hospital—Patient's property deposited on admission—Liability of hospital for loss—Measure of damages.

A local authority, who were under a statutory duty to maintain a hospital and to admit patients thereto, but were empowered to recover all the expenses to which they were put (including the cost of looking after patients' property), admitted a patient into the institution and took possession of certain jewellery and a cigarette case which she had in her handbag. They were unaware at the time that the articles were of value, but shortly afterwards they received a letter from the patient's sister asking for confirmation of the contents of the patient's handbag and referring to diamonds. They did not reply. The articles were entered in a book and stored with hundreds of others in envelopes on the floor in a room which a burglar would have had no difficulty in breaking into. They were not put into a safe even after receipt of the letter, and they disappeared, presumably being stolen. In an action against the authority for the return of the chattels or their value, and damages for their detention, and, alternatively, for damages for conversion, negligence, or breach of duty :—

HELD : (i) the local authority were bailees, but not gratuitous bailees, and so had a higher duty of care than that required from a gratuitous bailee.

E (ii) they were not entitled to assume that a patient's property was of no value, and they were negligent in not storing the property in a safe, particularly after the receipt of the letter drawing their attention to its value.

(iii) in arriving at the value of the property to determine the damages, purchase tax should be taken into consideration.

F [EDITORIAL NOTE. This case is of particular interest by reason of the measure of the damages awarded by the judge. In actions of trover and conversion the long established general rule is that the damages awarded should be the value of the thing taken : *Finch v. Blount* ((1836), 7 C. & P. 478). The judge here assumes the value of the lost jewellery to be the cost of replacement (as to which, see *Hall (J. & E.), Ltd. v. Barclay* ([1937] 3 All E.R. 620)) and he includes in that cost the amount of the purchase tax. There appears to be no previous reported case in which the amount of the tax has been so included, but the principle on which damages for conversion are awarded is the compensation of the owner of the goods for their loss, and in their replacement value the amount of purchase tax must be included since a purchaser is liable for purchase tax on a purchase of goods : *B. Morris, Ltd. v. Lunzer* ([1942] 1 All E.R. 77).

G AS TO LIABILITY OF BAILEES FOR NEGLIGENCE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 661, 662, paras. 935, 936; and FOR CASES, see DIGEST, Vol. 3, pp. 58-70; 72-92; 98, 99; 108, 109; 111-117; Nos. 33-74, 83-86, 96-118, 133-240, 209-272, 333, 336, 339, 354-402.]

H ACTION for the return of chattels or their value, and damages for their detention, or, alternatively, for damages for conversion, negligence or breach of duty. The facts appear in the judgment.

E. Holroyd Pearce, K.C., and *Roger F. Ormrod* for the plaintiff.

Leon Maclaren for the defendants.

HENN COLLINS, J. : The plaintiff sues by the Official Solicitor as her next friend to recover from the defendants the value of certain jewellery and a cigarette case of which the defendants took possession when the plaintiff was admitted

as a mental patient to St. Pancras Hospital, an institution which the defendants maintain in pursuance of their statutory duty in that behalf. The defendants have satisfied me that that jewellery was stolen from them while it was in their custody, probably by a burglar from without, and in those circumstances the questions which arise for my decision are (i) to what degree of care were the defendants bound in respect of the plaintiff's property; (ii) did they exercise that degree of care; and (iii) if they did not, to what compensation is the plaintiff entitled.

The first of those questions—i.e., the degree of care to which the defendants were bound—depends primarily on whether they could properly be described as gratuitous bailees or whether they were in a higher category and bound to a higher degree of care. If they were gratuitous bailees, it is clear that they would be liable only for that degree of negligence which earned the epithet of "gross." I do not know that that can be accurately defined, but it means some sort of carelessness which appeals to the plain man of common sense as being gross. If, on the other hand, they were not gratuitous bailees, they would be bound to take a higher degree of care, again not susceptible of accurate definition, but something appropriate to the circumstances in which the bailee is given something for the pains to which he is put in keeping the articles. I think that the defendants fall within the latter category and were not gratuitous bailees. They were under a statutory duty to receive the plaintiff into their institution, and it was a necessary precaution on their part to take possession of all the property which she brought there with her. The burden was in that sense put on them, but they are in a position to recover all the expenses to which they have been put, and that, no doubt, includes the expense of keeping safely the property which they had taken into their possession. The practice was to make entries in books of the property received from patients. That necessitated the use of a certain amount of stationery and clerical help, and I have no doubt that that all forms part of the expenses of the hospital. The property was put in envelopes appropriate for the purpose, the cost of which, again, I have no doubt forms part of the expenses of the hospital. As gratuitous bailee gets no recompense of any sort. If he is compensated for his pains, he ceases to be a gratuitous bailee and is bound to a higher degree of care, such at least as men of common prudence would take in regard to the class of article which falls into their possession.

What degree of care is indicated in the circumstances of this case? I think the defendants themselves have provided a measure of that care. I am told, and believe, that, if they had realised at the time that these articles were of anything like the value which, in fact, they were, they would have put them in the safe. I think it was wrong for the defendants to assume, as seems to have been the practice, that the articles which they received were all trumpery. They receive into their institution people of all classes, of the higher as well as the lower income groups, and there is no presumption that the property brought in by patients is not of value. If they choose, as it seems to me, to treat it as being worthless or as offering little temptation to thieves, that is a risk which they are taking on themselves. If they are going to err, it appears to me they ought to err on the side of safety, seeing that they are in possession of other people's property which has ultimately to be returned or accounted for. In saying that, I do not mean that they must treat every article that falls into their hands as of great value. No doubt, a good deal of property which falls into their hands is obviously of little value and they can deal with it as they please, but what is a reasonable degree of care in the case of articles which offer little temptation is not reasonable where such articles do so or may do so.

It is, however, not necessary to decide this case on generalities because in this particular instance the defendants were apprised by a letter dated Dec. 15, 1943—which is well before the date when the theft was perpetrated—that these articles were, or at any rate might be, diamonds, because the plaintiff's sister, who so describes herself in her signature, asks in that letter for confirmation as to the contents of her sister's handbag, giving some intimation as to what was in it, and says: "I would be obliged to you for a reply as soon as possible. Also a diamond ring and clip, etc. Would you please let me know where these things are deposited?" The writer of that letter obviously thought, putting it no higher, that the ring and clip contained real diamonds and were

of value. To that letter no answer was vouchsafed. The view, apparently, taken was that it is not the practice of the hospital to give receipts in respect of property taken, and that, that being so, the letter did not require an answer. But there was a plain intimation, if it penetrated to the right source, that it was, at any rate, worth while looking to see whether these articles, in fact, were not trumpery in value, but contained diamonds.

A In those circumstances it seems to me that there was some failure in the administration which prevented notice reaching those concerned that these articles either were diamonds or must be considered to be of value, with the result that the articles in respect of which the plaintiff sues were stored with hundreds of other articles in envelopes stacked on the floor in a room to which an expert burglar, according to the police evidence, given sufficient agility and perseverance, would have no particular difficulty in entering. I am satisfied that that is what did happen, that a thief did enter the room in which the plaintiff's jewels were stored through a window which was insufficiently secured, and that the jewellery went out through that window into the wider world outside. In those circumstances I think the defendants are liable.

B The next question is the amount of compensation to which the plaintiff is entitled. There is, first of all, a difficult question about purchase tax. It is suggested on behalf of the defendants that, in assessing the value of these articles, purchase tax must be disregarded. I think that must be wrong. You cannot buy the articles retail unless you pay purchase tax, which has, in effect, been added to the intrinsic value of the article. A person who has bought an article before purchase tax came into force may, perhaps, even feel flattered to think that in value it has gone up 100 per cent. merely by the imposition of the tax which he has not paid, but, if he is deprived of that article and seeks to replace it, he finds that there is an unfortunate reality about what he thought was a very pleasant accretion in value. In my view, the tax is a real addition to the price which is to be paid, and I, therefore, take it into account. I think the proper value of the ring is £700 and that of the clip £900, to which must be added an agreed price for the gold cigarette case of £40, making in all £1,640, for which I give judgment in favour of the plaintiff.

Judgment for the plaintiff with costs.

E Solicitors: *The Official Solicitor* (for the plaintiff); *J. R. Howard Roberts* (for the defendants).

[Reported by F. A. AMES, Esq., Barrister-at-Law.]

DUNGEY v. TUNBRIDGE WELLS PROPERTIES, LTD.

F [CHANCERY DIVISION (Evershed, J.), March 4, April 2, 1947.]

Landlord and Tenant—Lease—Lease for duration of hostilities—Lessee's option for further term—Time for exercise of option—Validation of War-Time Leases Act, 1944 (c. 34), ss. 1, 3 (3), 7.

G An underlease of premises from Aug. 29, 1942, until the cessation of hostilities between Great Britain and Germany and a period of six months thereafter contained an option clause which provided that the landlords would, on the written request of the tenants made 3 months before the expiration of the term thereby created, grant to the tenants a lease for a further term of 14 years from the expiration of the war period. By a letter dated Nov. 21, 1945, the tenants called for a renewal of their lease for 14 years, and on Mar. 23, 1946, the landlords gave notice to quit which expired on May 1, 1946. The tenants claimed specific performance of the option clause:—

H HELD: (i) by the Validation of War-Time Leases Act, 1944, ss. 1 and 7, the underlease must be treated for all purposes as though from the commencement there had been substituted for the contractual *habendum* the statutory *habendum* of 10 years, subject to the right of either party to determine the term earlier by serving one month's notice after the termination of hostilities, viz., May 9, 1945.

(ii) treating the option clause as one which related to the tenancy and reading it in conjunction with the *habendum* clause as amended by the

Act, the clause operated so as to entitle the tenants to a term of 14 years from the period which was ended by the service of notice following the termination of the war, *viz.*, from May 1, 1946.

M.W. Investments, Ltd. v. Kilburn Envoy, Ltd. ([1947] 1 All E.R. 710) followed.

[FOR THE VALIDATION OF WAR-TIME LEASES ACT, 1944, ss. 1, 3 (3), 7, see HALSBURY'S STATUTES, Vol. 37, pp. 341, 344, 345.]

Cases referred to :

- (1) *M.W. Investments, Ltd. v. Kilburn Envoy, Ltd.*, [1947] 1 All E.R. 710; *reversg.*, [1946] 2 All E.R. 567.
- (2) *Lace v. Chantler*, [1944] 1 All E.R. 305; [1944] 1 K.B. 368; 113 L.J.K.B. 282; 170 L.T. 185; Digest Supp.

WITNESS ACTION by the tenants for specific performance of a covenant containing an option of renewal of a lease. The landlords counter-claimed for possession, arrears of rent, mesne profits. The facts appear in the headnote and the judgment.

S. N. Bernstein for the tenants.

Hector Hillaby for the landlord.

Cur. adv. vult.

EVERSHED, J. : This action raises the question of the effect on an underlease, and particularly on an option for renewal in that underlease, of the Validation of War-Time Leases Act, 1944.

The tenants carry on a cake and confectionery business on the premises in question, which are lock-up shops. The underlease is dated Aug. 29, 1942, and the *habendum*, as expressed in this contract, is as follows :

To hold the same to the tenants from June 24, 1942, until the cessation of hostilities between Great Britain and Germany as evidenced by an Order in Council made by His Majesty and a period of 6 months thereafter.

There then follows in parenthesis : " hereinafter called ' the war term ' ." With regard to the parenthesis, I observe that the draftsman, having taken much care to define in that way the term created by the lease, never again in the document, so far as I am aware, from beginning to end uses the phrase, " war term." Other phrases are used, and when I come to the option clause, the formula " war period " is found. Therefore, in the view I take, it will be necessary for me to say what the phrase " war period " means when I come to it in the option clause ; but, so far as this *habendum* is concerned, though it was faintly suggested that this case differed from those which the decision in *Lace v. Chantler* (2) affected, that suggestion has not been pressed, and there is no doubt that this is an underlease which, according to the law of England before the passing of the Validation of War-Time Leases Act, 1944, was invalid to create a term. It has been saved by the operation of that Act. Therefore, putting it briefly, and as I read the decision of the Court of Appeal in *M.W. Investments, Ltd. v. Kilburn Envoy, Ltd.* (1) the result of ss. 1 and 7 of the Act of 1944 is that one must for all purposes treat this underlease as though from the start there had been substituted for the contractual *habendum*, which I have read, the statutory *habendum*, *i.e.*, to hold for 10 years subject to the right of either party to determine earlier by serving one month's notice after the termination of hostilities, which, for present purposes, has been defined as May 9, 1945. Either party could, by one month's notice in writing served on the other party, at any time after May 9, 1945, earlier determine the lease, but unless such notice of determination was given it would remain, and must be deemed always to have been, a 10 years term.

I do not propose to go through all the clauses of the lease, but I do observe, by way of illustration of the language used, that there is a reference in the covenants by the tenants expressed thus :

And particularly in a workmanlike manner during the sixth year of the said term, . . . which must mean what had been called earlier the " war term " as conceived by the draftsman, and must now mean the statutory term which is provided by the Act. In the tenants' covenants, one also finds the phrase :

To yield up the demised premises at the determination of the term hereby created . . .

again, a slight change of language, but, in my judgment, plainly meaning the term created by the *habendum*. Then we come to the landlord's covenants.

Covenant (a) states :

That the tenants paying the rents reserved and observing and performing the several covenants and stipulations herein on their part contained shall hold and enjoy the demised premises during the said term without any interruption by the landlord . . .

There is a covenant against competitive trades "during the term hereby created." Then, by way of slight variation, the draftsman, who was, apparently, never very attached to one single form of expression, varies it by saying : "That the landlord will during the tenancy."

As I have said, in my opinion, all those formulae mean one and the same thing, *viz.*, the term created by cl. 1.

I now come to the most material clause, cl. 5, which, so far as is material, is as follows :

It is mutually agreed that the landlord will on the written request of the tenants made three months before the expiration of the term hereby created and if there shall not at the time of such request be any existing breach or non-observance of any of the covenants on the part of the tenants hereinbefore contained at the expense of the tenants grant to them a lease of the demised premises for the further term of fourteen years from the expiration of the war period

at a certain rent which is then specified. The phrase "war period" is a new variation, but I have no doubt that it means the same thing as the other formulae, "the term hereby created," or "war term"; and "war term" has been defined as meaning a term referable to the duration of the war plus six months. Therefore, once the statutory *habendum* is substituted for the contractual *habendum*, there is, in my judgment, no difficulty. The "term hereby created" and the "war period" mean, as I think, the term of years which this document was apt to create, which was a period of 10 years determinable by notice after the cessation of hostilities. As it turned out, that was after May 9, 1945. I think it is possible that the "war period" in cl. 5 may be confined to the period which is strictly referable to the war, or to a notice given following the termination of the war, and not to the whole period of 10 years, had that been allowed to expire; but, in the events which have happened, nothing turns on that, and I am satisfied that the "term hereby created" and the "war period" mean the period which ended on May 1, 1946. I say that, because it is agreed that by an appropriate notice the term created by this document, as amended by the Act of 1944, was validly determined by a notice which expired on May 1, 1946. It is also conceded that the tenants had duly complied with and observed all their covenants in accordance with the conditions attaching to an effective notice 3 months before the expiration of this tenancy calling on the landlords to grant them an extended term.

Having regard to the construction which the Court of Appeal in *M.W. Investments, Ltd. v. Kilburn Envoy, Ltd.* (1) have indicated should be put on a document of this kind, to which the Act applies, I have no doubt that the result is that cl. 5 of the option clause takes effect in the way I have indicated, *viz.*, gives the right to the tenants to the further term of 14 years from May 1, 1946, they having exercised the option in the appropriate way.

There only remains one point on which I desire just to add a few sentences. In *M.W. Investments, Ltd. v. Kilburn Envoy, Ltd.* (1) ([1946] 2 All E.R. 570), one reason which VAISEY, J., gave why he felt that the option clause could not survive was, to use his own language, "because it relates to the duration of the tenancy within the meaning of s. 3 (3) of the Act." That sub-section reads as follows :

Nothing in the said s. 1 shall affect any provision of an agreement to which that section applies, being a provision which does not relate to the duration of the tenancy, and any such provision shall continue to apply in relation to the tenancy as it takes effect under that section.

Section 1 is the section which requires the court to substitute for the contractual *habendum* the statutory *habendum*. The other reason given by the learned judge was one peculiar to the construction of the document, and upon that other reason I would only say that the present case appears to be one much more favourable to the tenants than was the one before VAISEY, J. On the question of law, the learned judge gave no reason why he thought that the option clause would be defeated if it was related to the duration of the tenancy, and LORD GREENE, M.R., in his judgment in that case on appeal ([1947] 1

All E.R. 710), expressed his concurrence with the opinion of VAISEY, J., that the option clause there was one which related to the tenancy. LORD GREENE, M.R., said he disliked substituting one form of words for another, but he did say that, in his opinion, "relating to the tenancy" meant "is conditioned or affected by the *habendum*," and, following that expression of view, it is plain that the present option clause relates to the tenancy. But the Court of Appeal also expressed quite clearly the view that the fact that the option clause related to the tenancy, so far from being a ground for invalidating and rendering ineffective the option clause, had, indeed, the opposite effect. LORD GREENE, M.R., (*ibid.*, 712), expressed the opinion that the option clause, being a clause which is related to the tenancy, must be read as though the original *habendum* had been expressed in the form which the statute required, and, in so doing, in that case he had no difficulty in coming to a conclusion favourable to the tenants. Treating this option clause as one which relates to the tenancy and reading it in conjunction with the first clause as amended by the statute, I am in no difficulty in coming to the conclusion that it takes effect, and the events which have happened, as I have said, operate so as to entitle the tenant to a term of 14 years from the period which ended by the serving of notice following the termination of the war, *viz.*, from May 1, 1946.

Having regard to the fact that the landlord and the tenants are going to remain in reasonably close contractual association for a period of 14 years, I do not want to make a decree for specific performance unless that becomes necessary. What I propose to do is to declare that, on the true construction of cl. 5 of the underlease, dated Aug. 29, 1942, and in the events which have happened, and having regard to the effect of the Validation of War-Time Leases Act, 1944, the tenants are entitled to a further lease of the demised premises for 14 years from May 1, 1946, at the rent and subject to the terms and conditions stated in cl. 5 of the original underlease, and I propose to give the parties liberty to apply in case there is some dispute, or hitch, in giving effect to that declaration. The tenants are entitled to recover their costs of the action, and I shall order that the landlords pay the tenants' costs of the action, such costs to be taxed between party and party. The counter-claim will be dismissed with costs.

Declaration accordingly.

Solicitors: *Waterhouse & Co.*, agents for *F. B. Jevins & Riley*, Tonbridge (for the tenants); *J. H. Milner & Son*, agents for *Sir Robert Gower*, Tunbridge Wells (for the landlord).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

HOGG v. SCOTT.

[KING'S BENCH DIVISION (Cassels, J.), March 26, 27, 28, April 1, 2, 1947.]

Police—Metropolitan Police Force—Summary dismissal—Power of Commissioner—Officer convicted of theft—Metropolitan Police Act, 1829 (c. 44), s. 5—General Orders of Metropolitan Police Force, s. 5 (9).

Limitation of Actions—Public authority—Commissioner of Metropolitan Police—Dismissal of police officer—Claim by officer that dismissal illegal—Limitation Act, 1939 (c. 21), s. 21.

In Sept., 1942, the plaintiff, an inspector in the Metropolitan Police Force, pleaded guilty to three charges of stealing and was sentenced to a month's imprisonment. He was forthwith dismissed from the Force by the Commissioner of Police without being informed in writing on a misconduct form of the charge against him, without being supplied with copies of the reports on which the charge was founded, without being invited to give his explanation in writing or being given an opportunity of putting forward his explanation personally, and without a disciplinary board. He was subsequently allowed to appeal out of time against his dismissal to the Home Secretary, by whose order, made in Mar., 1943, he was reinstated in the Force with the rank of constable. In Mar., 1946, he brought an action for a declaration that he held the rank of inspector

and had been entitled to the privileges and emoluments attaching thereto since he was dismissed, on the grounds *inter alia* that the statutory requirements of the Police Act, 1919, and of regulations made under s. 4 of that Act had not been complied with in relation to his dismissal.

HELD : (i) the Commissioner had power under the Metropolitan Police Act, 1829, s. 5, and the General Orders of the Metropolitan Police Force, s. 5 (9), without following the ordinary disciplinary procedure to dismiss the plaintiff on the ground that he was unfit to hold office by reason of his conviction and imprisonment, and that power was properly exercised.

(ii) the plaintiff had waived his right to succeed in the proceedings by appealing to the Home Secretary in 1943 and accepting and acting on his decision for three years.

(iii) the action was barred by the Limitation Act, 1939, s. 21, it being brought against a public authority charged with a public duty in respect of something done in the discharge of that public duty more than a year before the issue of the writ.

[AS TO THE COMMISSIONER OF POLICE AS DISCIPLINARY AUTHORITY, see HALSBURY, Hailsham Edn., Vol. 25, pp. 297, 298, para. 484.

FOR THE METROPOLITAN POLICE ACT, 1829, s. 5, see HALSBURY'S STATUTES, Vol. 12, p. 745.]

Cases referred to :

- (1) *Cooper v. Wilson*, [1937] 2 All E.R. 726 ; [1937] 2 K.B. 309 ; 106 L.J.K.B. 728 ; 157 L.T. 290 ; 101 J.P. 349 ; 35 L.G.R. 436 ; Digest Supp.
- (2) *Kilduff v. Wilson*, [1939] 1 All E.R. 429 ; 160 L.T. 103 ; 103 J.P. 59 ; 37 L.G.R. 155 ; Digest Supp.
- (3) *Noakes v. Smith* (1942), 107 J.P. 101 ; Digest Supp.
- (4) *Coventry v. Wilson*, [1939] 1 All E.R. 448 ; 160 L.T. 103 ; 103 J.P. 59 ; 37 L.G.R. 155 ; Digest Supp.

ACTION for a declaration that the plaintiff held the rank of inspector in the Metropolitan Police Force and was entitled to the privileges and emoluments attaching thereto, despite his purported summary dismissal by the Commissioner of the Metropolitan Police. The facts appear in the judgment, and are summarised in the headnote.

D. A. Scott Cairns for the plaintiff.

Sir Valentine Holmes, K.C., Geoffrey Howard and *Stabb* for the defendant.

CASSELS, J. : The plaintiff seeks a declaration that, although he is serving with the rank of a police constable in the Metropolitan Police, he really holds the rank of inspector, and is entitled to the privileges and emoluments attaching thereto, and has been so entitled for the last 4½ years.

The plaintiff is 47 years of age. He was demobilised in 1919 after distinguished service in the forces during the first world war. For two years he had civilian employment, and in Feb., 1922, he entered the Metropolitan Police Force. He was promoted sergeant in 1931, station sergeant in 1933, and inspector in 1939, and he received commendation. Until 1942 there was nothing against him. In Sept., 1942, three charges of theft were made against him—charges of stealing six pieces of glass mirror from a building and of stealing a leather purse and a hat which had been entrusted to his possession as a police officer. The mirrors came from a building which had been damaged by enemy action. The purse and the hat were lost property. The offences may appear to be trivial, but, committed by a police officer in the course of his duty, they assume a serious aspect. He was arrested and charged. On Sept. 24 he was suspended from duty. On Oct. 7 he appeared before a metropolitan police magistrate at the Lambeth police court. He pleaded guilty to each charge, and was sentenced to a month's imprisonment. On the following day the Commissioner of Police, Sir Philip Game (not the defendant), dismissed the plaintiff from the Metropolitan Police Force. The plaintiff served 28 days in Wormwood Scrubs prison, and on being released obtained civilian employment. On Dec. 2, 1942, the plaintiff began the task of getting himself reinstated into the police force. He wrote a long letter to the then Commissioner, urging that dismissal from the Force was harsh, coming on top of his imprisonment. This action is brought against Sir Harold Scott, the present Commissioner.

The plaintiff wished to appeal to the Home Secretary, as he was entitled to do under the provisions of the Police Appeals Act, 1927, and the rules made thereunder. He was, in fact, out of time, but, thanks to the good offices of Sir Philip Game, the Home Secretary extended the plaintiff's time and agreed to consider the appeal. A complete statement of the case was presented. Sir Philip Game, in a letter to the Home Secretary, dated Feb. 25, 1943, said that, had the case been tried by a disciplinary board (that means, I take it, had the original charges of theft against the plaintiff been tried by a disciplinary board) and had a sentence of dismissal or enforced resignation been imposed, he would, if the plaintiff had appealed to him, have felt that he was in some difficulty as he regarded the action of the plaintiff as more in the nature of "scrounging" than of theft, and, while he would have found it impossible to retain the plaintiff as an inspector, he would, taking the whole of the circumstances into consideration, have reduced the sentence to reduction to the rank of police constable. The Home Secretary considered the matter and on Mar. 30, 1943, directed that the plaintiff should be reinstated in the force with the rank of constable, with pay at the rate of 90s 0d. a week (the plaintiff was getting £7 a week as inspector), and that the period from Sept. 24, 1942, to the date of the order should reckon for pension. On Apr. 6, 1943, the plaintiff expressed a desire to re-serve in accordance with the order of the Home Secretary, and on Apr. 12, he was reinstated, with the rank of police constable. That rank he has held since, and still holds, with credit. In fact it can be said that the plaintiff, apart from the three offences to which he pleaded guilty at the Lambeth police court, was, and is, a police officer of good repute throughout his service.

The plaintiff, however, questions the power of the Commissioner to dismiss him in the circumstances. His claim is that he has never properly been dismissed from the Force, and that he is still entitled to retain the rank of inspector and to have the emoluments of that rank. The grounds on which he bases this claim are that the statutory requirements of the Police Act, 1919, and of the regulations made under s. 4 of that Act, and the requirements of the General Orders by which the Metropolitan Police are governed, have not been complied with. A further ground is that the Home Secretary exceeded his jurisdiction and powers.

Under the Police Appeals Act, 1927, s. 2, the Secretary of State can, by order, either (a) allow the appeal, (b) dismiss the appeal, or (c) vary the punishment by substituting some other punishment which the disciplinary authority might have awarded. The plaintiff received a communication from the Home Office dated Apr. 1, 1943, stating that the Secretary of State, after full consideration, had decided to allow the appeal, and enclosing the order made under s. 2 of the Act to which I have referred. When that order is examined, it shows that what the Secretary of State did was to vary the punishment. There is nothing in the order which said that he allowed the appeal. The plaintiff says that the Home Secretary could allow the appeal or dismiss the appeal or vary the punishment, but he could not allow the appeal and vary the punishment because then he would be doing two things when he only had the power to do one, and, further, that, if he did allow the appeal, he had no power to reinstate the plaintiff as a police constable, for the act of allowing the appeal automatically reinstated the plaintiff as an inspector. I must be guided by the order which was actually made, and not by what someone in the Home Office has said that the Secretary of State did. The Home Secretary did not exceed his jurisdiction or powers. There is no substance in this point, and it fails.

The plaintiff further says that the action of the Home Secretary is of no consequence because he varied a punishment which (says the plaintiff) the Commissioner had no power to impose, because the Commissioner had not complied with the requirements of the Police Act, 1919, and the regulations made thereunder, or the General Orders. The plaintiff submits that he was dismissed without being informed in writing on a misconduct form of the charge against him, without being supplied with copies of the reports on which the charge was founded, without being invited to give his explanation in writing or being given an opportunity of putting forward his explanation personally, and without a disciplinary board. None of the steps mentioned was taken. The Commissioner just dismissed the plaintiff from the Force, the reason being

that the plaintiff was convicted at the Lambeth police court on Oct. 7, 1942, of larceny, and sentenced to one month's imprisonment. Assuming that the Commissioner had power to dismiss, it would certainly seem that he had grounds. On his own confession the plaintiff had been convicted of felony and had been sentenced to a term of imprisonment. The plaintiff's contention, however, is that the dismissal was a nullity because the Commissioner did not take the step of bringing the plaintiff, or the matter, before a disciplinary board after the usual preliminaries.

By the Police Regulations, 1920, made by the Secretary of State under the Police Act, 1919, provision is made that in the case of the Metropolitan Police the procedure in discipline cases shall be as specially approved by the Secretary of State and published in the General Orders of that force. The police authority for the Metropolitan Police District is the Secretary of State himself: see Police Act, 1919, s. 12, and Police Act, 1890, sched. III. The Secretary of State makes regulations, which have been before the court in this case in the book containing the General Orders. As regards discipline and punishments, on such matters as supplying the accused officer with reports and giving him an opportunity of making his explanation and calling witnesses, the regulations in regard to the metropolis are substantially the same as they are elsewhere.

Under the heading of "Liability to dismissal," para. 9 of s. 5 of those Orders provides:

An officer is liable to immediate dismissal for unfitness, negligence or misconduct, independently of any other punishment to which by law he may be subject. The Commissioner may also remove him from the service by dismissal or otherwise without assigning any reason, and the Disciplinary Code, No. 275, para. XVII provides:

Any member of the Force also commits an offence against discipline, and shall be liable to punishment, if he is guilty of an offence which is punishable on conviction, whether summarily or on indictment.

The Metropolitan Police Force has been in existence as a police force for 118 years. It began with the passing of the Metropolitan Police Act, 1829. The police at that time were under justices. Section 5 of that Act provides:

The said justices may from time to time, subject to the approbation of one of His Majesty's principal Secretaries of State, frame such orders and regulations as they shall deem expedient, relative to the general government of the men to be appointed members of the police force under this Act; . . . and the said justices may at any time suspend or dismiss from his employment any man belonging to the said police force whom they shall think remiss or negligent in the discharge of his duty, or otherwise unfit for the same . . .

By the Metropolitan Police Act, 1839, s. 4, the justices were replaced by Commissioners of Police. By the Metropolitan Police Act, 1856, s. 1, the number of Commissioners for the Metropolitan Police was reduced to one, and one it has remained ever since. Here, then, is a power of dismissal in the hands of the Commissioner, without any reference to a disciplinary board and without any compliance with the requirements set forth in regard to what I may call an ordinary matter of discipline or breach of the Disciplinary Code. The first defence to this action is that the Commissioner had the power to do what he did. He came to the conclusion that, having been convicted and sentenced to a term of imprisonment, the plaintiff was unfit for the discharge of his duty. Section 5 of the 1829 Act has not been repealed.

In the case of a borough police force, where the watch committee is the police authority and the disciplinary authority, the power to suspend or dismiss is reserved by the Municipal Corporations Act, 1882, s. 191. This has not been repealed: see *Cooper v. Wilson* (1). That was a case of a dismissal by the watch committee of a police officer who had actually resigned before he was dismissed, and the Court of Appeal held that what the watch committee had done was beyond their powers, but GREER, L.J., said ([1937] 2 K.B. 316):

. . . the power to make regulations under the Police Act, 1919, s. 4 (1), does not impliedly repeal s. 191 (4) of the Act of 1882.

In the case of county police, where the standing joint committee is the police authority and the chief constable is the disciplinary authority, the power to dismiss is contained in the County Police Act, 1839, s. 6. In the case of the City of London Police, where the Common Council of the City of London is the

police authority and the Commissioner is the disciplinary authority, the power to dismiss is contained in a private Act intituled the City of London Police Act, 1939, s. 14. It will, therefore, be seen that throughout the country the statutory provision remains in force for the dismissal of an officer considered by the disciplinary authority to be unfit for the discharge of his duties. Here, the Commissioner acted under the powers which he has under the Act of 1829 and the General Orders. He is not obliged to put into operation the whole of the machinery in such a case. The plaintiff was considered by the Commissioner to be unfit, by reason of his conviction and imprisonment. That such a situation has to be dealt with by the Commissioner is indicated by reg. No 311 (i), which provides :

If, during the proceedings of any disciplinary board, facts emerge which establish a *prima facie* criminal case, the board will forthwith adjourn and seek the instructions of the Commissioner.

Then there is reg. No. 320 :

When an officer is convicted of any criminal offence, the question of his retention in the service will be referred to the Commissioner.

The contention of the plaintiff that his dismissal is a nullity because procedural requirements were not complied with does not prevail. I find that he was regularly and legally, and on good and proper grounds, dismissed. If it were otherwise, the position would be difficult to maintain. Splendid as the police force is, it is a fact that occasionally, though very rarely, a member of it is convicted of a criminal offence and sentenced to a term of imprisonment. It would amount almost to a farce to say that in such circumstances the Commissioner was powerless to dismiss unless he had set in motion the procedure applicable to a case of insubordination. Some cases in which the Police Regulations of 1920 were dealt with have been cited. In *Kilduff v. Wilson* (2), TUCKER, J., said (103 J.P. 73) :

I think that the breaches of these regulations, or the non-compliance with these regulations are mere procedural matters, which did not go to the root of the jurisdiction of the watch committee . . .

In *Noakes v. Smith* (3) LEWIS, J., followed *Kilduff v. Wilson* (2), and held that the plaintiff, a police sergeant, failed to establish that an adverse decision of the watch committee was illegal, null and void, because he had not been ordered to appear before the chief officer of police in accordance with reg. 18.

My decision, therefore, that the Commissioner, in dismissing the plaintiff, acted regularly and legally, would conclude the matter in favour of the defendant, but I think I ought to deal briefly with the other grounds which are raised.

I think the plaintiff may be said to have waived his right to succeed in these proceedings by appealing to the Home Secretary and accepting and acting on the decision of the Home Secretary for three years. The writ was not issued until Mar. 28, 1946. The Limitation Act, 1939, s. 21, is also raised, the defendant, as Commissioner, being a public authority charged with a public duty, and this action being in respect of something done in discharge of that public duty. The same defence was successful in *Coventry v. Wilson* (4), where it was held by TUCKER, J., and affirmed by SCOTT, L.J., in the Court of Appeal, that an action founded on an alleged wrongful act more than a year earlier was barred. This action is in respect of acts done more than a year before the writ was issued, and I hold that the plaintiff was barred by the statute.

Declaratory judgments are in the discretion of the court. There has been considerable delay on the part of the plaintiff in bringing his proceedings. He was dismissed on Oct. 8, 1942, and he started these proceedings, as I have said, on Mar. 28, 1946, nearly three years after he was reinstated. On that ground alone I should not have been prepared to give a decision adverse to the plaintiff, but I think I should have taken into consideration the circumstances of the war, and the fact that the plaintiff had to prepare his own case until he consulted solicitors in September, 1945.

In the circumstances there must be judgment for the defendant.

Judgment for the defendant with costs.

Solicitors : Bolton, Jobson & Yate-Lee (for the plaintiff) ; T. MacDonald Baker (solicitor to the Metropolitan Police) (for the defendant).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

COLLINS v. COLLINS AND DOVE.
REEVES (E.A.M.) v. REEVES (T.A.).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Wallington, J.), October 24, 1946, March 21, 1947.]

Divorce—Costs—Poor person—Liability of poor person to pay or right to receive costs—Security for costs—Order against poor person—R.S.C., Ord.16, r. 28 (1) —Matrimonial Causes Rules, 1944, (S. R. & O., 1944, No. 389), r. 74 (2) (b) and (4).

Under R.S.C., Ord.16, r. 28 (1), no party to a divorce suit who has been granted a poor person's certificate is liable to pay or entitled to receive costs until the court or a judge shall otherwise make an order under the rule. The jurisdiction is discretionary and the order may be made by a registrar.

A wife who is not proceeding as a poor person has the right to apply, under the Matrimonial Causes Rules, 1944, r. 74 (2) (b) and (4), for security for costs against her husband, who is proceeding as a poor person.

[AS TO COSTS IN POOR PERSON'S CASES GENERALLY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 704, 726, 759 and 781; and FOR CASES, see 27 DIGEST 477, Nos. 5050-5052.]

Cases referred to:

- (1) *Smith v. Smith and Rutherford and others*, [1920] P. 206; 89 L.J.P. 175; 123 L.T. 174; 27 Digest 423, 4291.
- (2) *Grinham v. Grinham and Pascoe*, [1916] P. 1; 85 L.J.P. 20; 113 L.T. 1216; 27 Digest 423, 4290.

SUMMONSES adjourned into court.

In these two cases the wives petitioned for decrees of divorce on the grounds that their husbands were guilty of adultery and desertion respectively. The husbands obtained poor persons' certificates. The wives were successful in their petitions and in both cases they obtained from the registrar orders against their husbands for costs. In *Reeves v. Reeves* the wife obtained from the registrar a further order that her husband should lodge a sum of money as security for her costs. The husbands appealed.

H. Davenport Baskerville for the appellant husbands.

The wives were represented by their solicitors.

Cur. adv. vult.

Mar. 21, 1947. WALLINGTON, J. read the following judgment. These two cases raise questions of practice under the rules relating to poor persons. The cases were separately argued before me when sitting in chambers last term, and at the conclusion of the arguments counsel and the solicitors appearing before me invited me to adjourn the summonses into court. To this I assented, and I now propose to state my opinion on the various points raised.

The main question to be determined is whether any, and, if so, what, liability with regard to costs rests on the possessor of a poor person's certificate in respect of matrimonial proceedings. It is obvious that the special position in which a wife petitioner or respondent stands in this class of proceedings is one which creates problems that, broadly speaking, are absent from any other kind of proceeding. The rules as to taxation and payment of costs, and also with regard to security for the wife's costs, whether she be petitioner or respondent, do not give rise to any special difficulties in interpretation in cases where neither party is a poor person. Questions have, however, arisen in cases in which the husband or wife, or both, or a co-respondent or party cited, at or before the commencement, or during the pendency, of the suit are or become poor persons. In any such cases these rules have to be operated in such a manner as to give to the poor person the rights conferred by the Poor Persons' Rules. Rule 74 of the Matrimonial Causes Rules, 1944, is in part (cl. 3 of the rule), directed to this matter. Bound up with the question of costs and taxation of costs is also the right of a wife to security for her costs, and the extent to which, if at all, this right is affected in the case of a wife or a husband who is a poor person.

During the period preceding the second "world war," despite the large growth in the number of matrimonial proceedings that began after the first

"world war," the number of persons obtaining poor person's certificates was relatively small. In these latter days, however, when the number of suits, instead of being counted in hundreds, is reaching tens of thousands, the number of poor person's certificates in force is so great that their effect on costs and security for costs has become a matter of very great importance.

The Rules of the Supreme Court (Poor Persons), 1920 (S.R. & O., 1920, No. 2325), the Rules of the Supreme Court (Poor Persons), 1928, (S.R. & O., 1928, No. 566), and the rules contained in Ord.16, rr. 22 to 31 (H), both inclusive, are the rules which are, and have been, in force during the period covered by the few authorities to which I shall have to refer. The rules particularly affecting the matters with which I have to deal are to be found in Ord.16, r. 28, (1) (2) (3) and (4). The rules previously in force, although in slightly different language, were to the same effect. The poor person's certificate is in one of a number of forms, dependent on whether it is issued under one of the two branches of r. 23, or under r. 23 (a). Rule 23 (a) is with regard to the special certificate issued to a member of the armed forces of the Crown, or the wife of any such person. Looking at the rules and the certificate, it is manifest that the object of the poor persons procedure is to enable one who is a poor person within the meaning of the rules (and found so to be by the committee issuing the certificate), to have the benefit of the poor persons' rules with regard to costs from the moment that he or she obtains the certificate.

Until the present system of poor persons procedure was set up, there was no necessity, and, therefore, no provision, for the filing of a poor person's certificate in the Divorce Registry. The existing poor persons' rules contained in R.S.C., Ord.16 came into operation on Apr. 6, 1926, and necessarily provided for the filing of the certificate in the registry. I understand that a practice has grown up of taxing against a poor person a wife's bill of costs up to setting down on a full paying basis in respect of all items imbursement up to the date of filing (latterly the date of obtaining) the poor persons' certificate. This practice seems to me, if I may respectfully say so, inconsistent with the true interpretation of r. 28 (1) of the Supreme Court Rules. Rule 28 (1) provides :

... after such filing the poor person named in the certificate shall not be liable for any court fees and unless the court or a judge shall otherwise order no poor person shall be liable to pay costs to any other party or be entitled to receive from any other party any profit costs or charges.

I am of opinion that no party to a suit can become "liable to pay" or "entitled to receive" costs until an order to pay has been made. In other words, no such liability to pay or title to receive costs arises merely because (or at the time when) costs have been incurred. Accordingly, assuming the certificate to be in existence down to the conclusion of the suit, the poor person will become "liable to pay" or "entitled to receive" (as the case may be) only after and in consequence and to the extent of any such discretionary order.

In my opinion, r. 28 (1) contains two separate parts. The first part enables the poor person to escape payment of court fees from the date of filing the certificate. The second part is independent of the first part (despite the conjunction "and" after the words "court fees"). This second part does not depend on, and has no connection with, the date of the filing of the poor persons' certificate. The filing of the certificate proves to the court that the person named in it has the status of a poor person and is entitled to all the benefits and privileges conferred by the rules on a poor person. The provision contained in the second part of the rule, beginning with the word "unless," is twofold, namely (a) the poor person is not to be made liable to pay costs to any other party nor entitled to receive from any other party any profit costs or charges, and (b) the only exception to the operation of the rule in that sense is such a discretionary order as the court or a judge may make either against or in favour of the poor person. In other words, the poor person neither pays costs nor receives profit costs or charges in the absence of a discretionary order. Any other form of order in favour of a poor person cannot be effective except to the extent of his actual and proper "out-of-pocket." Rule 31B (1) also deals with out-of-pocket expenses. Incidentally, I may mention in passing that r. 31B (2) and (3) gives to the court or a judge power to make discretionary orders as to costs. See also r. 31B (5) which

restricts the right to enforce those discretionary orders. No difficulty arises as to these orders and I refer to them only to show that I have not forgotten them.

A In my view, if a poor person who commenced a suit as a paying litigant desires to recover from another party any profit costs incurred during the period in which such poor person was not the holder of a poor person's certificate, such desire cannot be satisfied except on a successful application to the trial judge for a discretionary order under the rule. Such an application must be based on facts fit for the consideration of the judge when he is invited to exercise the discretion conferred by the rule. For the purpose of interpreting that part of r. 28 (1) with which I am dealing, I am of opinion that the words "court or a judge" include a registrar, though the number of cases in which he would have before him the material on which such a discretion could properly be exercised must necessarily be very small. The trial judge will either have made a discretionary order as to costs or will not have done so and, in either event, there can be no room for such an order to be made by the registrar. It is conceivable that in some matters, such as maintenance, before the registrar, when he comes to making an order, he might feel it right to exercise this discretionary power (I mean by "this discretionary power" the power given by r. 28 (1)) for what appeared to him sufficient reasons, but those cases must be very small in number indeed. The principles that I have ventured to hold to apply to a poor person who is either petitioner or respondent in a suit will, of course, have the same effect on the position of a co-respondent or an intervener or party cited in a suit.

C I now come to the particular matters in the two cases with which I am now dealing.

D COLLINS v. COLLINS AND DOVE.

In this case the wife's petition for dissolution on the ground of her husband's adultery with Joan Mary Dove, the intervener, was signed and filed on Sept. 11, 1945, the petitioning wife not being at any time a poor person. The petition prayed for the exercise of discretion in respect of the petitioner's adultery. On Sept. 27, 1945, the husband entered an appearance, and on Oct. 9, 1945, obtained a poor person's certificate. On Dec. 10, 1945, the intervener obtained leave to intervene, and on Dec. 11, 1945, she entered an appearance. From that date the case proceeded in the ordinary way, and on Feb. 28, 1946, the cause was set down for trial. On Mar. 6, 1946, the wife filed her bill of costs, up to setting down, for taxation. On Mar. 18, 1946, it seems that the husband's poor person's certificate was placed on the file of the proceedings. It is marked "duplicate" which suggests that the original had been destroyed or lost, but its fate is not known. On Mar. 25, 1946, the costs were taxed and allowed at £46 17s. 9d. On an appeal to me from this order allowing the taxation of costs at £46 17s. 9d., on Apr. 9, 1946, the only question submitted for my decision was whether the certificate was in law effective from its date of issue or from the date of its filing. For what I considered good and sufficient reasons I then held that the husband was entitled to the protection afforded by the poor person's certificate (although it was not filed until after the bill of costs had been lodged) and the order for payment was discharged. I was not then asked to decide the questions now before me. On May 23, 1946, the suit was tried by STABLE, J. He found both adultery and desertion against the husband and granted a decree *nisi* and condemned him in the costs incurred and to be incurred on behalf of the wife. The order as to costs made by the trial judge is in the ordinary form. There is nothing to suggest that it is or was intended to be a discretionary order under r. 28 (1). The learned judge also gave to the wife the custody of the one child of the marriage. On Aug. 13, 1946, the decree *nisi* was made absolute.

H On Oct. 1, 1946, the wife's (petitioner's) costs of the suit were taxed and allowed at £18 4s. 3d., and the district registrar made an order for the payment of that sum by the husband (respondent). This taxation extended from the commencement of the suit down to the date of the poor person's certificate on a full basis, and thereafter included out-of-pocket payments only. The husband now appeals against this taxation and order to pay on the ground that on the date on which the order was made he was, in fact, a poor person,

and that, on the proper interpretation of Ord. 16, r. 28 (1), no such order can be made except it be a discretionary order under that rule, and this order does not purport to be, and was by the registrar not intended to be, a discretionary order. The submission made on behalf of the husband was that the effect of this rule is retro-active, and that once the certificate has been filed the rule extends to cover the whole proceeding and to include immunity from all costs whether incurred before or after the date of the filing of the poor person's certificate or the date of the certificate as the case may be. On behalf of the wife it was submitted by her solicitor that the order was right, and he based his submission on the fact that the course adopted by the district registrar in this case was in accordance with the practice as to these matters that had been adopted and acted on for many years. In my opinion, the order appealed from is wrong for the reasons that I have given and must be set aside. I make no order as to costs.

Order set aside.

REEVES v. REEVES.

In this case the wife filed her petition (dated Feb. 8, 1946) on Feb. 14, 1946, praying for the dissolution of the marriage on the ground of her husband's cruelty. The husband was in the services and abroad, and on Mar. 22, 1946, an order was made dispensing with personal service of the petition. On Apr. 18, 1946, the petition was served by post, and on May 22, 1946, an affidavit of service was made and filed. On May 21, 1946, the respondent husband obtained a poor person's certificate, which was granted to enable him to defend the proceedings in this suit. This certificate was, on May 28, 1946, duly filed in the registry. On June 4, 1946, an order was made giving to the husband leave to enter appearance and file an answer out of time, and on June 7, 1946, he filed an answer containing a simple denial of the cruelty alleged in the petition. By an order of July 10, 1946, the venue was fixed at Bristol, and on July 11, 1946, the cause was set down for trial. On Sept. 10, 1946, the wife lodged her bill of costs up to setting down, and on Sept. 26, 1946, those costs were taxed and allowed at £19 5s. 9d., and an order was made by the registrar for payment by the husband of that sum within 7 days, and for the lodgment of security to the amount of £9 for the wife's costs of the hearing. On Oct. 24, 1946, I heard in chambers an appeal from both portions of the order.

The grounds put forward for the appeal against the costs were similar to those in *Collins v. Collins and Dove*. The wife's solicitor sought to support the order on the ground that it did not contain any charges after the date of the certificate, that the husband was liable for costs up to that date, and that the wife's solicitor was entitled to protection to that extent. As to the order for security, it was urged that such an order was contrary to the provisions of Ord. 16, r. 28 (1), as placing on the poor person a liability to pay costs. The argument in support of the order for security was based on what was said to be the practice of the courts, and *Smith v. Smith and Rutherford and others* (1), was relied on. In this case also I was invited to deliver my judgment in court. I deal, first, with the question of costs. If the view that I have expressed in the earlier part of my judgment covering both cases is correct, it follows that the taxation and order for payment of the costs, the subject of the appeal, ought not to stand, as it imposes a liability on the poor person husband from which Ord. 16, r. 28 (1), frees him. There does not appear to me to be any ground for supposing that the registrar, in making the order, was intending to make, or that there was any material before him on which he could have made, a discretionary order for payment within the meaning of the rule. Accordingly, the order as to costs appealed from must be set aside.

On the question of security, I intend to deal only with the point raised on this appeal, namely, do the Poor Persons Rules allow, or do they in any way affect the jurisdiction of, the court to order security for his wife's costs against a poor person, whether petitioner or respondent? In this case the petitioning wife was not proceeding as a poor person, and, therefore, the provisions of r. 74 (2) (b) and (4) of the Matrimonial Causes Rules, 1944, apply to this case, and *prima facie* give to the wife a right to apply for security. There is no express provision in either the Poor Persons Rules or in r. 74 of the Matrimonial Causes Rules relating to the question that I have now to decide.

I am of opinion that the wife in this case was entitled to apply for security for her costs, and that the amount of the security to be ordered by the registrar should, as in every other case, be fixed by him at such a sum as is reasonable in the circumstances. I can see no reason why the holder of a poor person's certificate, having been relieved of the expense of prosecuting or defending a petition, should not give security for his wife's costs according to his means and having due regard to his wife's financial position and any other circumstances

A which, in the opinion of the registrar, ought to affect the amount of the security to be ordered. *Grinham v. Grinham and Pascoe* (2), and *Smith v. Smith and Rutherford and others* (1), clearly justify the view that such an order is proper, and indicate the circumstances to which attention should be paid when considering the propriety of making the order, or the amount of the security to be provided. I, therefore, dismiss the appeal as to security.

On Nov. 22, 1946, this case was tried by Mr. Commissioner Wethered, at

B Bristol. The record of the trial which is kept in the registry indicates that the commissioner found the petitioner's case proved, granted a decree *nisi*, gave to the petitioner the custody of the two children of the marriage, and "condemned the said respondent in the costs incurred and to be incurred on behalf of the said petitioner in this cause." The record in the registry to which I have referred indicates that this order was made because "respondent

C not now a poor person," which I understand to mean that in some way or other which does not appear, the respondent had in the meantime lost the benefit of his poor person's certificate. On the material before me it is impossible to ascertain how this came about, or what were the facts before the commissioner on which he made this order. So far as the documents recording the grant of the decree *nisi* and the other orders made by the commissioner at the same time, and recorded in the same document, afford any information,

D it appears that the order as to costs is in the ordinary form applicable to a case in which the husband has not at any time during the existence of the suit been a poor person. If this alone appeared, it would, in my view, be impossible to treat such an order as a discretionary order within the meaning of Ord. 16, r. 28 (1), with the result that it would be ineffective as against the respondent because made without jurisdiction, contrary to an express provision contained in that rule. On the other hand, the finding of the learned

E commissioner that when the case was before him the respondent had ceased to be a poor person opened the way for the making of the order for costs that the commissioner made. This order obliges the respondent to pay all the petitioner's costs of the suit.

I need only add that a further consequence of this opinion is that, although when the matter was before me in Oct., 1946, I had come to the conclusion

F that the registrar's order for payment of the wife's costs up to setting down must be set aside, this will not make any difference to the petitioner's rights against the respondent as to costs, because the commissioner's order at the trial will, as I have said, include the whole of the costs. In this case also I do not make any order as to costs.

Order as to costs set aside. Order as to security to stand.

G Solicitors: *F. N. W. Lockyer* (for the appellant husbands); *Haslewood, Hare & Co.*, agents for *E. J. Watson, Cox & Counsell*, Bristol, and *Speechly, Mumford & Craig*, agents for *Saul & Lightfoot*, Carlisle (for the wives).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. ILES.

[KING'S BENCH DIVISION (Atkinson, J.), March 20, 21, 24, 1947.]

Revenue—Excess profits tax—Profits arising from a trade or business—“Trade or business”—Sand and gravel merchant—Royalties received by him from licensees permitted to win gravel from his land—Finance (No. 2) Act, 1939 (c. 109), s. 12 (2).

The taxpayer carried on the business of sand and gravel merchant on certain land and at the same time he granted licences to three firms to enter his land and win gravel for themselves in return for which he received from them a royalty for each cubic yard of gravel taken away.

HELD: the royalties were not part of the profits of the business because, in granting the licences, the tax-payer was exploiting his rights of ownership in the land and was not carrying on his business of a sand and gravel merchant.

Croft v. Sywell Aerodrome, Ltd. ([1942] 1 All E.R. 110) and *Inland Revenue Comrs. v. Broadway Car Co. (Wimbledon), Ltd.* ([1946] 2 All E.R. 609), applied.

Inland Revenue Comrs. v. Desoutter Bros., Ltd., ([1946] 1 All E.R. 58), distinguished.

[AS TO WHAT CONSTITUTES TRADING, see HALSBURY, Hailsham Edn., Vol. 17, pp. 95-108, paras. 190-201; and FOR CASES, see DIGEST, Vol. 28, pp. 22, 23, Nos. 108-122.]

Cases referred to:

- (1) *Croft v. Sywell Aerodrome Ltd.*, [1942] 1 All E.R. 110; [1942] 1 K.B. 317; 111 L.J.K.B. 215; 24 Tax Cas. 126; Digest Supp.
- (2) *Fry v. Salisbury House Estate, Ltd.*, [1930] A.C. 432; 99 L.J.K.B. 403; 143 L.T. 77; 15 Tax Cas. 266; Digest Supp.
- (3) *Glanely (Lord) v. Wightman*, [1933] A.C. 618; 102 L.J.K.B. 456; 149 L.T. 121; 17 Tax Cas. 634; Digest Supp.
- (4) *Inland Revenue Comrs. v. Broadway Car Co. (Wimbledon), Ltd.*, [1946] 2 All E.R. 609.
- (5) *Inland Revenue Comrs. v. Desoutter Bros., Ltd.*, [1946] 1 All E.R. 58; 174 L.T. 162.
- (6) *Gloucester Railway Carriage and Wagon Co., Ltd. v. Comrs. of Inland Revenue*, [1925] A.C. 469; 94 L.J.K.B. 397; 133 L.T. 1; 12 Tax Cas. 720.

CASE STATED by General Commissioners of Income Tax. The facts are set out in the judgment.

Donovan, K.C., and *R. P. Hills* for the Crown.
G. G. Honeyman for the taxpayer.

Cur. adv. vult.

Mar. 24, 1947. ATKINSON, J.: In 1945 Mr. Frederick Henry Victor Iles was assessed to excess profits tax in respect of his business profits for the year ending Mar. 31, 1942, in the sum of £240, and for the following year in the sum of £2,166. He appealed on the ground that £809 in the first year and £1,288 in the second year had been wrongly included in the computation of his profits. He succeeded on his appeal, and the Inland Revenue Commissioners obtained a Case with which I have now to deal.

Mr. Iles owns certain land at Lechdale on which there is gravel and other ballast, and he carries on business as a sand and gravel merchant. Before and during the war he carried on this business by obtaining the gravel, washing it, and selling it for 3s. 6d. per cubic yard loaded on the purchaser's lorry. There is no doubt that his trade is one to which the provisions relating to excess profits tax apply. When the war came there was a great demand for gravel, and Mr. Iles, in addition to working and selling gravel himself, permitted three other firms to take gravel from his land in the following circumstances. Taking the first company, Kent and Sussex Contractors, Ltd., on Oct. 20, 1941, that company wrote to Mr. Iles:

We have pleasure in accepting your offer to allow us to excavate for and remove ballast from your pit at Lechdale, we to pay you 9d. per cubic yard for all ballast removed by us.

A day or two later the second company wrote:

We accept the prices contained in your quotation . . . We to remove the top soil and stack and in due course throw back into pit. We to compensate the farmer for

damage to land and loss of crops . . . We to pay you 9d. per yard royalty on all gravel taken away by us.

A letter, written by Mr. Iles, to the third company, states :

You to be allowed the right to dig and take away gravel from my pit and to pay royalty of 10d. a yard for all gravel removed . . . I am responsible for compensation to farmer, rates and taxes and all other assessments. You to load my lorries for local requirements at the rate of 6d. per cubic yard when required. I to let you have the use of my man, so long as required, you to pay him at the rate of 1s. 6d. per hour.

It is common ground that these agreements provide for payment of royalties in respect of each yard of gravel taken. During the currency of the agreements which were all proceeded with Mr. Iles continued working his pit in the same way as before. None of the other three had any exclusive right to work. They all worked at the same time. There was one excavation which was being worked, but it was extended by the additional excavations made by the three licensees on the land.

The question in the case is whether the royalties payable by these three companies were profits from the trade or business of a merchant carried on by Mr. Iles. Mr. Iles contends that what was done by these three firms was done in their trade or business, not in his. If he had ceased to carry on his business at any time, the existence of these licences would not have been affected. The licensees would have continued to get what gravel they wanted, and the royalties would have come in in precisely the same way. Mr. Iles says that his business was that of a merchant getting and selling gravel, and that permitting other people to carry on their trade on his land was no part of his business. He contends that the profits in question were made, not in any sense from or by the carrying on of his business, but from the exploitation by him of his rights of property, and that such profits would be covered by assessments under sched. A, or, possibly, sched. B, but for s. 21 of the Finance Act, 1934, which specifically made rent and royalties subject to tax. Another contention was that the land, quite properly, could be regarded as an investment, and royalties paid by other people for working on the land would be income arising from the investment. The Inland Revenue Commissioners merely affirm that the royalties were ordinary trading receipts of the business carried on by Mr. Iles. For Mr. Iles it is said that the question is one of fact, and that question of fact has been determined by the commissioners. Their finding was :

Having considered the evidence and arguments addressed before us we were of opinion that the respondent's appeal should be allowed as we felt the case had not been proved, and gave our decision accordingly.

Two cases were relied on. The first case, *Croft v. Sywell Aerodrome Ltd.* (1), was dealing with the question whether receipts coming in from licences granted by the aerodrome company were part of their profits. I need not trouble with the facts of that case, but what is relied on is the law laid down there as being of general application. LORD GREENE, M.R., says ([1942] 1 All E.R. 113) :

The questions raised by the appeals call for some re-examination of certain features of the Income Tax Acts which relate to assessments under sched. A and sched. B. If I may begin with a commonplace, income tax is a tax on income, and this observation applies equally in the cases of sched. A and sched. B and in those of the other schedules. There is, however, this difference. Whereas the other schedules deal only with income actually received (calculated, it is true, in accordance with the relevant rules), in the case of sched. A and sched. B the actual perception of income is not necessary in order to attract the tax. The owner of lands is deemed to obtain income from his mere ownership, and the occupier of lands is deemed to obtain income from his mere occupation. The measure of the income so deemed to be derived is, in the ordinary case, determined by reference to the annual value as defined. To quote the language of LORD DUNEDIN in *Fry v. Salisbury House Estate, Ltd.* (2) ([1930] A.C. 439) : "The result is that by the operation of the assessment under sched. A which is made imperative by the statute . . . the income of the assessee is so far dealt with and cannot be dealt with again." The same is true of income which is assessed under sched. B. Where, therefore, in respect of any particular land, tax has been assessed (as it must be) both in respect of the property in the land under sched. A and in respect of the occupation of the land under sched. B, no further tax is exigible in respect of any income referable to that property or that occupation, even if such actual income greatly exceeds the value upon which the tax is calculated. Similarly, apart from specific provisions, the taxpayer who derives from his property or his occupation an actual income which falls below

the assessed value can obtain no reduction of tax. It is perhaps not unnatural that the Revenue authorities, finding in certain cases a very large excess of actual income over the assessed value, have endeavoured to levy tax on that excess by treating it as referable to a trade under sched. D, Case I, or to a profit under Case VI. Instances of these endeavours are to be found, in the case of sched. A, in *Fry v. Salisbury House Estate, Ltd.* (2), and, in the case of sched. B, in *Glanely (Lord) v. Wightman* (3). The effect of these decisions is that, where profits are referable to property or occupation, the Crown, like the subject, is bound by the statutory measure in accordance with which such profits fall to be ascertained. A further principle, I think, also emerges—namely, that, even if the profits in question are made by means of a highly organised commercial operation, such as in ordinary parlance would be described as a trading operation, the relevant schedule, be it sched. A or sched. B, must be applied. Once a profit is referable to property or occupation, it must remain in that category. It cannot be taken out of that category by calling the operation which gives rise to it a trading operation.

On p. 116 he says :

When the owner of land grants a licence to another to come on his land, he is exercising his rights of property just as much as when he is granting a lease. It is by virtue of his proprietary rights that he has power to grant the licence, and this is equally true whether he is a freeholder or a leaseholder. The fact that a licensee carries on a trade on the strength of his licence has nothing whatever to do with the owner who grants the licence. It does not convert him for tax purposes into a person carrying on a trade, any more than in the case where a tenant carries on a trade. The fact that the land is peculiarly suitable for carrying on the trade, whether under a lease or a licence, will, or should in the long run, be reflected in its annual value for tax purposes.

I will read one more passage on p. 118 :

... I cannot myself see that a person who leases the land to others, or grants licences to others to come upon it, is doing anything more than exploiting his own rights of property, even if the tenant or licensee is, by the terms of the lease or licence, entitled himself to carry on a trade on the land.

Mr. Iles says that what happened here is precisely governed by those words, that he was merely exploiting his rights of property by letting other people come and excavate for gravel.

One other case was relied on by Mr. Iles, *Inland Revenue Comrs. v. Broadway Car Co. (Wimbledon), Ltd.* (4). There the company carried on a business of motor car agents and repairers on land which they held on a 20 years' lease at an annual rent of £750. By 1940 that business had dwindled under war conditions to such an extent that no more than one-third of the land was required. In those circumstances the remainder was sub-let for 14 years at a rent of £1,150 a year. The General Commissioners decided that the difference of £400 between the £750 rent paid and the £1,150 rent received was income received from an investment and was, therefore, not taxable. There was an appeal by the Crown, and it was claimed that this was not money derived from an investment, but was really part and parcel of the profits of the business carried on. The decision of the commissioners was reversed by MACNAGHTEN, J., but on appeal to the Court of Appeal the commissioners were upheld, it being held that it was a question of fact and that there was ample evidence to support their finding. SCOTT, L.J., said ([1946] 2 All E.R. 609) :

The appellant company was assessed in the sum of £2,500 on the profits of their business. They appealed to the general commissioners, and the latter held that a part of their income amounting to £400 net was income from an investment within the meaning of para. 6 (2) of pt. I of sched. VII to [Finance (No. 2) Act, 1939], and that, the company not being a company of one of the special kinds made liable for investment income in that sub-paragraph, the income in question ought to be excluded from the assessment . . . The argument of the Crown is that the wording of the commissioners' finding, in the Case Stated shows error. According to that finding (1) the income "did not arise in the ordinary course of the company's business," and (2) "was income from an investment." I cannot see how that was wrong. The commissioners rejected the contention of the Crown, so far as it was fact, that the rent "arose in the ordinary course of the business," if, by that, was meant as an ordinary transaction or operation of a motor car agent's business, and rightly rejected it because there was no evidence to support it . . . The question for the commissioners was one of mixed fact and law, the law being as to the meaning of the word "investment." In my opinion, as I have said, there was evidence to support the finding of fact and no error of law.

TUCKER, L.J. (at p. 611), said the same thing and made some remarks about *Inland Revenue Comrs. v. Desoutter Bros., Ltd.* (5).

Therefore, it seems clear—and *Gloucester Railway Carriage & Wagon Co., Ltd. v. Inland Revenue Comrs.* (6) is to the same effect (see the judgment of WARRINGTON, L.J., in 12 Tax. Cas. 720, at pp. 742, 743)—that the question whether or not these profits arise from a business is a question of fact, and the court cannot interfere if there is any evidence to support the decision of the commissioners. *The Broadway Car Co.* case (4) is interesting in the respect that there the company leased a part of the land which had been their business premises, and yet it was held that that did not make the rent they received rent receivable in the course of their business.

As I understand it, it was conceded that, if Mr. Iles had leased part of his land or had granted licences, as he did, to work some part of his land which did not adjoin or touch the excavation which was being worked by him, it would be difficult to say that these royalties were part of the profits of Mr. Iles' business. I cannot see what difference it makes that the receipts granted are in respect of land bordering on the area being dealt with. The land which was being dealt with was in a sense virgin land. One of these agreements speaks of what is to be done with the "top soil." The work was not going to be in a pit actually being worked. It is as if Mr. Iles started at point A and worked westwards and said to one of the licensees: "You start working away to the north"; and to another: "You work to the east"; and to another: "You work to the south." They are to excavate the land and remove the top earth and arrange with the farmers, and so on. It is not that they should proceed to work in the very pit which was being worked by Mr. Iles. They are delving into the land afresh. Surely it cannot make any difference whether those excavations join the existing excavation, or whether they begin 10 yards, 20 yards, or half a mile away. That is the case for Mr. Iles.

The first complaint of the Crown was on the wording of the finding of fact. It is a commonplace when an assessment has been made that it is for the taxpayer to prove it is wrong. Counsel for the Crown said that the words of the finding indicate that the burden has been put on the wrong shoulders, because the General Commissioners say: "Having considered the evidence and arguments addressed before us, we were of opinion that the respondent's appeal should be allowed as we felt that the case had not been proved, and gave our decision accordingly. Counsel says that that suggests that the commissioners thought it was for the Crown to prove that the decision of the assessing commissioners was right. I do not think that is what was meant. One must not be too hypercritical in dealing with the words of findings of this character. They were saying: "We think the appeal should be allowed. We think the decision was wrong. We think that these were not profits from the trade or business." I think it is plain they meant that, on the evidence, in their view, these receipts were not profits from a trade or business. It may be it is not expressed very happily, but they certainly were of opinion that these receipts were not profits of the business.

Then it was argued that, if that properly describes their finding, there was no evidence to support it, and the facts were such that there was only one conclusion possible. I cannot agree with that. On the contrary, in my opinion, if the commissioners had found these were profits from the trade carried on by Mr. Iles, there would have been a very strong case for saying there was no evidence to support it. I start with a finding of what the business was, a finding that the business was that of a merchant getting, washing and selling gravel. Not one of those operations was performed by Mr. Iles in this connection. Rent from the lease of part of his land, royalties from a licence to get gravel from part of his land, would indisputably be an exploitation of his rights of ownership. I repeat it was very half-heartedly contested, if not conceded, that, if the land had not been contiguous to this excavation, the royalties would not be profits from the business. The receipt of these royalties in no way depended on the continuance of Mr. Iles' business. They formed no part of it. What difference can it make that part of the land included in the lease or licence was contiguous to that part of the land which was being excavated by the owner?

Then it was suggested by counsel for the Crown that the case was like the *Desoutter* case (5), where it was held that, if you make use of a patent in your

business and also receive royalties from the use of the patent by others licensed to use it, those royalties cannot be regarded as receipts from an investment. In other words, the door has to be either open or shut. A patent is either an investment or it is not. The suggestion was that freehold land is in the same position, and if you carry on business on part of it whatever you do with the rest by way of licensing or letting cannot be regarded as producing income from an investment. That, however, is dead in the teeth of the judgment in the *Broadway Car Co.* case (4). The same argument was tried there, but TUCKER, L.J., said he thought the *Desoutter* case (5) had very little to do with it, as there was a great difference between land and a patent, and he did not think the *Desoutter* case (5) threw any light on the matter. In the *Broadway Car Co.* case (4) it must be remembered they actually leased two-thirds of their business premises, but that did not make the rent the company received profits of their business. A patent is quite different from freehold land. If the argument of counsel for the Crown were carried to the extreme, it would mean that the mere fact that a man carries on business on one corner of his land would make all the rents and all the royalties received from the use of the rest of the land ordinary trade receipts of his business. That, of course, is an impossible contention. I think there was ample evidence to support the view taken by the general commissioners. The view they intended to express, I think, was that they were satisfied that the rents were not part of the business, and I am of opinion that their decision should stand.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Pennington & Son*, agents for *Lemon, Humphreys & Parker*, Swindon (for the respondent taxpayer).

[Reported by W. J. ALDERMAN, ESQ., Barrister-at-Law.]

POTTER & CLARKE, LTD. v. PHARMACEUTICAL SOCIETY OF GREAT BRITAIN.

[COURT OF APPEAL (Lord Greene, M.R., Cohen and Asquith, L.JJ.), March 25, 26, 27, April 25, 1947.]

Medicine—Disclosure of composition—Sale by unauthorised persons—"Substance recommended as a medicine"—Substance known to public as supposed remedy for particular ailment—Name of substance and dosage given on label, but no reference to any ailment—Pharmacy and Medicines Act, 1941 (c. 42), ss. 11 (1), 12 (1), 17.

Where a substance is sold in a wrapper or container bearing a label on which, after the name of the substance, there are instructions regarding the dose to be taken (with, or without, a reference to the British Pharmacopœia), but there is no reference whatever to the nature of the ailment or ailments for which it is to be taken, the substance is not a "substance recommended as a medicine" within the meaning of that expression as defined in the Pharmacy and Medicines Act, 1941, s. 17, and, accordingly, it can lawfully be sold by unqualified persons, notwithstanding s. 12, and its composition is not required to be disclosed under s. 11. Although words relating to dosage indicate that a substance is a medicine, to bring it within the definition in s. 17 the written terms in which the substance is referred to must specify the particular ailment or group of ailments for the prevention or treatment of which the substance is appropriate, and it is immaterial that the general public or a particular consumer knows that the substance in question is supposed to be a remedy for a particular ailment.

Decision of WYNN-PARRY, J., ([1946] 2 All E.R. 561) reversed.

[FOR THE PHARMACY AND MEDICINES ACT, 1941, see HALSBURY'S STATUTES, Vol. 34, p. 192.]

Cases referred to:

- (1) *Farmer v. Glyn-Jones*, [1903] 2 K.B. 6; 72 L.J.K.B. 523; 89 L.T. 64; 67 J.P. 240; 34 Digest 568, 252.

(2) *Nairne v. Stephen Smith & Co., Ltd., and Pharmaceutical Society of Great Britain* [1942] 2 All E.R. 510; [1943] K.B. 17; 112 L.J.K.B. 108; 168 L.T. 175; Digest Supp.

APPEAL by the plaintiffs from an order of WYNN-PARRY, J., dated Oct. 25, 1946, and reported [1946] 2 All E.R. 561, on the construction of certain provisions of the Pharmacy and Medicines Act, 1941. The facts and the relevant sections of the Act appear in the judgment of the court read by ASQUITH, L.J.

A *H. Glyn-Jones, K.C., G. G. Honeyman and R. P. Colinvaux* for the appellants.

G. R. Blanco White, K.C., and J. G. P. Comyn for the respondents.

Cur. adv. vult.

Apr. 25. ASQUITH, L.J., read the following judgment of the court. This is an appeal by the plaintiffs from a judgment of WYNN-PARRY, J., on an originating summons raising for the determination of the court certain questions relating to the construction of the Pharmacy and Medicines Act, 1941, ss. 11, 12 and 17. The litigation is friendly litigation, the issues are difficult, and the result important. This is a test case. It affects vitally the respective rights, in relation to the sale of medicines, of qualified dealers (*e.g.*, chemists) and unqualified dealers (*e.g.*, grocers), and also the extent of the obligation resting on both to disclose the composition of medicines sold.

C The relevant provisions of the Act are as follows. Section 11 (1) provides :

Subject to the provisions of this Act, no person shall—(a) sell by retail any article consisting of or comprising a substance recommended as a medicine; or (b) supply any such article as a sample for the purpose of inducing persons to buy by retail the substance of which it consists or which it comprises; unless there is written so as to be clearly legible on the article or a label affixed thereto, or, if the article is sold or supplied as aforesaid in a container, on the container or a label affixed thereto, or, if the article is sold or supplied as aforesaid in more than one container, on the inner container or a label affixed thereto—(i) the appropriate designation of the substance so recommended, or of each of the active constituents thereof, or of each of the ingredients of which it has been compounded; and (ii) in a case where the appropriate designation of each of the active constituents or the ingredients is written as aforesaid, the appropriate quantitative particulars of the constituents or ingredients.

Section 12 (1) provides :

E Subject to the provisions of this Act, no person shall sell by retail any article consisting of or comprising a substance recommended as a medicine unless he is—(a) a registered medical practitioner or a registered dentist; or (b) an authorised seller of poisons; or (c) a person not being a registered medical practitioner or a registered dentist or an authorised seller of poisons, but being a person who—(i) has served a regular apprenticeship to a registered pharmacist, or to a body corporate authorised to sell poisons by virtue of s. 9 of the [Pharmacy and Poisons Act, 1933]; and (ii) is at the date of the passing of this Act carrying on on his own account a business which comprises the retail sale of drugs.

Section 12 (3) provides :

If any person sells an article in contravention of any of the preceding provisions of this section, he shall, subject to the provisions of this Act, be liable on summary conviction—(a) in the case of a first conviction, to a fine not exceeding £20; and (b) in the case of a subsequent conviction, to a fine not exceeding £100, or to imprisonment for a term not exceeding 3 months, or to both such a fine and such imprisonment.

G Sub-sections (4) and (5) need not be read but will be referred to later. Section 14 abolishes certain stamp duties imposed by the Medicines Stamp Act, 1802, the Stamp Act, 1804, and the Medicines Stamp Act, 1812. Finally, s. 17 contains a definition of “substance recommended as a medicine,” which is important, because the whole case turns on the meaning of that expression. The definition is as follows :

H “Substance recommended as a medicine,” in relation to the sale of an article consisting of or comprising a substance so recommended, means a substance which is referred to—(a) on the article, or on any wrapper or container in which the article is sold, or on any label affixed to, or in any document enclosed in, the article or such a wrapper or container; or (b) in any placard or other document exhibited at the place where the article is sold; or (c) in any advertisement published after the passing of this Act by or on behalf of the manufacturer of the article, or the person carrying on the business in the course of which the article was sold, or, in a case where the article was sold under a proprietary designation, the proprietor of the designation; in terms which are

calculated to lead to the use of the substance for the prevention or treatment of any ailment, infirmity or injury affecting the human body, not being terms which give a definite indication that the substance is intended to be used as, or as part of, a food or drink, and not as, or as part of, a medicine.

In the originating summons the plaintiffs submitted for the determination of the court two questions, of which the second is not involved in this appeal. The first is as follows :

Whether upon a true construction of the Pharmacy and Medicines Act, 1941 (and on the agreed facts of this case) any and which of the substances specified in the first column of the first schedule hereto, when sold in a wrapper or container labelled as described opposite each in the second column of the said schedule, are substances recommended as a medicine.

The first substance referred to is as follows : Senna Pods : Label :

Senna Pods, Potter & Clarke, Ltd., Viaduct House, Farringdon Street, London, E.C.4.

The second substance is "Fluid Extract of Cascara Sagrada." The label is

Trade Mark: Winged Lion Brand. Fluid Extract of Cascara Sagrada. British Pharmacopoeia. Dose: Half to one teaspoonful in half a wineglass of water.

The third substance is "Lemon and Squill Linctus." The label is :

Lemon and Squill Linctus. Potter & Clarke, Ltd., Viaduct House, Farringdon Street, London, E.C.4.

The fourth substance is "Compound Rhubarb Pills" and the label is :

Compound Rhubarb Pills. Dose: One or two at bed time. Parkinsons, Ltd., Burnley.

Lastly, the substance is "Effervescing Powders" and the label :

Extra strong Effervescing Powders. Prepared by Carter & Sons, Sheffield, a war-time substitute for Seidlitz Powders. Carters. Dissolve the contents of the blue paper in half a tumbler of water, and then add the powder in the white paper and drink while effervescing. Take first thing in the morning on an empty stomach.

Then follows Carter & Sons' address at Sheffield.

According to one construction of the words "substance recommended as a medicine"—that contended for by the defendant society—the preparations named in the schedule with the respective labels therein described are such substances, and can by virtue of s. 12 (1) only be sold by qualified vendors, *e.g.*, chemists and the other classes of persons described in that sub-section. According to the alternative construction, contended for by the plaintiffs, they are not such substances and may lawfully be sold by unqualified persons as well. In relation to the first substance, senna pods, labelled *eo nomine*, the trial judge has held in favour of the plaintiffs, and the defendants do not appeal against this decision. In regard to the third, lemon and squill linctus, he held in favour of the defendants, and the plaintiffs, the appellants, do not seek to disturb this finding. The appeal is, accordingly, limited to the other three substances in the schedule, namely, fluid extract of cascara, compound rhubarb pills and effervescing powders. In regard to these he has adopted the construction for which the defendant society argued. He has held, in other words, that these substances, labelled as they are, are "substances recommended as medicines" within s. 17, with the corollary that under s. 12 (1) they can only lawfully be sold by qualified persons, and under s. 11 (1) must have their composition disclosed. The decision proceeded on agreed facts contained in an affidavit by Richard Charles Wren, the material passages in which are set out in the judgment of the trial judge and will be referred to when necessary in this judgment.

The two rival constructions of "substances recommended as a medicine" are as follows. In the definition it will be remembered that such a substance means a substance which is "referred to" in writing the various forms of which are set out in (a) (b) and (c) of the paragraph containing the definition :

... in terms which are calculated to lead to the use of the substance for the prevention or treatment of any ailment, infirmity or injury affecting the human body ...

The plaintiffs argue that the written terms must specify the particular ailment or group of ailments for the prevention or treatment of which the substance is appropriate, and that, if the written terms are silent as to such ailment or

ailments, the substance is not a "substance recommended as a medicine" within the definition. The defendants, for their part, argue that the definition is complied with, though the label mentions no specific ailment or ailments, provided it is common knowledge that the substance in question is in fact used for the prevention or treatment of a specific ailment or group of ailments. In the case of a consuming public armed with that knowledge, for example, with the knowledge that fluid extract of cascara is a remedy for constipation, the written terms, though they do not mention constipation but are simply the correct name of the preparation offered, may nevertheless be "calculated" (so the argument runs) "to lead to the use of" fluid extract of cascara sagrada for the prevention or the treatment of constipation. The judge has accepted this contention as regards the three substances under appeal. It should be mentioned that in respect of each of those three substances the effect of the agreed evidence is that the public knows that the substance is, or is supposed to be, a remedy for a specific ailment, namely, constipation. The affidavit states, for example, (a) in the case of cascara sagrada: "It is a popular mild laxative . . . when purchased by retail customers cascara is purchased for human use as a laxative"; (b) in the case of compound rhubarb pills: "a well-known household remedy as a vegetable laxative"; (c) in the case of the effervescent powders (war-time substitute for seidlitz powders): "seidlitz powder is a well-known mild purgative."

In these circumstances it may be convenient to inquire, first, what meaning a court should attach to the words of the definition, if it limits its purview to the four corners of the definition itself. If that meaning is wholly clear, no other question arises. But if or in case that meaning is open to doubt or ambiguity, it will be convenient, secondly, to consider whether any clear policy can be discerned underlying the Act, in the light of which the obscurity or ambiguity might be resolved and a different meaning possibly attached to the disputed words from that which on the surface they bear. In some cases it is possible to deduce the "policy" of an Act from its preamble or from its other provisions alone. When these are in themselves neutral or unilluminating, it may be helpful to consider the *substratum* of law and fact, relating to the trade or other subject-matter in question, which obtained when the Act was passed, on which the Act was superimposed, and in relation to which a "policy" may be spelt out. Such matters as the general lay-out of the trade in drugs before 1941 (any legal or *de facto* delimitation, for instance, of provinces or lines of business between the qualified and unqualified dealers) might, viewed side by side with the provisions of the Act, indicate the mischief at which the Act struck and thus assist in its interpretation. But the first step is to construe the relevant words in abstraction from this background, to construe them, as it were, *in vacuo*. So regarded, their true construction appears to this court to be that favoured by the plaintiffs. We base this view on the following considerations. In the first place, it is the "terms" of the reference (inscribed on what will be called for short "the label")—it is these terms themselves which must be "calculated to lead to the use" of the substance for the prevention or treatment of any ailment, not the knowledge which the public happens to possess about its efficacy for any ailment, nor yet an amalgam or conglomerate of those terms and that knowledge. Secondly, (a consideration tending the same way) this is a statute which affects with criminal liability unqualified persons selling "substances recommended as medicines." Parliament would not, we think, have desired to impose on the vendor the duty of gauging to a nicety how far it is within the knowledge of the general public that a particular medicine is a remedy for a particular ailment, and to make criminal liability *vel non* depend on the accuracy of what may be a highly speculative computation. For the purposes of the criminal law persons are presumed to know (and to know that others know) the meaning of plain English, but they are not presumed to know how far others know the therapeutic purposes to which particular medicaments are put. If, however, the defendants' construction is right, the vendor is required at his peril to know this, and, indeed, to do more, namely, to divine the state of knowledge of the individual customer, for the question whether the terms of the label are "calculated to lead to the use" covers "use" by that customer, and so far as it does so, it is the knowledge of that customer which is relevant. The

words are not limited to use by the public at large. It is surely sensible to suppose that Parliament intended the vendor to apply a test less conjectural, less problematic, more objective. Such a test is available and can be applied quite simply, if what the vendor has to consider is, not the assumed knowledge of the general public or individual numbers of it, but the actual contents of the label. This he can read, and tell beyond a peradventure whether it does or does not specify an ailment or group of ailments for which the substance is recommended. Indeed, if the contrary criterion is assumed, importing the knowledge of the consumer and spelling out a "recommendation" from the aggregate of this knowledge plus the written terms, singular consequences follow. On this assumption, liability to a £20 fine may result from the unqualified vendor's act in simply labelling a bottle of, say, aspirin with the word "aspirin," provided the general public or the particular customer knows that aspirin is good for headaches. A bald accurate description of the substance sold, without more, would, if the consumer's knowledge derived *aliunde* is suffered to eke it out, amount to a "reference" to it in "terms which are calculated to lead to" its use for the purpose described in the definition. We cannot believe that the legislature intended such grave consequences to follow from calling a spade a spade, and the judge manifestly thought the same when dealing with the case of the senna pods described on the label as "senna pods" without more.

For these reasons the court is of opinion that the words of the definition (construed by themselves, in abstraction from any legislative or factual context) are not satisfied unless the written terms indicate that the substance is a remedy for an ailment or ailments specified in such written terms, and that, if all that the written terms contain is an accurate description of the substance or of its ingredients, it is not a "substance recommended" within the definition. When this canon is applied to the three substances under review it would appear in each case to rule them out of that category, since in each case the written "terms" are purely descriptive. In the case of fluid extract of cascara sagrada, the label contains the inscription "B.P." and prescribes the dosage. If the consumer's knowledge is excluded, this means merely that the preparation is compounded according to the formula and standard of purity set out in the British Pharmacopœia, one of the monographs of which is headed "Liquid Extract of Cascara Sagrada" and sets out the ingredients of this substance together with a maximum or minimum dose. This monograph itself is simply a description of what constitutes "liquid" or "fluid" extract (the two are stated in the text to be synonymous) of cascara sagrada. The reference to proper dosage on the label and to maximum and minimum dosage in the British Pharmacopœia certainly imply that the substance is to be used as a medicine for some ailment or ailments, but neither on the label nor in the Pharmacopœia is there the smallest hint as to the nature of the ailment or ailments for which it is to be used. So again with "Compound Rhubarb Pills. Dose: One or two at bedtime," plus the name of the suppliers. The "B.P." is not referred to in this case. But here, as before, while the words relating to dosage imply that the substance is a medicine, there is nothing to indicate for what it is a medicine. In the third case the label contains the words: "Extra strong effervescing powders. Prepared by Carter & Sons, Sheffield, a war-time substitute for Seidlitz Powders." The same considerations apply here also. Moreover, such a label stands on precisely the same footing for present purposes as a label simply marked "Seidlitz Powders." If it had been so marked, it would have been the barest of bare descriptions, like a label marked "Senna Pods" without more. In the case of senna pods the judge himself excluded the knowledge of the public. The principle on which he did so logically extends to the case of the seidlitz powder substitute, and, indeed, in our view, to all the three disputed cases. Either the consumer's knowledge can be prayed in aid in supplement of the written "label," or it cannot. If it cannot, the defendants fail. If it can, a mere descriptive word—say "Aspirin" without more—on the label (*plus* the consumer's knowledge) is enough (just as sufficient as that word *plus* something about dosage or the British Pharmacopœia) to impress the medicament with the stamp of a substance recommended as a medicine. Once the consumer's knowledge is assumed to be a relevant supplementary factor, there can be

no material distinction between a label which reads "Aspirin" *simpliciter*, and one which adds information as to dosage and the like.

In our opinion, therefore, there is no real doubt or ambiguity as to the meaning of the relevant words, but let us assume that there is room for such doubt or ambiguity and proceed to the second factor which would then have to be considered, namely, matters extrinsic to the definition but possibly affecting its interpretation. Prominent among these (but not exhaustive of them) is the condition of the law and practice in relation to the exaction of customs duties on the sale of medicines previous to 1941. What was this condition? Was it such as should lead the court to revise the construction of the words "substance recommended as a medicine" provisionally arrived at on the basis of the bare language of the Act of 1941, either by pointing to a specific policy underlying the material provisions of that Act, or otherwise? We must go back to the Medicines Stamp Act, 1812, but need not go back further. This Act was in force for over a century until repealed by the Act of 1941. It charged with duty the substances named or described in its schedule. The schedule begins with a list of specific preparations. Then follow words charging generally all substances which fall within certain named categories. The general charging provision can, in part, safely be paraphrased. The subject-matter of the charge consists of all "pills powders," etc., "to be used . . . as medicines . . . for the prevention, cure or relief of any disorder or complaint . . . affecting the human body . . . vended . . . by any . . . persons whatsoever," provided they fall into any of four named categories. These categories are (i) occult or secret remedies, (ii) proprietary remedies, (iii) patented remedies, (iv) and (most material) remedies which in certain terms (public notices or advertisements, labels and the like) are :

. . . held out or recommended to the public by the makers, vendors or proprietors thereof as nostrums or proprietary medicines, or as specifics, or as beneficial to the prevention, cure or relief of any distemper, malady, ailment, disorder, or complaint incident to or in any wise affecting the human body.

We are concerned, first, with the question whether under this provision duty would have been legally exigible, or would in fact and in practice have been exacted, by the customs authorities before 1941 in respect of the three substances involved in this appeal, bearing the labels which they in fact bore. As a matter of legal construction, we are of opinion that the words "held out or recommended . . . as beneficial to the prevention, cure or relief of any . . . ailment" are not satisfied unless the label or other written terms specify the particular ailment or ailments concerned. The matter can be tested in this way. If the question were asked: "Did the label recommend the substance as beneficial for the relief of any ailment?" an affirmative answer, surely, could only truthfully be given if the label indicated a particular ailment or ailments for which the substance was recommended as beneficial. There is no clear-cut authority on the construction of these words which recur without any material alteration in the Venereal Disease Act, 1917, s. 2 (2). But, on principle, in the case of both Acts, we think the construction above indicated is right. In the case of the provision in the Venereal Disease Act, 1917, if the alternative interpretation prevailed, any seller of, say, mercurial ointment, advertised simply as such, would be criminally liable, because it is known to purchasers (or some of them) to be used in the treatment of venereal disease, although it has other uses too.

But whether or not the duty would have been legally exigible on the true construction of the Act of 1812 in respect of the substances under review, is, perhaps, less material than whether duty would in practice have been exacted in respect thereof by the stamp authorities. On this we are assisted by a statement agreed between counsel which reads as follows :

It is agreed that the passage in ALPE'S HANDY BOOK OF MEDICINE STAMP DUTY beginning at p. 78, line 1, represents the practice of the commissioners in enforcing the medicine stamp duties until their repeal.

The passage in ALPE reads :

It is a good general rule that a medicine is liable to duty if the description is one that would enable a purchaser unacquainted with the virtues and efficacies of the drugs of which it is composed to doctor himself for any ailment, or class of ailments.

The holding out or recommendation may be conveyed by the title, as "corn cure," or in the body of the description, or even in the directions for use. The holding out or recommendation must be for some ailment, or class of ailments; that is to say, some ailment or class of ailments must be indicated or mentioned.

The statement agreed between counsel continues :

It is also agreed that packages bearing the labels exhibited for fluid extract of cascara sagrada, and compound rhubarb pills, would not have been required by reason of the labels to be stamped.

(It will be seen that for some reason this specific admission does not extend to the "Effervescing Powders" though the approved passage from ALPE would seem clearly to cover this substance also).

[MR. BLANCO WHITE : I have since found out that seidlitz powder is a patent medicine. It was patented in 1823, and, therefore, would, or ought to, bear stamp duty.

LORD GREENE, M.R. : It would have been liable to tax under the head of "patent," and not under the head of "recommended" ?

MR. BLANCO WHITE : That I do not know, but it would, I think, have been liable to tax as a patent medicine.]

ASQUITH, L.J. : This, then, was one leading feature of the *status quo* on which the Act of 1941 supervened. The second was that, under the third exemption in the schedule to the Act of 1812, as construed in *Farmer v. Glyn-Jones* (1), qualified dealers were exempt from stamp duty on sales of certain "known, admitted, and approved" medicines, sales of which by unqualified dealers attracted the duty. In practice this discrimination squeezed the unqualified dealer out of this field. The exempting paragraph in question relieved of duty "mixtures," etc., vended by qualified dealers, and by such dealers only, in the event, and in the event only, of such mixtures being "known, admitted, and approved" remedies. The exemption is denied when the mixtures, etc., are (a) occult, (b) proprietary, (c) patented, or (d) "held out or recommended" (by its label or other specified written *media*) by the "owners, proprietors . . . or first vendors" (these words are different from the corresponding words in the charging section) "as beneficial for the . . . relief of any . . . ailment." In *Farmer v. Glyn-Jones* (1) a retail chemist had affixed to a bottle a label reading :

Ammoniated Tincture of Quinine. B.P. A well-known and highly recommended remedy for influenza and colds.

This was a "known, admitted and approved remedy"—its composition was notorious. The chemist was held on a Case stated by magistrates not liable to duty because the preparation was not occult, proprietary, or patented, and because, although it was recommended by him, it was not recommended by the "owners, proprietors or first vendors" (the latter being the wholesale supplier, who had not affixed the label). Henceforward a retail chemist, in the case of a whole range of remedies whose composition was disclosed, could sell them duty free, notwithstanding that he labelled them as remedies for named complaints.

We may now summarise the salient features of the position on the eve of the enactment of the Act of 1941, under the following heads. (i) Qualified and unqualified persons alike were in law free to sell any medicines they chose, nor were they bound in law to disclose the composition of such medicines. The discrimination between the two operated not through any one-sided prohibition of sales, but through the differential incidence of the stamp duties. (ii) Up to a point there was no discrimination at all. When the label, etc., did not specify an ailment or class of ailments, duty was in practice exacted from neither. (iii) It was expressly agreed by counsel that neither qualified nor unqualified dealers would have been liable to duty in respect of two of the three substances in dispute in this case, and the passage in ALPE'S HANDY BOOK OF MEDICINE STAMP DUTY, seems clearly to cover the third. (iv) Neither qualified nor unqualified dealers could escape duty on proprietary medicines. But (v) under the law as declared in *Farmer v. Glyn-Jones* (1), retail chemists might lawfully sell (duty-free) a large range of "recommended" medicines if their composition was disclosed, whereas grocers were subject, in respect

of such sales, to duties of prohibitive weight (for example, 3*d.* in the shilling, and the like). This confined a very substantial class of business in practice to qualified dealers.

Such are the relevant antecedents of the Act of 1941. Do the terms of that Act, in the light of these antecedents, disclose any distinct "policy"? Apart from the regulation and restriction of the sale of poisons and the prohibition of advertisements relating to certain diseases (ss. 1-10) and the requirement in s. 11 that all "substances recommended as medicines" (a category which, on either construction, admits of many exceptions) should have their composition declared, the Act has, in our view, no coherent governing aim. For instance, if the policy had been to prevent unqualified persons from recommending substances as remedies, why are all persons, unqualified as well as qualified, left free to give any oral recommendations they choose? Why again, when the sale of "substances recommended" is limited by s. 12 (1) to qualified persons, is it made possible by s. 12 (5) for grocers or other unqualified persons (subject to certain conditions) to escape this limitation by selling such substances under a "proprietary description"—a perfectly easy thing to do? Why prohibit them from selling "Liver Pills" but leave them free (subject to certain conditions) to sell "Smith's" or "Jones'" Liver Pills? And why are unqualified dealers by s. 12 (4) enabled to escape it when selling herbs? These provisions, far from suggesting any consistent policy of inhibiting unqualified persons, suggest rather an intention merely to preserve or to establish a certain balance between the various interests involved, chemists, grocers, herbalists and so on, and, if the changes wrought by the Act divest any such interest of advantages previously enjoyed, to see that such interest is (in meal or in malt) compensated for its sacrifice. For instance, the Act (by s. 14) sweeps away the old stamp duties which over the preceding century had been found, administratively, a troublesome impost. If the Act had stopped there, the pre-existing equilibrium between the interests would have been gravely disturbed. Before the Act the exemption from duty of qualified dealers in respect of "known, admitted, and approved" remedies, coupled with the liability of unqualified ones to a duty of crushing severity in respect of such remedies, had vested, within that field, a *de facto* monopoly in the former. A simple repeal of the duties, without more, would have destroyed this monopoly and swept a mass of business out of the hands of the chemists into those of the grocers. Hence, a compromise. Under the Act, on the one hand, the previous *de facto* monopoly of the qualified in the sphere of "known, admitted, and approved" medicines is replaced by a legal monopoly of "substances recommended as medicines"; but, on the other hand, the unqualified are within limits empowered to do what they could never do before without paying a prohibitive duty, namely, to sell recommended medicines with a "proprietary designation" (or to sell herbs without). To prevent a mere repeal of the duty conferring a windfall bonus on the unqualified at the expense of the qualified, the latter are given a nominal monopoly, which offsets that bonus. Then, to compensate the unqualified, loopholes and leaks are opened in the monopolistic structure, whereby in some form and degree these benefits (or equivalent ones) percolate back to them —to grocers under s. 12 (5), to herbalists under s. 12 (4). This parcelling out of benefits, spheres of influence and consolation prizes is stamped with the hallmark of practical compromise, and is utterly repugnant to the operation of any clear-cut principle or policy.

A comparison, therefore, of the Act with the *status quo* on which it was superimposed, in our view, does nothing to displace the meaning of the disputed words as deduced from the bare terms of the definition in the Act of 1941, if this were in doubt. It is true that the words of that definition differ from the corresponding words ("held out or recommended," etc.) in the charging provision of the Act of 1812. But, if the new formula had been intended by Parliament to be radically different from the old formula as understood and enforced for over a century under the Medicine Stamp Act, 1812, nothing would have been easier than for Parliament to make this plain, for example, by adding to the definition some such words as "whether or not such ailment is specified in such label, advertisement," and so on. Indeed, the difference in language admits of a simpler explanation. No doubt, it was desired to

substitute for the sprawling inartistic draftsmanship of the schedule to the Act of 1812 and something shorter and tidier.

Can any light be thrown on the formula in the definition by reference to its occurrence elsewhere in this or similar Acts? The identical words "terms . . . calculated to lead," etc., occur in ss. 8 and 9 of the same Act and in s. 4 of the Cancer Act, 1939. Section 9 of the Act of 1941 does not, perhaps, help, but s. 8 of that Act and s. 4 of the Cancer Act, 1939, seem to support the construction propounded above. In the latter, case, for instance, the section reads:

(1) No person shall take any part in the publication of any advertisement . . . (b) referring to any article, or articles of any description, in terms which are calculated to lead to the use of that article, or articles of that description, in the treatment of cancer.

If the defendants' argument is well founded, it logically carries them as far as to say that an advertisement simply of "radium" for sale would involve a criminal offence if it were common knowledge that radium is used in the treatment of cancer. This, we feel, cannot be right. Similar considerations apply to s. 9 of the Act of 1941. If the defendants are right, an advertisement of "Lung Tonic" which does not designate any of the ailments enumerated in the section would be an offence, *vis-a-vis* a purchaser who thought lung tonic was a remedy for, say, tuberculosis, which is one of the ailments therein enumerated.

Finally, there is a decided case on the meaning of the definition which, though not binding on this court, is in consonance with our conclusions. In *Nairne v. Stephen Smith & Co., Ltd. and Pharmaceutical Society of Great Britain* (2), ATKINSON, J., in construing the definition in s. 17, accepted the view that the words "any ailment" means some specific ailment, and held that bottles of "Hall's Wine," labelled in terms recommending it as a remedy for "all run-down conditions," were substances recommended by the label for a specific "ailment" within the definition. For these reasons we think that the three substances, labelled as they were labelled, were not "substances recommended as medicines" within the Act, with the consequences that they can lawfully be sold by unqualified persons notwithstanding s. 12, and that their composition is not required to be disclosed under s. 11. The appeal must be allowed.

Appeal allowed.

Solicitors: *Constant & Constant* (for the appellants); *Thompson, Quarrell & Co.* (for the respondents).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

KELLEY v. GOODWIN.

[COURT OF APPEAL (Cohen and Evershed, L.J., and Lynskey, J.), April 24, 1947.]

Landlord and Tenant—Rent restriction—House "reasonably required by the landlord . . . for occupation . . . for himself"—Part of house only required—Hardship—Financial position of tenant—Steps taken by tenant to obtain accommodation—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3 (1), sched. I, para. (h).

The landlord let a controlled dwelling-house to the tenant for the duration of the war, and, the tenancy having been determined by the landlord by notice to quit, the tenant became statutory tenant of the premises. The landlord was living in one room and paying 30s. a week rent, which was more than that paid to her by the tenant, who was earning about £1,000 a year. The tenant spent most of his time in London, but the house was also occupied by his wife and daughter. He had adequate means to buy a house, but there was no evidence that he had attempted to do so or to find any other accommodation. The landlord required the premises for her own occupation, and had offered to let part of the house to the tenant after she had regained possession, but the offer was refused. She applied to the court for possession under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1), and sched. I, para. (h).

HELD: although the landlord only required part of the premises for accommodation, the county court judge was justified in finding on the evidence that "the dwelling-house [was] reasonably required by the landlord . . . for occupation as a residence for [herself]", and, on the question of hardship, he was entitled to have regard to the financial means of the tenant by reason of which he was in a position to obtain accommodation, not merely by renting a house, but by buying one, and also to the fact that the tenant had taken no real steps to provide himself with alternative accommodation.

[EDITORIAL NOTE.] The cases in which it was laid down that the burden of proof on the question of greater hardship lies on the tenant were *Sims v. Wilson* ([1946] 2 All E.R. 261); *Fowle v. Bell* ([1946] 2 All E.R. 668); and *Robinson v. Donovan* ([1946] 2 All E.R. 731).

AS TO RESTRICTIONS ON THE LANDLORD'S RIGHT TO POSSESSION, see HALSBURY, Hailsham Edn., Vol. 20, pp. 329-334, paras. 392-399; and FOR CASES, see DIGEST, Vol. 31, pp. 576-581, Nos. 7256-7302.]

Cases referred to :

(1) *Smith v. Penny*, [1946] 2 All E.R. 672; [1947] K.B. 230; [1947] L.J.R. 271.

(2) *Chandler v. Strevett*, [1947] 1 All E.R. 164; 176 L.T. 300.

APPEAL by tenant from an order of His Honour JUDGE ARCHER, K.C., at Brighton and Lewes County Court, dated Oct. 11, 1946.

The county court judge held that the landlord reasonably required the premises for her own occupation, and, taking into account the financial means of the tenant, that the tenant had failed to prove greater hardship. An order for possession was, therefore, granted. The facts appear in the judgment of LYNSEY, J.

Heathcote-Williams for the tenant.

Pensotti for the landlord.

COHEN, L.J. : I will ask LYNSEY, J. to give the first judgment in this case.

LYNSEY, J. : This is an appeal from the judgment of His Honour JUDGE ARCHER, whereby he adjudged that the landlord should have possession of the dwelling-house and premises known as 54, Harrington Road, Brighton. After the outbreak of war the landlord joined the services and had no need to use the premises as a residence, and on Aug. 28, 1941, she let the premises to the tenant for the duration of hostilities. That tenancy was duly determined by notice to quit and as from Aug. 28, 1946, the tenant occupied the premises as a statutory tenant. The landlord, who was then occupying one room for both sleeping and living, wished to obtain possession of the premises. She consulted her solicitors and tried to induce the tenant to come to some agreement. The negotiations, however, broke down, and the landlord took proceedings for possession.

The claim was made under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1), and sched. I, para. (h). Section 3 (1) provides :

No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment, and either—(a) the court has power so to do under the provisions set out in sched. I to this Act . . .

Schedule I provides :

A court shall, for the purposes of s. 3 of this Act, have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if . . . (h) the dwelling-house is reasonably required by the landlord (not being a landlord who has become landlord by purchasing the dwelling-house or any interest therein after the eleventh day of July, 1931) for occupation as a residence for—(i) himself . . . Provided that an order or judgment shall not be made or given on any ground specified in para. (h) of the foregoing provisions of this schedule if the court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order or judgment than by refusing to grant it.

On the question of greater hardship, this court has decided that the burden of proof that greater hardship would be caused by granting the order than by refusing it is on the tenant. According to the evidence before the county court judge, the landlord, who was living in one room for which she paid 30s. on a weekly tenancy, was receiving as rent for these premises, less than the rent she had to pay for her own accommodation. She said: "The tenant is an engineer working in London and only here for week-ends. He is only paying pre-war rent. I did not snap up any increase of rent. I now require possession for my own occupation." It was obviously, on that evidence, open to the county court judge to find that she wanted these premises for her own occupation. She goes on to say: "I would like to let the upper part of the house. I am willing that the tenant should have another room beyond what I have already offered him." In other words, in addition to accommodation which she had offered, she was prepared to give the tenant another room so as to provide him with accommodation in that house if he could not obtain accommodation elsewhere. That, however, was not accepted by him. The tenant, in his evidence, said he had a wife, aged 48, who was not in good health. He has a daughter of 14 who is to go to the High School until she is 18. He is an engineer and is in London most days. His income is approximately £1,000 a year. He says: "I have nowhere else to go. I want three bedrooms. I want attendant for wife. I can find smaller accommodation, but not suitable for me, as there is only one bedroom. I sold my house in Birmingham with the intention of buying a house in London but I did not because of the blitz." In cross-examination he said: "My business is in London. During war I spent only week-ends in London. Now I come frequently all the week. I could pay £3,000 for a house. I would give that price for landlord's house. I think that £2 is standard rent. You can buy houses, but not easy to get four bedrooms."

The county court judge had to apply his mind, first, under s. 3 (1) itself to whether it was reasonable to make an order. As to the application of his mind to that particular requirement and as to applying that requirement to the facts of this case no objection is taken by the tenant before us. Then he had to consider whether the dwelling-house was reasonably required by the landlord for occupation as a residence for herself, and, if so, whether, having regard to all the circumstances of the case, greater hardship would be caused by granting the order than by refusing it. It is clear that he did apply his mind to both those questions. That being so, we have to apply what, in my view, is a correct statement of the law in *Smith v. Penny* (1), in which SOMERVELL, L.J. said ([1946] 2 All E.R. 673):

It is necessary for the tenant to show that the county court judge misdirected himself or that he based his judgment on some finding of fact of which there was no evidence.

Applying that test and looking at the county court judge's judgment, the first question is: Was there evidence to support his finding that the landlord reasonably required these premises as a residence for herself. It was argued by counsel for the tenant that she does not bring herself within the provisions of para. (h) of the schedule, because she does not reasonably require these premises as a residence. It is suggested she only requires part of them and, therefore, is not within the ambit of para. (h). In our view of the matter, on her evidence and on the facts before him, the county court judge was justified in finding that she did require these premises as a residence for herself and that she reasonably required them.

The next matter one has to consider is whether there was evidence on which the county court judge could come to the conclusion that there would be greater hardship in making the order than not making the order. He has taken into account, in relation to that question, first, the position of the landlord, and, secondly, the position of the tenant. He has taken into account the financial means of the tenant. It is argued before us that he was wrong in doing that. In my view, he was quite entitled, in considering hardship, to have regard to the financial means of the tenant in considering whether he could obtain other accommodation because, by reason of his means, he was in a position, not merely to rent premises, but to buy a house. It seems to me also that,

on this question of hardship, the judge was entitled to take into account the fact that the tenant had taken no real steps to try and find other accommodation or no real steps to buy a house. The judge took the view on the evidence that the tenant had not discharged the onus which lay on him of proving that greater hardship would be inflicted by making the order than by not making the order. It was said he ought to have disregarded the means of the tenant because he had no evidence of the means of the landlord, but the onus was on the tenant. The landlord was called, and no question was put to her about the matter.

For these reasons, in my view, there was ample evidence from which the county court judge could draw the inference that he did. We ought not to interfere unless we can say there was no evidence from which he could draw that inference or that he misread the evidence in some way in drawing the inference that he sought to do, and therefore, the appeal should be dismissed.

COHEN, L.J. : I agree, and I only desire to add one word. Counsel for the tenant, suggested that the function of this court in cases of this kind was rather wider than that defined in the passage in the judgment of SOMERVELL, L.J., which LYNSKEY, J., has read. He relied on some philosophical observations of SCOTT, L.J. in *Chandler v. Strevett* (2), which might have a wider import than, I think, SCOTT, L.J., intended. When these are read in connection with their context and taking into consideration the ground which SCOTT, L.J. gave in the last paragraph of his judgment for the conclusion which he reached, he was, on his earlier observations, I think, doing no more than pointing out how fine was the border-line between fact and law in complicated questions of this kind. I do not think he was in any way dissenting from the principle stated by SOMERVELL, L.J. in *Smith v. Penny* (1) a principle which I think has been for many years accepted in this court.

I agree that the appeal should be dismissed.

EVERSHED, L.J. : I also agree.

Appeal dismissed with costs.

Solicitors : *J. de Meza & Co.* (for the tenant) ; *Gordon, Gardiner, Carpenter & Co.* (for the landlord).

[*Reported by R. L. ZIAR, Esq., Barrister-at-Law.*]

R. v. STEANE.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Atkinson and Cassels, JJ.), April 15, May 1, 1947.]

Criminal Law—Assisting the enemy—Intent—Duress—Burden of proof—Direction to jury—Defence (General) Regulations, 1939 (S. R. & O., 1939, No. 927), reg. 2A.

Where the essence or a necessary constituent of an offence is a particular intent, that intent must be proved by the Crown just as much as any other fact necessary to constitute the offence, and the burden of proving that intent remains throughout on the prosecution.

If the prosecution prove an act the natural consequences of which would be a certain result and no evidence or explanation is given, then the jury may, on a proper direction, find that the accused is guilty of doing the act with the intent alleged, but if on the totality of the evidence there is room for more than one view as to the intent of the accused, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction, and if, on a review of the whole evidence, they either think that the intent did not exist or are left in doubt as to the intent, the accused is entitled to be acquitted.

Where acts are done by a person in subjection to the power of another, especially if that other be a brutal enemy, an inference that he intended the natural consequences of the acts must not be drawn merely from the fact that he did them. A guilty intent cannot be presumed and must be proved.

Before the war the appellant, a British subject, was employed as a film actor in Germany, where he resided with his wife and two children.

At the outbreak of war he was arrested and, according to his own evidence, his first interview on Sept. 11, 1939, ended with the order: "Say Heil Hitler, you dirty swine," which he refused to obey. He was thereupon knocked down, losing several teeth, and was then interned. Just before Christmas, 1939, he was sent for by Goebbels who asked him to broadcast and, on his refusing to do so, was warned that he was in an enemy country and that they had methods of making people do things. Subsequently, hints were dropped by officials as to German methods of persuasion and in consequence he submitted to a voice test, trying to perform as badly as he could. Next day he was ordered to read news three times a day and continued to do so until Apr., 1940, when he refused to do any more. "G men" called on him and said: "If you don't obey, your wife and children will be put in a concentration camp," and later he was badly beaten up by more "G men" one ear being partly torn off. He agreed to work for his old employers helping to produce films, but there was no evidence that the films were or could be of any assistance to the Germans or harmful to this country. He swore that he never had the slightest idea or intention of assisting the enemy, that what he did was done to save his wife and children and not to assist the enemy. On an appeal on the ground of misdirection against a conviction, under the Defence (General) Regulations, reg. 2A, of doing an act likely to assist the enemy with intent to assist the enemy:—

HELD: the proper direction to the jury would have been that it was for the prosecution to prove the criminal intent, and that, while the jury would be entitled to presume that intent if they thought that the act was done as the result of the free, uncontrolled action of the accused, they would not be entitled to presume it if the circumstances showed that the act was done in subjection to the power of the enemy or was as equally consistent with an innocent intent as with a criminal intent, e.g., a desire to save his wife and family from a concentration camp, and that the jury should convict only if satisfied by the evidence that the act complained of was, in fact, done to assist the enemy.

[EDITORIAL NOTE.] LORD GODDARD, C.J., points out that where an intent is a necessary ingredient of the offence charged, the burden of proving that intent remains throughout on the prosecution. It would seem, however, that if *prima facie* proof of the intent be given and the defence wish to set up duress, the burden of proving duress would then shift to the defence. In many cases the facts constituting the *res gestae* must include those giving rise to the alleged duress, in which event the attempt of the prosecution to make out a *prima facie* case of intent may fail. The jury must say, on the whole of the facts, whether the act done was the free action of the accused or whether it was done in subjection to superior power.

AS TO CRIMINAL INTENTION, see HALSBURY, Hailsham Edn., Vol. 9, pp. 10-16, paras. 3-8; and FOR CASES, see DIGEST, Vol. 14, pp. 31-33, Nos. 31-40.]

APPEAL against a conviction, before HENN COLLINS, J., at the Central Criminal Court, for doing acts likely to assist the enemy with intent to assist the enemy, contrary to the Defence (General) Regulations, 1939, reg. 2A. The facts appear in the judgment of the court read by LORD GODDARD, C.J.

G. D. Roberts, K.C., and *E. Clarke* for the appellant.

Gerald Howard and *J. S. Bass* for the Crown.

Cur. adv. vult.

May 1. LORD GODDARD, C.J., read the judgment of the court. The appellant was convicted at the Central Criminal Court before HENN COLLINS, J. on an indictment which charged him under the Defence (General) Regulations, reg. 2A, with doing acts likely to assist the enemy with intent to assist the enemy. He was convicted on the first count of the indictment, and the jury were discharged from returning a verdict in respect of the other eight counts which the indictment contained. He was sentenced to 3 years penal servitude and on Mar. 31 last obtained leave to appeal on the ground of misdirection. This court heard and allowed the appeal on Apr. 15, and discharged the appellant, and now proceeds to give the reasons for so doing.

The count on which he was convicted charged him with entering the service of the German Broadcasting System on a date in Jan., 1940, and it was common ground and admitted by the appellant that he did so enter that service and on

several occasions broadcast certain matters through that system. The evidence called by the prosecution was that of one witness who did not carry the matter very far beyond proving that the appellant did in fact broadcast, but also said that he had seen a telegram in the appellant's possession signed "Emmie Goering" which stated that he could expect to be released and be home very shortly. The principal evidence against him was a statement taken from him by an officer of the British Intelligence Service in Oct., 1945, which purported to give an account of his activities in the German Broadcasting Service. It is to be observed that this statement concludes in this way :

I have read this statement over and to the best of my knowledge and belief it is all true, and must request it to be used in conjunction with my written report, dated July 5, 1945, to the American C.I.C., in Augsburg.

This previous statement or report was, however, not produced. This was, no doubt, inevitable, but none the less unfortunate, especially as the appellant in his evidence before the jury maintained that many matters were contained in that report which he, accordingly, did not re-state in the statement which he made to the intelligence officer. It seems, and this again was common ground, that before the war he was employed in Germany as a film actor and was so engaged when the war broke out. His wife and two sons were then living in Germany. The appellant was at once arrested and taken to Berlin and his wife and two sons remained in Oberammergau. The only other evidence in the case was that of the appellant himself. It was to the effect that he was at once arrested and questioned, and that the interview ended with the order :

"Say Heil Hitler, you dirty swine." He refused and was thereupon knocked down, losing several teeth, and was then interned. This was on Sept. 11, 1939. Just before Christmas he was sent for by Goebbels who asked him to broadcast. He refused. He was thereupon warned that he was in an enemy country and that they had methods of making people do things. A week later an official named von Bockman saw him and dropped hints as to German methods of persuasion. A professor named Kossuth also warned him that these people could be dangerous with those who gave trouble. In consequence of these matters he submitted to a voice test, trying to perform as badly as he could. The next day he was ordered to read news three times a day, and did so until April. In April he refused to do any more broadcasting. Two "G men" called upon him. They said : "If you don't obey, your wife and children will be put in a concentration camp." In May three "G men" saw him and he was badly beaten up, one ear being partly torn off. He agreed to work for his old employers helping to produce films. There was no evidence that the films he helped to produce were or could be of any assistance to the Germans or at all harmful to this country. He swore that he was in continual fear for his wife and children. When the Americans overran the part of Germany in which he was, he reported to them—giving, on Aug. 5, 1945, a statement of his history during the war. In Oct., 1945, an English official, Captain Shorter, saw him and to him the appellant made another statement. The appellant also asserted again and again and said that he had done so in the written report of July 5, which, as we have already said, was not produced, that he never had the slightest idea or intention of assisting the enemy and what he did was done to save his wife and children, and that what he did could not have assisted the enemy except in a very technical sense. Unlike the evidence which has been adduced in many other similar cases, there was no record of the actual broadcasts made by the appellant. This again was, no doubt, inevitable, but unfortunate, as the actual tone of the broadcast might have thrown some light on the motives and intentions of the appellant, but, in the opinion of the court, there was undoubtedly evidence from which a jury could infer that the acts done by the appellant were acts likely to assist the enemy.

The far more difficult question that arises, however, is in connection with the direction to the jury with regard to whether these acts were done with the intention of assisting the enemy. The case as opened, and, indeed, as put by the learned judge, appears to this court to be this :—A man is taken to intend the natural consequences of his acts. If, therefore, he does an act which is likely to assist the enemy, it must be assumed that he did it with the intention of assisting the enemy. Now, the first thing which the court would observe is that where the essence of an offence or a necessary constituent of an offence

is a particular intent, that intent must be proved by the Crown just as much as any other fact necessary to constitute the offence. The wording of the regulation itself shows that it is not enough merely to charge a prisoner with doing an act likely to assist the enemy. He must do it with the particular intent specified in the regulation. While, no doubt, the motive of a man's act and his intention in doing the act are in law different things, it is none the less true that in many offences a specific intention is a necessary ingredient and the jury have to be satisfied that a particular act was done with that specific intent, although the natural consequences of the act might, if nothing else was proved, be said to show the intent for which it was done. To take a simple illustration, a man is charged with wounding with intent to do grievous bodily harm. It is proved that he did severely wound the prosecutor. Nevertheless, unless the Crown can prove that the intent was to do the prosecutor grievous bodily harm, he cannot be convicted of that felony. It is always open to the jury to negative by their verdict the intent and to convict only of the misdemeanour of unlawful wounding. Or again, a prisoner may be charged with shooting with intent to murder. Here, again, the prosecution may fail to satisfy the jury of the intent, although the natural consequence of firing, perhaps at close range, would be to kill. The jury can find in such a case an intent to do grievous bodily harm, or they might find that, if the person shot at was a police constable, the prisoner was not guilty on the count charging intent to murder but was guilty of intent to avoid arrest. The important thing to notice in this respect is that where an intent is charged in the indictment, the burden of proving that intent remains throughout on the prosecution. No doubt, if the prosecution prove an act the natural consequences of which would be a certain result and no evidence or explanation is given, then a jury may, on a proper direction, find that the prisoner is guilty of doing the act with the intent alleged, but if, on the totality of the evidence, there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction, and if, on a review of the whole evidence, they either think that the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted.

In many offences it is unnecessary to allege any particular intent. The commonest case is in larceny where the prisoner is simply charged with stealing. If the evidence shows that the prisoner picked a person's pocket, there is no necessity to prove that he intended to steal, although he may give some evidence in defence which would lead the jury to believe that he was not acting with a felonious intent, but we repeat that, where a particular intent must be laid and charged, that intent has to be proved. An illustration given by the learned judge in the course of his rather brief summing-up related to what are commonly called the "blackout regulations." He pointed out to the jury that, if a person accidentally omitted to put up his blackout curtains or left some gap in them, although he was doing an act likely to assist the enemy, as it was accidental he would not be committing the offence with intent to assist the enemy. Matters which involve accidental acts are, perhaps, not altogether a happy illustration. A nearer case would be if a person deliberately took down his blackout curtains or shutters with the result that light appeared on the outside of his house, perhaps during an air raid. It might well be that, if no evidence or explanation were given and if all that was proved was that during that raid the prisoner exposed lights by a deliberate act, a jury could infer that he intended to signal or assist the enemy, but if the evidence in the case showed, for instance, that he or someone was overcome by heat and that he tore down the blackout to ventilate the room, the jury would certainly have to consider whether his act was done with intent to assist the enemy or with some other intent, so that, while he would be guilty of an offence against the blackout regulations, he would not be guilty of an offence of attempting to assist the enemy.

In this case the court cannot but feel that some confusion arose with regard to the question of intent by so much being said in the case with regard to the subject of duress. Duress is a matter of defence where a prisoner is forced by fear of violence or imprisonment to do an act which in itself is criminal. If the act is a criminal act, the prisoner may be able to show that he was

forced into doing it by violence, actual or threatened, and to save himself from the consequences of that violence. There is very little learning to be found in any of the books or cases on the subject of duress and it is by no means certain how far the doctrine extends, though we have the authority both of HALE and of FITZJAMES STEPHEN, that, while it does not apply to treason, murder and some other felonies, it does apply to misdemeanours, and offences against these regulations are misdemeanours. But here again, before any question of duress arises, a jury must be satisfied that the prisoner had the intention which is laid in the indictment. Duress is a matter of defence and the onus of proving it is on the accused. As we have already said, where an intent is charged on the indictment, it is for the prosecution to prove it, so the onus is the other way.

Another matter which is of considerable importance in this case, but does not seem to have been brought directly to the attention of the jury, is that very different considerations may apply where the accused at the time he did the acts is in subjection to an enemy power and where he is not. British soldiers who were set to work on the Burma road or, if invasion had unhappily taken place, British subjects who might have been set to work by the enemy digging trenches would, undoubtedly, have been doing acts likely to assist the enemy. It would be unnecessary surely in their cases to consider any of the niceties of the law relating to duress, because no jury would find that merely by doing this work they were intending to assist the enemy. In our opinion, it is impossible to say that where acts were done by a person in subjection to the power of another, especially if that other be a brutal enemy, an inference that he intended the natural consequences of his acts must be drawn merely from the fact that he did them. The guilty intent cannot be presumed and must be proved. The proper direction to the jury in this case would have been that it was for the prosecution to prove the criminal intent, and that, while the jury would be entitled to presume that intent if they thought that the act was done as the result of the free, uncontrolled action of the accused, they would not be entitled to presume it if the circumstances showed, that the act was done in subjection to the power of the enemy or was as equally consistent with an innocent intent as with a criminal intent, *e.g.*, a desire to save his wife and children from a concentration camp. They should only convict if satisfied by the evidence that the act complained of was, in fact, done to assist the enemy and if there was doubt about the matter, the prisoner was entitled to be acquitted. It is to be observed also in this case that in summing-up the learned judge did not remind the jury of the various threats to which the prisoner swore he had been exposed. The jury might of course have disbelieved his evidence. The matters of these threats depended upon his evidence alone and, while it is fair to say that he does not appear to have been in any way shaken in cross-examination on these matters, the jury were not necessarily bound to believe it. But we do not think that the summing-up contained anything like a full enough direction as to the prisoner's defence. The defence must be fully put to the jury and we think they ought to have been reminded of various matters upon which the accused relied as negating the intent. The jury may well have been left under the impression that, as they were told that a man must be taken to intend the natural consequences of his acts, these matters as to which he had given evidence were of no moment.

On both these grounds, therefore, we were of opinion that the conviction could not stand and accordingly quashed it.

Appeal allowed.

Solicitors: Registrar of Court of Criminal Appeal (for the appellant);
H Director of Public Prosecutions (for the Crown).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

R. v. BALL.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Atkinson and Oliver, JJ.), April 28, 1947.]

Criminal Law—Sentence—Probation—Breach of recognisance—Sentence of one days' imprisonment instead of fine—Sentence of Borstal detention for original offence—Criminal Justice Administration Act, 1914 (c. 58), s. 10 (1)—Criminal Justice Act, 1925 (c. 86), s. 7 (4).

A girl was charged before a magistrate with stealing, and, on her consenting to be dealt with summarily, she was found guilty of the offence, but was discharged under the Probation of Offenders Act, 1907, conditionally on her entering into a recognisance to reside at Leicester where her mother lived. On her committing a breach of recognisance for the second time, the magistrate sentenced her to one day's imprisonment, cancelled the probation order, recorded the conviction of the original offence, and committed her to quarter sessions for sentence, with a recommendation for detention in a Borstal institution. On appeal to the Court of Criminal Appeal from the sentence of Borstal detention passed by quarter sessions, it was contended on her behalf that the penalty of one day's imprisonment imposed by the magistrate must have been in respect of the original offence because, under the Criminal Justice Act, 1925, s. 7 (4), the magistrate had power to impose only a fine for breach of recognisance, and he had no power to send her to quarter sessions to be sentenced for the same offence :—

HELD : (i) the sentence of one day's imprisonment was imposed, not for the original offence, but for the failure to observe the condition of the recognisance, and was technically wrong and could have been quashed on *certiorari*.

(ii) the magistrate was entitled to convict the girl and send her to quarter sessions for sentence and, on the facts of the case, quarter sessions was justified in thinking it a proper case for detention in a Borstal institution.

[AS TO FAILURE TO SATISFY CONDITION OF RECOGNISANCE, see HALSBURY, Hailsham Edn., Vol. 9, p. 235, para. 332.

AS TO SENTENCE OF DETENTION IN A BORSTAL INSTITUTION, see HALSBURY, Hailsham Edn., Vol. 9, pp. 243, 244, para. 344.]

APPLICATION for leave to appeal against a sentence of detention in a Borstal institution passed by London Quarter Sessions.

The applicant, who had been charged before a metropolitan magistrate with larceny and found guilty of the offence, was discharged conditionally under the Probation of Offenders Act, 1907. On her committing a breach of recognisance, she was sentenced by the magistrate to one day's imprisonment, the probation order was cancelled, a conviction of the original offence was recorded, and she was committed to quarter sessions for sentence, with a recommendation for detention in a Borstal institution. The facts appear in the judgment of the court delivered by LORD GODDARD, C.J.

S. H. Noakes for the applicant.

J. H. Buzzard for the Crown.

LORD GODDARD, C.J. [delivering the judgment of the court] : On June 19, 1946, the applicant was charged before a magistrate at Clerkenwell Police Court with stealing two coats and other property valued at £10, contrary to the Larceny Act, 1916. On her consenting to be dealt with summarily, the magistrate bound her over in the sum of £5 for 12 months, placing her under the care of the probation officer, and making a condition that she should reside where the probation officer should direct, and he directed her to reside at Leicester where her mother lived. In so doing, the magistrate, under the Probation of Offenders Act, 1907, refrained from proceeding to conviction. The effect of the binding over was that, if the applicant broke her recognisance, she would have to come up before the court again, and the court, having been satisfied that she was guilty of the offence, would then proceed to conviction without further proof of guilt. She committed a breach of that recognisance by not residing at Leicester. She was brought before the magistrates there and was fined the sum of 10s., but she again committed a breach of recognisance, and on Jan. 8, 1947, she was brought before a magistrate at

Clerkenwell and charged with a failure to observe the condition of her recognisance, to which she pleaded guilty. The minute of adjudication by the magistrate was: "One day"—which, of course, is a purely nominal sentence—"Probation order cancelled. Committed to sessions on conviction for original offence, recommended for Borstal." The recommendation for Borstal was made under the Criminal Justice Administration Act, 1914; s. 10 (1), which provides:

- A** Where a person is summarily convicted of any offence for which the court has power to impose a sentence of imprisonment for one month or upwards without the option of a fine, and . . . (c) it appears to the court that by reason of the offender's criminal habits or tendencies, or association with persons of bad character, it is expedient that he should be subject to detention . . . it shall be lawful for the court, in lieu of passing sentence, to commit the offender to prison until the next quarter sessions and the court of quarter sessions shall inquire into the circumstances of the case, and, if it appears to the court that the offender . . . should be subject to such detention . . . shall pass sentence of detention in a Borstal institution . . .

B A highly technical point was taken on behalf of the applicant. It is provided in the Criminal Justice Act, 1925, s. 7 (4):

A court before which an offender is brought or appears under s. 6 of the [Probation of Offenders Act, 1907] for failing to observe the conditions of his recognisance may, instead of sentencing him for the original offence under sub-s. (5) of that section or remanding him to custody or on bail under sub-s. (3) of that section, as the case may be, and without prejudice to the continuance in force of the recognisance, impose on him in respect of such failure a penalty not exceeding £10.

C Section 6 of the Probation of Offenders Act, 1907, provides:

(1) If the court before which an offender is bound by his recognisance under this Act to appear for conviction or sentence, or any court of summary jurisdiction, is satisfied by information on oath that the offender has failed to observe any of the conditions of his recognisance, it may issue a warrant for his apprehension . . . (5) A court before which a person is bound by his recognisance to appear for conviction and sentence, on being satisfied that he has failed to observe any condition of his recognisance, may forthwith, without further proof of his guilt, convict and sentence him for the original offence . . .

D That was done in this case. On the applicant being brought before the court on Jan. 8, 1947, the magistrate recorded the conviction of the original offence of which she had already been found guilty, but with regard to which the magistrate had refrained from proceeding to conviction. It is said that the vice of the magistrate's order is that, in imposing a penalty of one day's imprisonment, he must have imposed that penalty in respect of the original offence, because, if he was imposing a penalty for failing to observe the terms of probation, he had only power to impose a fine. In the opinion of this court, the imposition of one day's imprisonment was technically wrong and could have been quashed on *certiorari*, because the magistrate had no power to pass a sentence of one day for a breach of recognisance, though he could have fined the applicant. So far as the original offence is concerned, he convicted her and sent her to the sessions for sentence. We think that he was entitled to take those steps, although technically he ought not to have imposed a penalty of one day's imprisonment for the failure to observe the conditions of the recognisance. No harm has been done to the applicant because she has not served the sentence of one day. She has been detained in prison under s. 10 (1) of the Act of 1914 (*supra*) which enables the magistrate to send her to quarter sessions for sentence to Borstal detention and provides for committal to prison during the time which elapses between appearance before him, and the holding of the sessions.

E There is nothing, we think, wrong in the sessions having dealt with this case if its circumstances justify the sentence of Borstal detention. Clearly, in the applicant's own interests, detention in a Borstal institution is the satisfactory way of dealing with her case, if the conditions in the statute are satisfied and it is shown that at any time she had been an associate of prostitutes or living a life of prostitution. It may well be that when she was before the magistrate in June, 1946, he would not have been able to send her to the sessions merely because she had been associating with prostitutes. Once she has been properly sent to sessions, however, the sessions can take the whole of her history

into account. As associating with persons of bad character is one of the matters which the court can take into account when considering whether Borstal treatment is suitable, it was proper to call evidence to show that before the applicant was charged in 1946 she had been associate of prostitutes. Then she showed herself to be a thoroughly naughty girl because she had to be dealt with at Leicester for a breach of recognisance, and was fined there, but that had no effect on her. She still persistently refused to perform the condition of the recognisance, and quarter sessions thought it was a proper case for Borstal detention. So does this court, and, therefore, this application, which we have treated as an appeal, is dismissed. The time will run from the date of conviction.

Application dismissed.

Solicitors: *Registrar of the Court of Criminal Appeal* (for the applicant):
Director of Public Prosecutions (for the Crown).

[Reported by R. HENDRY WHITE, ESQ., *Barrister-at-Law.*]

Affirmed. C.A. [1948] 1 All E.R. 694.

WILTSHIRE COUNTY VALUATION COMMITTEE OF THE WILTSHIRE COUNTY COUNCIL v. BOYCE. WILTSHIRE COUNTY VALUATION COMMITTEE OF THE WILTSHIRE COUNTY COUNCIL v. RATING AUTHORITY FOR THE MARLBOROUGH AND RAMSBURY RURAL DISTRICT AND ANOTHER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Atkinson and Oliver, JJ.), D
April 30, 1947.]

Rates and Rating—Exemption—Lands belonging to a vicarage—Exemption from parochial rates under Inclosure Act—Exemption from general rate imposed by Rating and Valuation Act, 1925, s. 2—Rating and Valuation Act, 1925 (c. 90), ss. 2 (1) (2) (3) (a), 64 (1) (b), (2) (a) (b).

By the (local) Ramsbury Inclosure Act, 1777, it was provided that all the lands belonging to the vicarage of Ramsbury should be exempted from all parochial taxes and duties so long as the vicar should perform the offices of the church as vicar for the poor of the parish without fee or reward. The question was whether this exemption operated to exempt lands of the vicarage from the general rate levied under the Rating and Valuation Act, 1925, s. 2, and, if so, whether the exemption applied to land which had been let on a 999 years' lease to the rural district council:—

HELD: (i) the provision of the Act of 1777 exempted the lands of the vicarage from the general rate levied by the Rating and Valuation Act, 1925.

(ii) until a scheme had been made under s. 64 (2) of the Act of 1925 by the rating authority or the Minister, the exemption must continue.

(iii) the exemption extended to the lands of the vicarage which were let on a 999 years' lease to the rural district council, because the land still "belonged" to the vicarage even though a long leasehold interest had been imposed on the freehold interest.

[AS TO SPECIAL EXEMPTIONS FROM PAYMENT OF RATES, see HALSBURY, Hailsham Edn., Vol. 27, p. 382, para. 819.

FOR THE RATING AND VALUATION ACT, 1925, see HALSBURY'S STATUTES, H Vol. 14, p. 617.]

Cases referred to:

- (1) *R. v. Aylesbury-with-Walton Inhabitants* (1846), 9 Q.B. 261; 4 Ry. & Can. Cas. 314; 1 New Mag. Cas. 560; 7 L.T.O.S. 226; 10 J.P. Jo. 371; Digest Supp.
- (2) *Associated Newspapers, Ltd. v. London Corpn.*, [1916] 2 A.C. 429; 85 L.J.K.B. 1786; 115 L.T. 419; 80 J.P. 393; 38 Digest 475, 350.
- (3) *London Corpn. v. Associated Newspapers, Ltd.*, [1915] A.C. 674; 84 L.J.K.B. 1053; 113 L.T. 1; 79 J.P. 273; 38 Digest 475, 351.

CASE STATED by Appeals Committee of Wiltshire Quarter Sessions to determine whether exemption from parochial taxes and duties conferred by the Ramsbury Inclosure Act, 1777, in respect of lands belonging to the vicarage of the parish operated to exempt such lands from rates levied under the Rating and Valuation Act, 1925, and, in particular, from the general rate. The facts and the relevant sections of the Acts appear in the judgment of LORD GODDARD, C.J.

A *Harold Williams* for the appellants.

Gilbert Dare for the respondent, M. E. Boyce.

G. R. Blanco White, K.C., and *M. McGougan* for the respondents, the rating authority for the Marlborough and Ramsbury Rural District and Joseph Orchard.

B LORD GODDARD, C.J.: This Special Case raises the question whether, by virtue of the Rating and Valuation Act, 1925, a certain exemption from rating which applied to the lands belonging to the vicarage of Ramsbury in Wiltshire has ceased to be effective, and whether, in consequence, those lands are now liable to be rated.

C It appears that in 1777, when the inclosure of open lands and common lands was a common feature in England, certain lands which were liable to tithes in favour of the incumbent of Ramsbury were inclosed under a private Act, the Ramsbury Inclosure Act, 1777. That Act provided, among other things :

D . . . that all the lands tenements tithes hereditaments rights and properties within the parish of Ramsbury aforesaid which shall belong to the vicarage of the same parish shall from and immediately after the date and execution of the award of the said commissioners to be made as hereinbefore directed be and for ever remain free from and discharged of all parochial taxes and duties whatsoever so long as the vicar of the said parish for the time being shall do and perform all the offices of the church as vicar for the poor of the said parish who shall receive alms without fee or reward and no longer.

The object of this provision, no doubt, was to give the vicar a *quid pro quo* for the extinction of certain tithes and to make the exemption conditional on his performing the offices of the church for the poor without receiving any fee, such as a burial or mortuary fee or, I suppose, a fee for marriage.

E Under the Rating and Valuation Act, 1925, it was provided, so far as rural districts are concerned, by s. 2 (2) :

As from the appointed day the rating authority of each rural rating area shall, in lieu of making a poor rate for each parish, make and levy a general rate for the whole of the district.

F Pausing there for a moment, it is clear, as is well known, that, before the Act of 1925, in deciding the amount of the poor rate, many other matters had to be taken into account as well as the amount required merely for the relief of the poor. In modern times the expenses of the old board of guardians, who were responsible for the relief of the poor, were often quite a minor part of the poor rate. Such things as the education rate were all levied as part of the poor rate because a county rate had been set up in the reign of George II [County Rates Act, 1738], under which the county authorities issued a precept to the overseers of the poor in any parish showing how much they required from that parish as a contribution to the general county expenses. The general county expenses included such matters as main roads, police, prosecution of offenders, and various other county purposes, but it seems clear that from quite an early time, although the poor rate might be levied to raise a sum of money which would be applied to these various other matters, it none the less remained a poor rate. That was decided in 1846 in *R. v. Aylesbury-with-Walton Inhabitants* (1), and I think, from the point of view of this court, the matter is put beyond controversy by the decision of the House of Lords in *Associated Newspapers, Ltd. v. London Corpn.* (2), where it was held that a private Act conferred on certain lands exemption from any further rates levied in respect of that land and collected as part of the general rate, and one had not to consider whether or not the further rate was a new class of rate which was not in existence when the exempting Act was passed.

It seems, therefore, on those authorities that an exemption granted from parochial rates will confer exemption in respect of any rates which are levied

together with, and as part of, the ordinary poor rate. In the Rating and Valuation Act, 1925, s. 2 (2), the rate is no longer called a poor rate; it is called a general rate. That seems to me a mere change of name, because in the general rate are included all the matters which were formerly dealt with in the poor rate.

Then s. 2 (3) (a) provides:

In the case of any general rate made in a rural rating area in respect of any period before the date of the first new valuation, the rating authority shall, notwithstanding anything in this sub-section, give effect in the collection of the rate to any exemption or abatement to which any person would have been entitled in respect of any hereditament if the rate had been a poor rate.

That obviously is a temporary provision made in respect of the first new valuation. The person who has had exemption in the past is still to get exemption, and that looks as though Parliament contemplated some further action in the future. The further action contemplated is, no doubt, that contained in s. 64.

Section 64 (1) provides that nothing in the Act shall affect:

(b) any exemption from or privilege in respect of rating conferred by any local Act or Order on the occupiers of hereditaments in any particular part of a rating area or on the occupiers of any particular hereditaments.

Section 64 (2) provides:

For the purpose of securing the continued operation, notwithstanding the passing of this Act, of any such privilege or exemption as aforesaid—(a) the rating authority of every area in which immediately before the passing of this Act any such privilege or exemption was in force shall, before the appointed day, submit to the Minister [of Health] a scheme making provision, whether by deductions to be made from the net annual value or otherwise, for the purpose aforesaid; (b) if no such scheme is submitted by the rating authority before the appointed day, the Minister may himself make a scheme for the purpose aforesaid. . . . Provided that the rating authority and all persons interested in the hereditament may agree that the privilege or exemption shall be surrendered and extinguished in consideration of such payments as may be agreed between them.

So the ratepayer can sell the benefit or relinquish it on the payment of a sum of money. It is not necessary to speculate on the reasons for these schemes or what they should contain. It may be that a scheme could provide that the exemption granted by an Act should not extend to the full amount of the general rate, in view of the varied and new matters with which the general rate may be made to deal. In the present case—and this is why it comes before the court—no scheme has been made. Neither the rating authority nor the Minister has ever made a scheme. If no scheme has been made, it seems to follow that the exemption must continue. The exemption has been given by an Act of Parliament, and it has never been terminated. I have already said that the general rate now made only takes the place of the poor rate which previously existed, and it is shown that, a poor rate being one and indivisible, as was said in the House of Lords [by LORD SUMNER in *London Corp'n. v. Associated Newspapers, Ltd.* (3)], any purpose for which that rate is made and which leads to certain sums being included in that rate, makes no difference. It is all part of the poor rate.

One consideration which I must say appeals to me in this matter is that it is possible for the rating authority to prepare a scheme, but not possible for the ratepayers to do so. If, therefore, there is no scheme prepared, it would seem in the highest degree unjust to take away the exemption because a scheme had not been prepared and submitted by the only people who can submit it or by the Minister on whom the statutory duty was placed but who has not performed that statutory duty. I think, therefore, that, until a scheme is made and submitted—as to which it is not necessary to express any opinion—the exemption given by the Act applies and the lands remain exempted from the general rate.

The only other point which has been argued is this. In respect of one of the hereditaments with which we are concerned, the Old Vicarage at Ramsbury, which is occupied by a Miss Boyce, there is no question that that was part of the ancient glebe of the benefice. It still belongs to the vicar and churchwardens, and is leased on a short lease. But with regard to the other land, which is the land which became the property of the vicarage, to use the words

of the Ramsbury Inclosure Act, 1777, which of course in strictness means the vicar and churchwardens, by virtue of the award, that land has been let on a 999 years' lease to the rural district council in consideration of a rent of some £26, and we are invited to say whether, in those circumstances, the land still belongs to the vicarage. I think it clearly does. I think the word "belong" in this case must indicate the person who has the legal title to the land as freeholder, and the vicar and churchwardens undoubtedly have that.

- A There are reversions vested in them. On breaches of covenant or failure to pay the rent they would be entitled to take action notwithstanding that the lease is for 999 years. I find it impossible to hold, merely because there is a leasehold interest imposed on the freehold interest, that that prevents the land from belonging to the vicarage. It may be that, if this sort of point had been visualised, some provision would have been made in the Act about these very long leases, but, as it has not been, I think we are bound to give effect to the plain words of the Act and hold that both these hereditaments belong to the vicarage and are exempt from rating, and the question put to the court must be answered in that sense.

ATKINSON, J. : I agree. The question asked is whether the exemption from parochial taxes and duties conferred by the Ramsbury Inclosure Act, 1777, in respect of the lands belonging to the vicarage of the parish operates to exempt such lands from rates levied by virtue of the Rating and Valuation Act, 1925, and, in particular, from the general rate.

- C The argument is that the general rate quite clearly includes something more than a parochial rate, that it includes the county rate, and that the words of the exemption were merely "free from and discharged of all parochial taxes and duties whatsoever." It was argued that merely because there was an exemption from the poor rate, or the purely parochial rate, one cannot extend that into an exemption to include the county rate. The answer to that, I think, was provided in *R. v. Aylesbury-with-Walton Inhabitants* (1), in the two opening lines of LORD DENMAN's judgment (9 Q.B. 269) :

The poor rate is the fund which raises, in the different parishes, the county rate. That means that the county rate was always raised by being included in the poor rate and was, in fact, part of the poor rate. Therefore, if you were exempted from the poor rate, automatically you were also exempted from that part of it which might be spent on county purposes. In *London Corpn. v. Associated Newspapers, Ltd.* (3), LORD PARKER OF WADDINGTON said ([1915] A.C. 697) :

It is true that the moneys now leviable by means of such rate [*i.e.*, the poor rate] are applied for a variety of statutory purposes, but the rate remains the same.

- F That explains the Rating and Valuation Act, 1925, s. 2 (1), which says :

As from the date of the first new valuation, the rating authority of each urban rating area, in lieu of the poor rate and any other rate which they have power to make, shall make and levy for their area a consolidated rate which shall be termed "the general rate."

This obviously treats the general rate as co-extensive with the poor rate and including any other parochial rate.

- G That the old rate included everything covered by the general rate seems to me the answer to the question, and, therefore, the exemption covers the general rate that is levied to-day.

OLIVER, J. : I agree and cannot usefully add anything.

Order accordingly.

- H Solicitors : *Radcliffes & Co.*, agents for *P. A. Selborne Stringer*, clerk of the Wiltshire county council (for the appellants); *Wallace, Pyman & Co.*, agents for *Phelps & Laurence*, Ramsbury, Marlborough, Wiltshire (for the respondent, *M. E. Boyce*); *Ernest Bevir & Son*, agents for *H. Bevir & Son*, Wootton Bassett, Wiltshire (for the respondent, the Rating Authority for Marlborough and Ramsbury Rural District and Joseph Orchard).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

LABRUM v. WILLIAMSON.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Atkinson and Oliver, JJ.), April 29, 1947.]

Street and Aerial Traffic—Motor vehicle—Insurance against third-party risks—Causing a motor vehicle to be used on the road without a policy of insurance being in force—Disqualification for holding licence—"Special reasons" for refraining from disqualification—Assured misled as to effect of policy—Proposal form signed for general cover—Temporary general cover certificate issued, but policy limited to named driver—Road Traffic Act, 1930 (c. 43), s. 35 (2).

A garage proprietor made a proposal to an insurance company for general cover for all his trade vehicles. A temporary cover note was issued to him covering "third party risks for any vehicle used in connection with the motor trade," and the company undertook to inform the assured if his proposal was declined. The policy which was subsequently sent to him and which he did not read was, however, on a "named driver" basis.

HELD: the assured having been misled by the insurance company, it was reasonable for him to believe that his proposal for general cover was accepted, and there was a "special reason" within s. 35 (2) of the Road Traffic Act, 1930, why he should not be disqualified for holding a licence on his being convicted of using a motor vehicle when there was not in force in relation to its user a policy of insurance against third-party risks.

Rennison v. Knowler, [1947] 1 All E.R. 302, distinguished.

[EDITORIAL NOTE. In *Rennison v. Knowler* (1) LORD GODDARD, C.J., emphasised (and he again emphasises it in the present case) that it was the "obvious duty" of the owner of a motor vehicle to see that he was insured and to that end "to make himself acquainted with the contents of his policy." His LORDSHIP went on to indicate that, if an assured was misled as to the terms of his policy, that might constitute a "special reason" within s. 35 (2). The present case is an illustration of an assured being misled. The circumstances are obviously unusual, and the case necessarily depends on its own facts, but it is a valuable guide to the principles on which the court will act when considering cases under s. 35 (2).

FOR THE ROAD TRAFFIC ACT, 1930, s. 35, see HALSBURY'S STATUTES, Vol. 23, p. 636.]

Cases referred to:

- (1) *Rennison v. Knowler*, [1947] 1 All E.R. 302; 176 L.T. 271.
- (2) *Whittall v. Kirby*, [1946] 2 All E.R. 552; [1947] K.B. 194; [1947] L.J.R. 234; 111 J.P. 1; 175 L.T. 449.

CASE STATED by Northampton Quarter Sessions.

The Recorder of Northampton held that the assured had been misled by the insurance company into thinking that he had secured general cover in respect of his motor vehicles, and that these circumstances constituted "special reasons" for the purposes of the Road Traffic Act, 1930, s. 35 (2). The facts appear in the judgment of LORD GODDARD, C.J.

A. P. Marshall for the appellant.

The respondent was not represented.

LORD GODDARD, C.J.: The facts of this case are that the recorder has found that a garage proprietor, the respondent in this court, "made a proposal for a general trade cover for all vehicles used in connection with his aforesaid trade to the Road Transport and General Insurance Co., Ltd., and received a cover note dated Oct. 5, 1945, from the said company holding him insured against third party risks for any vehicle used in connection with the motor trade." The cover note was produced to us. The proposal form was not, but we have a finding of the recorder that the respondent made a proposal for a general trade cover, and it would be a very remarkable thing if a garage proprietor did not make a proposal of that nature. The respondent received a cover note from the insurance company which covered in the widest possible terms any vehicles used in connection with his trade, whether they were being driven by himself or by anybody else. It appears, however, that for some reason, the policy which was subsequently sent to the respondent was on the

"named driver" basis. Motor policies may be obtained from insurance companies at a lower premium if it is warranted that the car will only be driven by a named person, and if a motor car owner takes out one of those policies he must not allow somebody other than the named driver to drive. If he does, the vehicle will not be insured and an offence against the Road Traffic Act will have been committed. It is clear that the policy which the respondent received was not a policy which conformed with the cover note.

A The cover note stated that the respondent

... having made a proposal to insure the undermentioned risks in respect of the motor vehicle referred to and any vehicle used in connection with the motor trade is hereby held insured in respect of such risks until a policy is prepared and payment of the premium demanded, but in no case exceeding 30 days from the date hereof, subject to the terms exceptions and conditions of the company's policy for the class of risk to be covered. If such proposal be accepted by the directors, a policy and a detailed certificate of insurance to run to the expiry date of the policy will be prepared in due course, but if it should be declined the liability of the company shall cease upon notice being given to the proposer or his agent and a proportionate charge will be made for the period during which the company has accepted liability under this cover note.

B The risks which are covered are "Third Party (Damage to Property and Personal Injuries)." There is nothing on the face of this cover note to say that it is in any way limited to a named driver.

C When the policy was received by the respondent, he did not read it. I think the recorder has found special circumstances in this case because he was of opinion that the respondent was misled by the insurance company's issuing him a cover note and then, having undertaken to tell him if they declined the proposal, his proposal being for a general cover, sent him a policy which, for some reason, was limited to a named driver.

D I do not resile in the smallest degree from what I said in *Rennison v. Knowler* (1), in which case the questions were very much the same, but a judgment must always be read in the light of the facts of the particular case. It is perfectly true that I said in that case that it was the obvious duty—and I repeat it—of people to make themselves acquainted with their policies and, as I said also in that case, if they do not understand them, it is their duty to take advice. *Rennison v. Knowler* (1) was also a case of a named driver policy,

E but there was no suggestion there that the assured had made a proposal for a general cover, and had received a policy which was not a general cover—still less that he had received a cover note which had given him a general cover and a policy which one would naturally expect would follow the cover note but did not follow the cover note. In the present case the recorder has found that the respondent was misled into believing that he was covered. I should be sorry if it was thought that *Rennison v. Knowler* (1) had laid down that in

F no case where a man was misled by the contents of his policy, or, perhaps, had received wrong advice as to the legal effect of the policy, could that be treated as a special circumstance. I think that what happened here can properly be regarded as a special circumstance. It is not a circumstance which refers to every sort of case under the Road Traffic Act, 1930, s. 35. If the facts here had simply been that the respondent, having made a proposal, got a policy and did not look at it, I should have said that the decision of *Rennison v. Knowler* (1) applied also in this case, but he received a cover note which told him in substance that he would get a policy in accordance with the cover note or the directors would inform him that they did not accept the proposal in accordance with his terms. Therefore, I think there were grounds here on which the recorder could say there was a special reason in this case because

G this man had been misled.
H If an ignorant man who has a motor bicycle gets a policy and is puzzled by its terms and he goes to some person who it would be reasonable to suppose would be able to give him proper information about the effect of the policy and that person gives him advice which turns out to be wrong, nothing I have said in *Rennison v. Knowler* (1) was intended to cover that sort of case. That might be an excuse. In *Rennison v. Knowler* (1) the assured had made no enquiry. He had taken out a policy which covered the use of his motor cycle while he himself and no other person was driving it. He let a friend drive the motor cycle and there was an accident. He was not insured and he said he had

taken no step to find out what the effect of his policy was. He had the policy for which he had applied, and he had no reasonable ground for believing that it would cover the circumstances which actually occurred. In the present case I think there were circumstances which would lead the respondent to think that, having made a proposal for a general cover and having received a cover note giving him a general cover, he would receive a policy providing general cover. He might well be excused for not having read the policy and found out that it had not been issued in accordance with the proposal. In these circumstances I am not prepared to say that there was no evidence on which the recorder could come to the conclusion that there was a special circumstance in this case. I look on this as an entirely exceptional case, and the fact that it is an exceptional case is a ground for saying that there was a special reason here.

ATKINSON, J. : I agree. I call attention to the words in the cover note :

If such proposal be accepted by the directors, a policy and a detailed certificate of insurance to run to the expiry date of the policy will be prepared in due course, but if it should be declined the liability of the company shall cease upon notice being given to the proposer

It is not suggested that any notice was given to the proposer that the directors had not accepted his proposal. I do not know why he should be regarded as to blame, when he receives as a policy something for which he has not asked, for not looking to see if the insurers had done what they had contracted to do. I agree with everything my Lord has said as to respondent's duty to make sure, but here he was misled in the sense that he is told that the protection for which he has asked will only cease on notice being given to him. I should have thought that there were plenty of circumstances on which the recorder was entitled to find that there were special reasons within the Road Traffic Act, 1930, s. 35.

OLIVER, J. : I agree.

Appeal dismissed.

Solicitors : *Perkins & Tustin*, Northampton (for the appellant).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

HALL v. JORDAN.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Atkinson and Oliver, JJ.), April 24, 1947.]

Solicitors—Offence—Penalty—Pretending to be qualified to act as solicitor—Dismissal of information under Probation of Offenders Act, 1907—Probation of Offenders Act, 1907 (c. 17), s. 1 (1)—Solicitors Act, 1932 (c. 37), s. 46—Solicitors Act, 1941 (c. 46), s. 22, sched. III.

J. was charged with wilfully pretending to be qualified to act as a solicitor, contrary to the Solicitors Act, 1932, s. 46, and was found guilty of practising as a solicitor after he had been suspended from practice by an order of the Disciplinary Committee of the Law Society. Although there was an aggravating circumstance, the justices dismissed the information under the Probation of Offenders Act, 1907, s. 1 (1), on payment of costs, on the ground that the matters which constituted the offence "appeared to be isolated matters" :—

HELD : wilfully pretending to be a solicitor was a serious offence and one that could not properly be dealt with under the Probation of Offenders Act, 1907, s. 1, and the case must be remitted to the justices with a direction to convict.

[As to DISMISSAL UNDER PROBATION OF OFFENDERS ACT, 1907, see HALSBURY, Hailsham Edn., Vol. 21, pp. 622, 623, para. 1081 ; and FOR CASES, see DIGEST, Vol. 33, p. 364, Nos. 738-740.]

As to PRETENDING TO BE QUALIFIED TO ACT AS A SOLICITOR, see HALSBURY, Hailsham Edn., Vol. 31, pp. 315, 316, para. 348, and Supplement.]

Cases referred to :

- (1) *Phillips v. Evans*, [1896] 1 Q.B. 305; 65 L.J.M.C. 101; 74 L.T. 314; 60 J.P. 120; 39 Digest 246, 296.
- (2) *White v. Hurrell's Stores, Ltd.* (1941), 164 L.T. 334; 105 J.P. 105; Digest Supp.
- (3) *Oaten v. Aty*, [1919] 2 K.B. 278; 88 L.J.K.B. 1072; 121 L.T. 215; 83 J.P. 173; 33 Digest 407, 1172.

CASE STATED by Acton (Middlesex) justices.

A The respondent was charged with wilfully pretending to be qualified to act as a solicitor, contrary to the Solicitors Act, 1932, s. 46 (as amended by the Solicitors Act, 1941, s. 22, sched. III.) The justices found that the offence had been committed, but dismissed the information under the Probation of Offenders Act, 1907, s. 1, on the ground that the matters which constituted the offence "appeared to be isolated matters." The facts appear in the judgment of LORD GODDARD, C.J.

B *J. R. Cumming-Bruce* for the appellant.
Alan S. Trapnell for the respondent.

C LORD GODDARD, C.J. : The question raised by this Case is whether, when the justices convicted the respondent of wilfully pretending to be qualified to act as a solicitor, they could treat the case as one which was properly within the Probation of Offenders Act, 1907, s. 1 (1), and not register a conviction, but dismiss the summons on payment of costs.

D In my opinion, it was not open to the justices to do such a thing. Wilfully pretending to be a solicitor is treated by the law as a serious offence. Where a man has been on the roll of solicitors and has either been struck off the roll or has had his practising certificate suspended, and he deliberately—because that is what "wilfully" means—acts as a solicitor, he has committed a very serious offence. He has defied the tribunal which has been appointed by Parliament to deal with the discipline of solicitors. In the present case the respondent was practising as a solicitor at Chiswick, and early in 1945, he was consulted by a client, a Mrs. Cullum, in connection with some matter of personal injury. In July, 1945, he was suspended from practice by an order of the Disciplinary Committee of the Law Society for professional misconduct. In April, 1946, he interviewed Mrs. Cullum and acted for her. On Apr. 1, 1946, E he wrote in respect of this claim for personal injuries to the Assistant Director of claims of an insurance company on letter paper which was headed "Henry N. Jordan & Co., Solicitors and Commissioners." There he was wilfully pretending that he was a qualified solicitor. He stated in this letter—which is the sort of letter which a solicitor retained in such a matter would write and is headed, "Without prejudice." :

F It would appear from our records that you were considering a proposal which you would make without prejudice to settle this matter. I should be glad to hear from you accordingly.

Anyone receiving that letter would think it was a letter from a solicitor. The next letter he wrote was only headed "Henry N. Jordan & Co." but again it was stated to be "without prejudice," and was written in the same way as the other letter :—

G I have now seen Mrs. Cullum and she is quite agreeable to your proposal for a settlement of this matter.

Then the terms of settlement were set out, the third being : "To pay costs £5 5s." Again, anyone receiving that letter would assume that it was from a solicitor. The justices have found that the respondent was guilty of the offence charged which is punishable by a fine not exceeding £50, (which shows that the legislature considered it a serious matter), but they say :

H We found that the offences were proved, and being of the opinion that these appeared to be isolated matters in all the circumstances, we held that these summonses should be dismissed under the Probation of Offenders Act on payment of five guineas costs on each summons.

It has been held over and over again—both under s. 16 of the Summary Jurisdiction Act, 1879, which enabled justices to dismiss cases if they were of opinion that they were trivial and so forth, and under the Probation of Offenders Act, 1907—that a proceeding of this sort on the part of the justices

can be reviewed in this court. In *Phillips v. Evans* (1), a case under s. 16 of the old statute, where this court held that the offence of keeping a dog without a licence could not be treated by magistrates under s. 16 as a trivial offence, and in *White v. Hurrell's Stores, Ltd.* (2), where justices dismissed a case under the Probation of Offenders Act, 1907, but this court held that the offence was not of a trivial nature, this court has held that such procedure was an improper exercise of the discretion of the justices and sent the case back to the justices with a direction to convict. Again, in *Oaten v. Auty* (3), a case in which a man had been charged with failure to comply with the provisions of the Military Service Acts and the justices acted under the Probation of Offenders Act, 1907, it was held that that was wrong.

The Probation of Offenders Act, 1907, by s. 1 (1) enables the court to dismiss an information if they find circumstances which justify their doing so :

... having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed. . .

If, on consideration of those circumstances, they think it is inexpedient to inflict any punishment or any other than a nominal punishment, "they can dismiss the information," but all that the justices say here is that the matters to which I have referred which constituted the offence appeared to be "isolated matters." I do not know what that means except that it was a first offence and that the respondent was only acting in respect of one client, but he committed the offence, and he committed it deliberately. How can it be said that wilfully pretending to be a solicitor is a trivial offence, more especially in the case of a man who was a solicitor and who has been suspended from practising? This is a worse case than if a man who has never been a solicitor acts as one because the respondent was not only committing an offence against the statute. He was also setting at defiance the sentence of his own professional tribunal which had passed sentence on him.

In my opinion, this is a case which cannot possibly be properly dealt with under the Probation of Offenders Act, 1907. There is no ground for saying that it is a trivial offence. It is a serious offence. There are no extenuating circumstances. Indeed, one of the matters which the justices find is an aggravating circumstance, because, having received this amount of £25 for the woman who had met with the accident, he at once borrowed the money from her. The case must go back to the justices with a direction that it is not one suitable to be dealt with under the Probation of Offenders Act, 1907, but is a case in which they must convict. The matter of penalty is for them.

ATKINSON, J. : I agree. I would only like to emphasise that the ground on which the justices have purported to exercise the discretion given to them by s. 1 is not one of the grounds set out in that section. They have not ventured to find that the offence was trivial. They have not suggested that there were any extenuating circumstances. Therefore, on the face of it, they have exceeded the jurisdiction given by the section.

OLIVER, J. : I agree.

Solicitors : *Hempsons* (for the appellant); *V. Mervyn Taylor* (for the respondent).

Case remitted.

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

ELKINS v. CARTLIDGE.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Atkinson and Oliver, JJ.), April 24, 1947.]

Street and Aerial Traffic—Motor vehicle—Being in charge of motor vehicle under influence of drink—"Public place"—Parking enclosure at rear of inn—Road Traffic Act, 1930, (c. 43), ss. 15 (1), 121.

A On an information under the Road Traffic Act, 1930, s. 15 (1), charging the respondent with being in charge of a motor vehicle in a public place, when under the influence of drink, the justices found that the respondent while under the influence of drink, put his car in an enclosure at the rear of an inn at the side of which an open gateway gave access to the enclosure, and that cars had access to the enclosure and were actually parked there, but they dismissed the information:—

B HELD: the enclosure, being a place to which the public had access, was a "public place" within s. 15 (1) of the Act, and the respondent was guilty of an offence under that section.

R. v. Collinson (1) ((1931) 75 Sol. Jo. 491) followed.

[FOR THE ROAD TRAFFIC ACT, 1930, s. 15 (1), 121, see HALSBURY'S STATUTES, Vol. 23, pp. 622, 686.]

C Cases referred to:

(1) *R. v. Collinson* (1931), 75 Sol. Jo. 491; 23 Cr. App. Rep. 49; Digest Supp.

(2) *Bugge v. Taylor*, [1941] 1 K.B. 198; 110 L.J.K.B. 710; 164 L.T. 312; 104 J.P. 467; Digest Supp.

CASE STATED by Otley (Yorkshire) justices.

D The respondent was charged on an information with being, when in charge of a motor vehicle in a public place, unlawfully under the influence of drink to such an extent as to be incapable of having proper control of the vehicle, contrary to s. 15 (1) of the Road Traffic Act, 1930. The justices dismissed the information. The facts appear in the judgment of LORD GODDARD, C.J.

Withers Payne for the appellant.

C. P. Harvey for the respondent.

E LORD GODDARD, C.J.: The justices dismissed an information preferred against the respondent charging him, when in charge of a motor vehicle in a public place called the Fox and Hounds Inn Car Park, Church Hill, with being under the influence of drink to such an extent as to be incapable of having proper control of the vehicle, contrary to s. 15 of the Road Traffic Act, 1930. The justices have found that the respondent was under the influence of drink, and that he put his motor car in an enclosure at the rear of the Fox and
F Hounds Inn, and they state:

At the side of the inn there is a well-defined parking ground from which an open gateway gives access to the said enclosure. Cars have access to the said enclosure and do actually park there.

In other words, this enclosure is part of a car park. The licensee invites people to go there, and people do go and park there.

G The section refers to "a road or other public place." I emphasise the word "other." "Road" is defined in s. 121 of the Act, and one must have regard to that definition when considering the meaning of the words "public place," because the two things are treated *ejusdem generis*. "Road" means "any highway and any other road to which the public has access," and so includes every road over which the public passes. Having regard to the definition of "road," "public place" for the purposes of this section must be read as
H meaning a place to which the public have access, *i.e.*, have access in fact. In this case it is expressly found that cars have access to the enclosure.

The case is, however, concluded by *R. v. Collinson* (1), which is indistinguishable in principle, though it may be distinguishable in detail, from the present case. There a man who was charged with being in charge of a car while under the influence of drink was in a car which was in a field to which at the relevant time the public were invited to watch some point-to-point races. It was a private field, and no doubt it could have been closed in at any time, and I have no doubt that the proprietor of the field could have objected to any particular per-

son going into it. The public had not a legal right which they could enforce of access to the field, but it was a public place for the purposes of this section because at the relevant time the public were being invited to use it. That is the *ratio decidendi* of the case, and so long as that case stands it is clear that, in circumstances such as those found here by the justices, they had no option but to find that this car park was a public place. Accordingly, we must remit this case to the justices with the intimation that on the facts proved an offence had been committed.

ATKINSON, J. : I agree.

OLIVER, J. : I agree.

Appeal allowed with costs.

Solicitors : *R. C. Linney*, Wakefield, (for the appellant) ; *Broadbent, Rhodes & Co.*, Leeds (for the respondent).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

EDWARDS v. JONES.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Atkinson and Oliver, JJ.).
April 24, 1947.]

Magistrates—Summary jurisdiction—Information—Two or more offences charged in one information—"Defect in substance or form"—Summary Jurisdiction Act, 1848 (c. 43), ss. 1, 10.

Street and Aerial Traffic—Offences—Two offences in one information—Dangerous driving and driving without due care and attention—Procedure—Road Traffic Act, 1930 (c. 43), ss. 11, 12 (1)—Road Traffic Act, 1934 (c. 50), s. 35.

The provision in s. 1 of the Summary Jurisdiction Act, 1848, that no objection as to the substance or form of an information is to prevail does not entitle justices to proceed to hear an information which, contrary to s. 10 of the Act, charges more than one offence at the same time.

Rodgers v. Richards ([1892] 1 Q.B. 533) *not followed*.

Where, contrary to s. 10 of the Act, an information contains more than one offence, the justices should take steps to see that it is amended. The prosecutor should be invited to decide on which offence he elects to proceed, and, on such election being made, the remaining offence or offences should be struck out. If the prosecutor refuses to elect, the information should be dismissed.

Johnson v. Needham ([1909] 1 K.B. 626) *explained and followed*.

The appellant was charged with dangerous driving, contrary to s. 11 (1) of the Road Traffic Act, 1930, and, in the same information, with driving without due care and attention, contrary to s. 12 (1) of the Act. At the hearing before the justices it was submitted on behalf of the appellant that the information was bad and that the prosecution should elect which offence should be proceeded with. The prosecution refused to elect on the ground that they were asking for a conviction of one offence only. The justices held it was for them to decide, after hearing the evidence, which offence had been proved, and, after hearing the whole of the evidence, announced they would not convict on the charge of dangerous driving, but would convict on the charge of driving without due care and attention :—

HELD : (i) the procedure and formalities prescribed by the Summary Jurisdiction Act, 1848, had not been fulfilled in that the appellant had been called on to answer two charges at the same time, and the conviction must be quashed.

(ii) the proper procedure to have followed was that specially provided by s. 35 of the Road Traffic Act, 1934, *viz.*, to charge the appellant with dangerous driving and, if that charge had not been made out, to have directed or allowed a charge of driving without due care and attention to be preferred.

[EDITORIAL NOTE.] A practice of somewhat long standing, based on *Rodgers v. Richards* (2) and statements in various text books, appears to have grown up by which justices, in such a case as the present, hear all the evidence and then determine which of the two offences charged in the information has been proved. It should be

noted that this decision makes it clear that this practice can no longer properly be followed.

AS TO CONTENTS OF INFORMATION AS TO OFFENCES, see HALSBURY, Hailsham Edn., Vol. 21, p. 599, para. 1044; and FOR CASES, see DIGEST, Vol. 33, pp. 322, 323, Nos. 367-381.

FOR THE ROAD TRAFFIC ACT, 1934, s. 35, see HALSBURY'S STATUTES, Vol. 27, p. 561.]

Cases referred to :

- A (1) *Johnson v. Needham*, [1909] 1 K.B. 626; 78 L.J.K.B. 412; 100 L.T. 493; 73 J.P. 117; 33 Digest 323, 376.
 (2) *Rodgers v. Richards*, [1892] 1 Q.B. 555; 56 J.P. 281; *sub nom. Rogers v. Richards*, 66 L.T. 261; 33 Digest, 322, 375.

CASE STATED by Llandudno (Carnarvonshire) justices.

The facts appear in the judgment of LORD GODDARD, C.J.

- B *H. Emlyn-Jones and J. F. Copleston Boughey* for the appellant.
Arthian Davies for the respondent.

LORD GODDARD, C.J.: This Case Stated raises a question with regard to what should happen where more than one offence is contained in an information which is preferred before magistrates. I desire to say at once that the point with which we are now dealing is one which in some respects may be described as technical, and it must not be thought that I am in any way reflecting on the justices in this case because they are lay justices. It is the duty of the prosecution to assist the justices, and the duty of their clerk to keep them right on these matters. The only surprise I feel is that the respondent, an experienced police officer, should have thought that it was possible at this time of day to include two charges in one information, but that is what was done.

- D An information was preferred against the appellant for two offences—
 dangerous driving, contrary to s. 11 (1) of the Road Traffic Act, 1930, and also driving without due care and attention, contrary to s. 12 (1). It appears from the facts which the justices state that at the outset it was submitted to them on the appellant's behalf that the information was bad as being for two offences, and the appellant definitely said that the respondent ought to elect for which offence he was proceeding. The respondent stated that he would not elect because he was only asking for a conviction on one charge and not on two charges, but he did not say for which offence he was seeking a conviction. The appellant was, therefore, in the position of having to defend himself, not on one charge, but on two charges at the same time. The justices held that it was for them to decide, after hearing the evidence, which offence had been proved, and they invited the appellant's solicitor to apply for an adjournment, stating that they were prepared to grant an adjournment in which event the respondent could amend his information. The respondent did not say whether he was going to amend his information, and, in fact, he did not amend it. Thereupon the justices heard the whole of the evidence and announced that they would not convict on the charge of dangerous driving, but would convict on the charge of driving without due care and attention.

- G It appears to me that the procedure adopted in this case was quite wrong and that the justices ought to have been advised that they could not proceed in this way. Under s. 10 of the Summary Jurisdiction Act, 1848, it is laid down that an information shall be for one offence only. There is also a provision in s. 1 of that Act that no objection as to substance or form is to prevail, but that does not mean that, where the statute provides that an information shall be for one offence only, the justices can proceed to hear an information which charges two offences at the same time.

- H What the justices ought to do in such a case—and I state this for the information of justices generally—is this. If an information is preferred which contains two offences and not one, they should take steps to see that it is amended. According to the authorities the way they should do this is by asking the prosecutor on which offence he elects to proceed. The prosecutor can then elect to proceed on one offence, and thereupon the information should be amended by striking out the other offence or offences charged, as the case may be, so that the defendant is only called on to answer to the one offence. On the other hand, if the prosecutor declines to elect, the information is bad, and the justices should dismiss it. Any conviction which takes place on such

an information would be bad for duplicity.

I think that is really all this court decided in *Johnson v. Needham* (1). The judgment in that case, which was delivered by LORD ALVERSTONE, C.J., must not be considered to be an authority that justices can proceed on a bad information and hear two or three offences at the same time and then elect to convict on one. The information in *Johnson v. Needham* (1), charged three offences, and the prosecutor was called on to elect on which offence he would proceed. He declined to elect, the justices dismissed the summons, and this court held that they were right in doing so. If that case is properly understood, it shows that the procedure which I described a moment ago is the correct procedure and has been so recognised by this court. There is no ground for saying that, if an information discloses two offences, the justices can hear the two offences together and then say: "We will convict on one." That would be giving the go-by to the provisions of s. 10 of the Summary Jurisdiction Act, 1848, which makes it perfectly clear that in a justices' court a defendant can only be called on to answer one charge at a time. If there are two informations against a defendant, on which the facts are very much the same, it is, of course, open to the defendant to agree to the two summonses being heard at once. That is constantly done. In this case the appellant did not agree to anything of the sort. He took the objection that the information was bad, and so it was. No agreement by him could put that right. The information could have been amended by striking out one of the charges. A charge could then have been preferred under the other section, and the appellant could have said: "Well, I want one heard first and see what happens to that, and then I will consider what I will do with regard to the second charge."

Another point that I think has to be remembered is this. A special provision has been made in the Road Traffic Act, 1934, s. 35, with regard to the offence of dangerous driving. It might have been a useful amendment of the law if the Act of 1934 had provided that where a person is charged with the offence of dangerous driving it should be open to the justices to convict him, on the same information, of the offence of driving without due care and attention, just as, by virtue of s. 34 of that Act, if a person is charged on indictment with manslaughter through the dangerous driving of a car, he may be convicted of the lesser offence of dangerous driving, on the same principle as a jury, on a charge of attempted murder, can find a man guilty of wounding with intent to commit grievous bodily harm without any separate count in the indictment, or, on an indictment of attempting to commit grievous bodily harm, can find him guilty of unlawful wounding.

Section 35 of the Act of 1934 provides:

(1) Where a person is charged before a court of summary jurisdiction with an offence under s. 11 of the [Road Traffic Act, 1930] (which relates to reckless or dangerous driving) and the court is of the opinion that the offence is not proved, then, at any time during the hearing or immediately thereafter, the court may, without prejudice to any other powers possessed by the court, direct or allow a charge for an offence under s. 12 of the [Act of 1930] (which relates to careless driving) to be preferred forthwith against the defendant and may thereupon proceed with that charge, so however that he or his solicitor or counsel shall be informed of the new charge and be given an opportunity, whether by way of cross-examining any witness whose evidence has already been given against the defendant or otherwise, of answering the new charge, and the court shall, if it considers that the defendant is prejudiced in his defence by reason of the new charge being so preferred, adjourn the hearing.

Observe the careful provision which is made in that section to prevent the two charges being heard together. The justices have to come to a conclusion, first, that the dangerous driving charge is not made out, and then a separate charge may be preferred of driving without due care and attention. That emphasises the point which I have been making that the defendant is never to be called on to answer two charges at the same time unless there are two separate informations and he consents to their being heard together.

I ought to say one word with regard to *Rodgers v. Richards* (2). In that case the charge was for unlawfully using a place for the purpose of fighting two dogs and encouraging and assisting at the fighting of such dogs. Again, two offences were included in the information. It is to be observed there that the stipendiary magistrate held that the objection taken that the information

disclosed two offences was good, but he refused to amend the information and summons for reasons which I need not go into, and the prosecutor took a Case to this court. I should have no hesitation, if necessary, in differing from the decision in that case, not merely because we are sitting now as a court of three, and that was a court of two, but also because the case was not argued for the defendants, who did not appear, and when a case has been argued only on one side, it has not the authority of a case which has been fully argued.

A I certainly find the judgment of HAWKINS, J. somewhat difficult to follow. He says ([1892] 1 Q.B. 556):

By s. 1 [of the Summary Jurisdiction Act, 1848] no objection is to be allowed to any information for any defect in substance or in form, or for any variance between it and the evidence adduced. Now, was the irregularity in this information a defect in substance or in form? In my opinion it was a defect in substance because the charging of two offences in one information is forbidden by statute. No objection, therefore, to the information ought to have been allowed on such a ground.

B If he means it was not open to the defendant to object, with all respect to that learned judge, I entirely differ. The objection was one which it was, of course, right to take because the information was not in accordance with s. 10 of the Act. The judge continues:

C In the case of a variance between the charge and the evidence adduced, the justices are empowered to adjourn the case, but this is only in the case of variance. Where the objection is for a defect in substance or in form, there is no such power. It seems only good sense to say that if the information charges two offences, the defendant must be prepared to meet both.

With that statement of the law—again I say with all respect—I emphatically differ. He goes on:

D He may rightfully object to being sued on more than one charge, and it would be competent to the justices to say whether the information in fact disclosed more than one offence.

There I quite agree, but, although he had said that the defendant might rightfully object to being proceeded against on more than one charge, the learned judge proceeds:

E In the present case it is admitted that two offences were charged. That is, as I have said, a defect in substance, in respect of which no objection should have been allowed, and the case must therefore, be remitted to the magistrate.

I think the judgment of WILLS, J., is much more easily understood. That learned judge said (*ibid* 557):

F The justices, no doubt, if two offences are charged in one information, may decline to allow the prosecutor to proceed on both; but it is impossible to say that because one such charge is discarded, the other cannot be proceeded with.

G I think, in saying "may decline to allow the prosecutor to proceed on both," the learned judge meant to say, "must decline to allow the prosecutor to proceed on both," and then, if one charge is discarded, the other can be proceeded with. Of course it can, but in the present case throughout there was no amendment of the information or discarding of the one charge. Therefore, it seems to me that the procedure and the formalities prescribed by the Summary Jurisdiction Act have not been followed and the appellant has been called on to answer two charges at the same time, which is exactly what the provisions of the Act are designed to prevent. For these reasons, I think that the appeal must be allowed and the conviction quashed.

H I might just add this, which is another reason which seems to me to be a compelling reason in this case. If a conviction has to be drawn up for the purposes of an appeal, it must follow the information. If the conviction here showed two findings, one of Not Guilty on one charge and one of Guilty on another, it would at once appear that there was duplicity in the information and the conviction would be bad. If, on the other hand, the conviction was drawn up in relation to one charge only, it would not be following the information, and again it would be bad. I do not think, therefore, that in this case it would have been possible to have properly drawn up a conviction which could have stood, and that is another ground why this appeal must succeed.

ATKINSON, J.: I only want to add one word with reference to *Rodgers v. Richards* (2). It is interesting to see that the argument for the prosecutor puts my Lord's judgment in a nutshell. It was this ([1892] 1 Q.B. 555):

Admitting that the information disclosed two offences, the magistrate ought not to have dismissed the summons. He ought to have amended the information and summons by calling on the prosecutor to elect on which charge he would proceed.

I think that one must read what WILLS, J. said, substituting the word "must" for "may," "The justices, no doubt, if two offences are charged in one information, must decline to allow the prosecutor to proceed on both"—that had been conceded by the prosecutor—"but it is impossible to say that because one such charge is discarded the other cannot be proceeded with."

OLIVER, J.: I agree. By s. 10 of the Summary Jurisdiction Act, 1848, it is laid down in terms that every information shall be for one offence only. In this case the information deliberately charged two offences. If we are to uphold this conviction there is no reason that I can see why an information should not contain 50 or any other number of different offences. To my mind, it is fundamental in summary jurisdiction procedure that an information should contain only one offence. Our attention has been drawn to the provisions of s. 1 of the Act which are that no objection is to be taken or upheld with regard to substance or form. All I take that to mean is that no information is to be summarily dismissed because it is defective in form or in substance, but it must be put in a condition in which it is not in complete violation of s. 10 before it is determined. On that I agree with every word which has fallen from my Lord.

I also agree with him that the effect of what was done in this case is to produce this position. Here is an information charging two different offences. One of them has been found proved. The other has been found disproved. If a conviction is to be drawn up, how is it to be done? The information has to be dealt with as a whole. It has either to be found proved and so a conviction recorded, or it is to be found disproved and a dismissal recorded. To split it into halves and say that one half is proved and the other half is disproved involves an operation which is, perhaps, even more difficult to perform than the splitting of the atom. It cannot be done. There is no adjudication on part of the information as it was drawn. I agree with what has fallen from my Lord and ATKINSON, J. about *Rodgers v. Richards* (2). I find myself quite unable to follow the reasoning of the judgment of HAWKINS, J. More particularly, I select the sentence: "It seems only good sense to say that if the information charges two offences, the defendant must be prepared to meet both." It would seem to be equally good sense to say if you charge 100 offences the same result would follow. I cannot agree with that statement. I also agree with my Lord and my brother about the judgment of WILLS, J. which I think expressed the true view. I further associate myself with the view expressed by my Lord that it would have been far better if the Road Traffic Act, 1934, had empowered justices, on a charge of dangerous driving, to convict of a lesser offence, a power which has been conferred on the courts in a number of other cases which have been alluded to.

Appeal allowed with costs.

Solicitors: *Whitlock & Storr*, agents for *W. Brookes Parry*, Rhyl (for the appellant); *Bell, Brodrick & Gray*, agents for *Henderson & Hallmark*, Llandudno (for the respondent).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

DENERLEY v. SPINK.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Atkinson and Oliver, JJ.),
April 23, 1947.]

Medicine and Pharmacy—Chemists and druggists—Offence—Title or description calculated to suggest qualification—Business carried on as “Spink’s, the Chemists”—No qualified chemist at branch shop—Card displayed stating no qualified assistant in charge—Pharmacy and Poisons Act, 1933 (c. 25), s. 3 (2).

By the Pharmacy and Poisons Act, 1933, s. 3 (2): “It shall not be lawful for a person to use in connection with any business any title, emblem or description reasonably calculated to suggest that he or anyone employed in the business possesses any qualification with respect to the selling, dispensing or compounding of drugs or poisons other than the qualification which he in fact possesses.”

A registered and qualified chemist and druggist owned eleven chemist’s shops which he carried on under the name of “Spink’s, the Chemists.” Qualified assistants were in charge of ten of them, but the eleventh shop was under the control of unqualified assistants. The chemist exhibited in the window of this shop a card stating that, owing to war circumstances, there was no qualified assistant in charge of the shop and medicines could not be dispensed:—

HELD: (i) apart from the placard, the words “Spink’s, the Chemists” represented only that the shop belonged to a Mr. Spink, who was a qualified chemist, and not that there was necessarily a qualified chemist in control at the branch, and, therefore, there was no offence against s. 3 (2).

(ii) when the word “Chemists” over the shop was read in conjunction with the announcement contained in the placard, the word “Chemists” was not reasonably calculated to suggest that anyone employed in the business possessed the qualification of a registered chemist.

[FOR THE PHARMACY AND POISONS ACT, 1933, ss. 3 (2) and 10, see HALSBURY’S STATUTES, Vol. 26, pp. 565, 569, 570.

FOR THE PHARMACY AND POISONS ACT, 1908, s. 3, see HALSBURY’S STATUTES Vol. 11, pp. 736, 737.]

CASE STATED by Wilton Beacon (Yorkshire) justices.

The justices dismissed an information preferred by the appellant, an inspector of the Pharmaceutical Society, against the respondent charging him with unlawfully using in connection with his business a description, “chemists,” reasonably calculated to suggest that he or some one employed in the business possessed a qualification with respect to the selling, dispensing or compounding of drugs or poisons other than that which he, in fact, possessed, contrary to the Pharmacy and Poisons Act, 1933, s. 3 (2).

Blanco White, K.C., Cyril Morgan and J. Sopher for the appellant.

W. A. L. Raeburn for the respondent.

LORD GODDARD, C.J.: The facts found by the justices are that the respondent, Spink, owns eleven chemist’s shops in various places, including one at Pocklington, carried on under the name of “Spink’s, the Chemists.” The respondent himself is a duly registered and qualified chemist and druggist. Qualified assistants were in control of ten of the respondent’s shops, but, owing to the shortage of qualified assistants, there was no such assistant at the Pocklington shop, which at the relevant time was under the control of unqualified female assistants. The respondent exhibited a card in the window of this shop informing the public at large that, owing to war circumstances, there was no qualified assistant in charge of the shop and that medicines could not be dispensed. The appellant bought at the shop an innocuous substance called glycerine and rose water, and on the bottle was a label with the name “Spink’s, Chemists.” It was suggested that in those circumstances an offence had been committed against the Pharmacy and Poisons Act, 1933 s. 3 (2), which provides:

It shall not be lawful for a person to use in connection with any business any title, emblem or description reasonably calculated to suggest that he or anyone employed

in the business possesses any qualification with respect to the selling, dispensing or compounding of drugs or poisons other than the qualification which he in fact possesses.

There are two preliminary remarks I would make. In the first place, we are dealing with a penal section and we have, therefore, to construe it strictly and are not entitled to read into it words which are not there to create an offence which the statute would not otherwise create. Secondly, the Pharmacy Acts have been in existence since 1852, and been the subject of constant amendment and expansion by Parliament until 1933, when the Act with which we are now dealing was passed. Parliament has had every opportunity of amending the Acts and remedying any defects in them which may have appeared from cases in the courts. The Pharmaceutical Society, who may be supposed to promote the Acts, have also had every opportunity of dealing with this matter. We are not concerned here with the policy of the Acts, except in so far as one gives a reasonable construction to an Act having regard to its nature and policy. We have only to see whether the statute causes to be an offence the facts which are proved. A

It is argued by counsel for the appellant that the use of the word "chemists" must be calculated to suggest that a person in the shop or the person in control of the shop is a registered chemist. In other words, he would ask the court to read the words "he or anyone employed in the business possesses any qualification with respect to the selling, dispensing or compounding of drugs or poisons other than the qualification which he in fact possesses," as though the words of the section were "he or any person in control of premises where the business is carried on." I am unable to read such words as those into the section, more especially when I find that, while there is no prohibition in express language of the use of the word "chemist," but only a description reasonably calculated to suggest what the Act is aimed against, it is provided in the very same section : B

For the purposes of this subsection the use of the description "pharmacy" in connection with a business carried on on any premises shall be deemed to be reasonably calculated to suggest that the owner of the business and the person having the control of the business on those premises are registered pharmacists. C

Speaking for myself, I should decide this case mainly on a different ground from that which commended itself to the magistrates, because it seems to me that it is clear from the sections of the Act, and also from s. 3 of the repealed Poisons and Pharmacy Act, 1908, that Parliament has always had in mind that chemists' businesses may be carried on at more than one set of premises, but they have not, in the subsection with which we are dealing, dealt with any premises in which the business is carried on. They have made it unlawful for a person to use in connection with any business a title which suggests that he or anyone—not "and anyone"—employed in the business possesses a qualification which, in fact, he has not got. D

Whose business was this? The business belonged to the respondent, Spink. Spink was a chemist, and, therefore so long as the business is his and he is carrying it on, although he may not be in control of the particular premises in the sense of his being personally there, the business is his, and the title represents only, as it seems to me : "This is a shop belonging to Mr. Spink, who is a chemist." When you contrast the language of s. 10 of the Act of 1933 with the language of s. 3 (2), it becomes impossible to give the construction for which counsel for the appellant has contended, because s. 10, which deals with executors of deceased chemists or persons who carry on a business in bankruptcy or after making an arrangement with creditors, provides that, in each set of premises where the business is carried on, the business, so far as it concerns the retail sale of drugs, must be under the personal control of a registered pharmacist. There you at once find the words "in each set of premises," and in the repealed Act of 1908, s. 3 provided : E

(1) Any person who, being a duly registered pharmaceutical chemist or chemist and druggist, carries on the business of pharmaceutical chemist or chemist and druggist shall, unless in every premises where the business is carried on the business is *bona fide* conducted by himself or some other duly registered pharmaceutical chemist or chemist and druggist, as the case may be, and unless the name and certificate of qualification F

of the person by whom the business is so conducted in any premises is conspicuously exhibited in the premises, be guilty of an offence . . .

In those cases Parliament has dealt expressly with a business carried on in more than one place and has laid down in that repealed section and in s. 10 of the Act of 1933 what is to be done where a business is carried on at a number of premises, but I cannot find anything in s. 3 (2) which deals with any more than

A by the respondent in calling his shop "Spink's, the Chemists" when he is a chemist and it is his shop.

The point on which the magistrates dismissed the summons was one for which there is a great deal to be said, and, on the whole, I think the decision of the magistrates was right. They came to their decision on the ground that, although the business was called "Spink's, the Chemists," Mr. Spink had given a notice to the public by a placard in the window, which the magistrates, no
B doubt, saw, which indicated to the public that there was not a qualified chemist in charge of the business. People could decide for themselves whether they would risk buying a bottle of fruit salts or a packet of tooth paste from an unqualified person, but it was clearly stated that no dispensing would be carried on. There, again, counsel for the appellant says that, if the word "chemist" is used, as it was over the shop, that in itself is an offence. The
C words of the section are ". . . any title, emblem or description reasonably calculated to suggest . . ." and the magistrates decided :

When you take the word "chemist" over the shop, with the announcement which is contained in the placard, the word "chemist" is not reasonably calculated to suggest to the public that the person possesses some particular qualification which, in fact, he does not.

D I cannot help thinking that that is right. At any rate, it seems to me to be a question of fact because the question whether a thing is reasonably calculated to achieve a certain end must in all cases be one of fact. That conclusion seems to be strengthened by the further provisions of the sub-section that the use of the word "pharmacy" is to be deemed to achieve this result. The Act does not provide that the use of the word "chemist" is to be deemed to achieve that result. If the word "pharmacy" were used, it might be a nice question
E whether or not a notice such as that in the present case would achieve the result intended, because of the precise words of the section, but I cannot find anything which makes the use of the word "chemist," if I may so put it, irrefutable, and the magistrates have found here that it was not reasonably calculated to suggest what the section was aimed at. Therefore, in my opinion, on that ground the magistrates came to a correct decision in point of law on the facts they found, and for these reasons I would dismiss the appeal.
F

ATKINSON, J. : I agree. It seems to me that the first thing to do is to look at the emblem or description which is being attacked and see what that implies. "Spink's, the Chemists," is not a simple use of the word "chemists." If there had been over this shop window merely "chemists," the position might be different, but there was "Spink's, the Chemists," which means, I should
G have thought : "This is a branch of the business carried on by Mr. Spink," and it certainly would imply that Mr. Spink was a qualified person. He is, but the argument is that the description, "Spink's, the Chemists," must be deemed to imply that the person in control of the business is also a registered chemist. I cannot follow the argument. Parliament knew perfectly well how to express a provision of that kind, because s. 3 (2) and (4) of the Act of 1908, with its provisions relating to decessed
H chemists and chemists who sell poison, made it perfectly clear that those provisions related, not merely to the owner of the business, but also to the person in control. The final screw in the coffin of the argument for the appellant is to be found in the latter part of sub-s. (2) where it is provided that the word "pharmacy" shall be deemed to be reasonably calculated to suggest that the owner of the business and the person having control are registered pharmacists. It is all very well to argue that the word "chemist" has to be treated as if it were "pharmacy," but the section does not say so, and, therefore, to my mind, it is impossible to say we are to construe this title,

"Spink's, the Chemists" as, quite apart from the placard in the window, one reasonably calculated to suggest that the person having control of the business was also a registered practitioner.

OLIVER, J. : I agree.

Appeal dismissed with costs.

Solicitors : *A. C. Castle* (for the appellant) ; *Smith & Hudson*, agents for *Mainprize, Rignall & Whitworth*, Hull (for the respondent).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

COMBE v. SWAYTHLING.

[CHANCERY DIVISION (Wynn-Parry, J.), March 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, April 25, 1947.]

Sale of Land—Purchaser's lien—Costs of suit—Deposit paid to stakeholder.

The basis of the undoubted right of a purchaser, who has paid a deposit to a vendor, to have a lien on the property for his deposit when the contract goes off otherwise than by the default of the purchaser is that the purchaser is to be regarded as a secured creditor in respect of that deposit. The lien extends to the costs of a suit by the vendor to compel performance of the contract, but where, in accordance with a condition of the contract, the deposit has been paid to a stakeholder, and, consequently, the purchaser could not in an action by the vendor counterclaim for the return of his deposit or for a declaration of lien in respect of that deposit, he is not entitled to a lien for the costs of the action.

[As to PURCHASER'S LIEN, see HALSBURY, Vol. 20, pp. 570, 571, paras. 718, 719; and FOR CASES, see DIGEST, Vol. 32, pp. 268-273, Nos. 492-551.]

Cases referred to :

- (1) *Whitbread & Co. Ltd., v. Watt*, [1902] 1 Ch. 835; 71 L.J.Ch. 424; 86 L.T. 395; 50 W.R. 442; 32 Digest 271, 519; *affy.*, [1901] 1 Ch. 911.
- (2) *Rose v. Watson* (1864) 10 H.L. Cas. 672; 3 New Rep. 673; 33 L.J.Ch. 385; 10 L.T. 106; 10 Jur. N.S. 297; 12 W.R. 585; 11 E.R. 1187, H.L.; 32 Digest 268, 493.
- (3) *Middleton v. Magnay* (1864), 2 Hem. & M. 233; 10 L.T. 408; 12 W.R. 706; 71 E.R. 452; 32 Digest 270, 507.
- (4) *Turner v. Marriott* (1867), L.R. 3 Eq. 744; 15 L.T. 607; 15 W.R. 420; 32 Digest 272, 531.
- (5) *Kitton v. Hewett*, [1904] W.N. 21; 32 Digest 272, 532.

VENDOR AND PURCHASER ACTION.

At the time of the action the vendor was ordered to pay two-thirds of the purchasers' taxed costs. The purchaser, who had paid a deposit in conformity with a special condition, claimed to be entitled to a lien on the property in the suit for these costs. The facts are set out in the judgment.

Harman, K.C., and *W. F. Waite* for the vendor.

Gerald Upjohn, K.C., and *P. J. Sykes* for the purchaser.

Cur. adv. vult.

Apr. 25. WYNN-PARRY, J. read the following judgment. I have already ordered that the vendor should pay to the purchaser two-thirds of his taxed costs of this action. Counsel for the purchaser then claimed that the purchaser was entitled to a lien on the property in suit for those costs, and the question which emerges raises, in my view, a point which has not previously come before the courts. In support of his claim to a lien counsel relies on a principle which, he submits, is supported by a number of authorities and is conveniently set out in COOTE ON MORTGAGES, 9th ed., p. 1379, in a passage which, indeed, is a repetition of a similar statement in an earlier edition which was approved by FARWELL, J., in *Whitbread & Co., Ltd. v. Watt* (1) ([1901] 1 Ch. 913). That statement is as follows :

If a purchaser advance all or any part of the money to the vendor, and the contract is broken off, an implied contract arises, by which the purchaser has a lien on the land ; and if the purchaser properly declines to complete, he has a lien for the deposit and interest on unpaid purchase-money, and for interest on the payments, and also for the costs of a suit by himself or the vendor to compel performance of the contract, and this lien attaches on the deeds. If the purchase goes off through the fault of the purchaser, of course he has no lien for what he has paid.

A It is to be observed that the opening words of that statement postulate the condition : "If a purchaser advance all or any part of the money to the vendor." In the present case it is provided by the contract that the purchaser is to purchase the property in question from the vendor at the price of £28,000, subject to the accompanying conditions of sale, the sum of £2,800 having been paid to Messrs. Willis & Willis as a deposit and in part payment of the purchase money. The deposit of £2,800 was paid by the purchaser to B Messrs. Willis and Willis, and in accordance with the second special condition of sale it was paid to them as stakeholders.

It is manifest in those circumstances that the payment of that sum of £2,800 in accordance with that condition would to that extent discharge the purchaser, but that does not mean that, by his act in paying that sum to Messrs. Willis & Willis, he paid it to the vendor. The purchaser could not have brought any proceedings against the vendor to obtain payment by the vendor C to him of that sum.

It is in the light of those facts that I have to examine the claim put forward by counsel for the purchaser and the applicability to this case of the statement which I have read from COOTE ON MORTGAGES. The basis of the undoubted right of a purchaser who has paid a deposit to a vendor to have a lien for his deposit when the contract goes off otherwise than by the default of the purchaser seems to me to be that the purchaser is, in D respect of that deposit, to be regarded as a secured creditor. That, I think, clearly emerges from the speeches of LORD WESTBURY and LORD CRANWORTH in *Rose v. Watson* (2). It is to be observed that in that case there was no claim that the lien should extend to the costs of the suit, but in the later authorities to which I have been referred, viz., *Middleton v. Magnay* (3), *Turner v. Marriott* (4), *Whitbread v. Watt* (1), and *Kitton v. Hewitt* (5), it does E appear that the right of the purchaser, where the sale goes off otherwise than by his default, has been extended to cover his costs of suit and the costs of investigating the title.

In my judgment, all those cases are to be explained by reference to the underlying principle that the right of the purchaser to a lien in such circumstances proceeds on the basis that he is to be regarded as a secured creditor. Until that can be postulated of a purchaser I am unable to see how he has F any right to a lien. It follows, therefore, in my judgment, that in this case, where the purchaser could not by his counterclaim have sued for a return of the deposit and a declaration of lien in respect of that deposit, he is not entitled to a lien for the costs of the action. To hold otherwise would be to introduce a new rule for which the principle which underlies the authorities that have been cited to me and relied on by counsel for the purchaser could not be prayed in aid ; and for which no other basis has been suggested. In my judgment, G therefore, the purchaser is not entitled to any lien for his costs.

Solicitors : *Willis & Willis* (for the vendor) ; *Gilbert Samuel & Co.* (for the purchaser).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

KLIGER *v.* SADWICK.²

[KING'S BENCH DIVISION (Hilbery, J.), April 21, 22, 23, 1947.]

Damages—Measure of damages—Breach of contract—Couponed material supplied for manufacture—Failure to deliver manufactured articles—Reduction of turnover—Loss of profit.

A
A manufacturer failed to deliver to the plaintiff garments which he had contracted to make-up out of materials supplied to him by the plaintiff for which the plaintiff had given coupons.

HELD: the damages awarded for the breach of contract might include the loss suffered by the plaintiff through the reduction in the turnover of his business consequent on the loss of the coupons.

[EDITORIAL NOTE. The basis of the whole coupon rationing system is that the vendor of goods to the public must deliver to the manufacturer or wholesaler coupons against the goods which are supplied to him for sale, and in turn receives from his customer coupons in respect of the goods sold by retail. He is then able, by passing on the coupons to his supplier, to obtain further goods for sale. From this it will be seen that the loss of coupons through the default of a supplier is, in effect, a loss of part of the capital employed in the business.]

AS TO MEASURE OF DAMAGES IN CONTRACT, see HALSBURY, Hailsham Edn., Vol. 10, pp. 121, para. 151; and FOR CASES, see DIGEST, Vol. 17, pp. 130-135, Nos. 380-412.]

ACTION for damages for breach of contract. The plaintiff engaged the defendant to make women's house coats from material supplied by him (the plaintiff), for which he had given clothing coupons. The defendant failed to deliver 27 coats which he should have delivered under the contract.

P. Goodenday for the plaintiff.

C. D. Aarvold for the defendant.

HILBERY, J.: (after holding that the defendant had failed to deliver 27 coats which he should have delivered under the contract): I think the plaintiff is entitled to 27 coats which cannot be replaced. I have taken the measure of damage, in the first place, as the price which the plaintiff could have obtained for each of the types of coat which make up the 27 missing garments, and that comes to a figure of £98 11s. 0d. Then comes the difficulty in regard to the loss of his coupons. What is to be done about that? He has lost the coupons which he had given for the material which those 27 coats represent, and those coupons would have been replaced for him in his business when he, in his turn, had sold the goods. Being deprived of the coupons altogether, he loses the use of material in his business to the extent of the value which those coupons represent. The loss of the coupons diminishes the amount of material which he can employ and turnover in the course of the year. There is, of course, a very definite value attaching to coupons to-day in such a business as the plaintiff's and the loss of coupons must represent a true loss to him. It is a difficult matter to decide, but I have come to the conclusion that £75 ought to be given for that. Therefore, I make the total damages £173 11s. 0d.

Judgment for the plaintiff.

Solicitors: Alexander Fine, Hawkins & Co. (for the plaintiff); J. L. Myers (for the defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

PAYNE AND ANOTHER v. COE.

[CHANCERY DIVISION (Vaisey, J.), April 17, 1947.]

Building Societies—Winding up—General meeting—Notice of meeting to be sent to all members—Register of members destroyed—Notice to members by public advertisement—Building Societies Act, 1874 (c. 42). s. 32 (4).

A The trustees of an instrument of dissolution of a building society wished to call a general meeting of the society to obtain the necessary authorisation for a winding up petition to be presented to the court under the Building Societies Act, 1874, s. 32 (4), but they were unable to do so because, under the rules, notice of all meetings had to be sent to all the members at least 7 days before such meetings, and, owing to the fact that the society's register of members had been destroyed by enemy action, this rule could not be complied with:—

B HELD: (i) the Companies Act, 1929, s. 115 (2), did not apply.

(ii) notice, as provided by the rules, must be sent to all members whose names and addresses were known, but the matter could be brought to the notice of those members whose names and addresses were not known by means of public advertisement in appropriate newspapers indicating the purposes of the meeting and calling on the members to attend the meeting after a proper interval of time.

C *Semble*: where a society is already in dissolution under s. 32 (3) of the Act of 1874, it can present a petition for a winding up order under s. 32 (4).

[AS TO DISSOLUTION AND WINDING UP OF BUILDING SOCIETY, see HALSBURY, Hailsham Edn., Vol. 3, pp. 441-445, paras. 838-845.

FOR THE COMPANIES ACT, 1929, s. 115 (2), see HALSBURY'S STATUTES, Vol. 2, p. 848.]

D ADJOURNED SUMMONS by the trustees of an instrument of dissolution of a building society asking for directions in regard to calling a meeting of the society to obtain authorisation for a petition to the court for the winding up of the society under the Building Societies Act, 1874, s. 32 (4). The facts appear in the judgment.

E *C. Montgomery White, K.C.*, and *P. B. Morle* for the plaintiffs.

Michael J. Albery for the defendant, a shareholder.

VASEY, J.: The questions which now arise for my decision on this summons are two in number. First, I am asked: "Whether the plaintiffs"—who are the trustees of an instrument of dissolution of the Pall Mall Building Society—"can and should cause application to be made to the court under the Companies Act, 1929, s. 115, to direct a meeting to be called and held and conducted in such manner as the court thinks fit." In my judgment, the section in question has no application. Secondly, I am asked:

F Whether the plaintiffs can and should call a general meeting of the society for the purpose of the Building Societies Act, 1874, s. 32 (4), and, if so, how notice of such meeting should be given having regard to the provisions of r. 23 of the society and to the fact that the register of members has been destroyed by enemy action and the names and addresses of approximately 120 members are not known.

G The society was incorporated on Oct. 12, 1932, under the Building Societies Act, 1874. Under that Act certain matters had to be provided for by rule, and r. 23, the relevant rule, is:

Notice of all meetings of the members shall be sent to all members at least 7 days before such meetings.

H In 1940, owing to the outbreak of the war, the society found it impossible to continue to carry on business, and with the necessary consent of members it was decided that it should be dissolved. On Apr. 21, 1940, an instrument of dissolution was made pursuant to s. 32 (3) of the Act of 1874, and in due course the plaintiffs were nominated as trustees for the purposes of the dissolution. By s. 32 of the Act of 1874: "A society under this Act may terminate or be dissolved . . ." Then come four headings not separated by any conjunctive or disjunctive words, but following one after the other in this way:

1. Upon the happening of any event declared by its rules to be the termination of the society. 2. By dissolution in manner prescribed by its rules. 3. By dissolution with the consent of three fourths of the members, holding not less than two thirds of the number of shares in the society, testified by their signatures to the instrument of dissolution.

There follow provisions as to what the instrument should contain. Then heading 4 provides :

By winding up, either voluntarily under the supervision of the court or by the court, if the court shall so order, on the petition by any member authorised by three fourths of the members present at a general meeting of the society specially called for the purpose to present the same on behalf of the society . . .

The first matter that occurred to me was whether, as the society is already in dissolution under the third of the four courses prescribed by means of an instrument of dissolution, it can now present a petition for a winding-up order by the court under the fourth heading. I do not propose to decide that matter, but I understand that text-book writers have expressed the view that it can. My own view at the moment—although the matter is not really relevant—is that a winding-up order can be made in such circumstances as exist in the present case. The difficulty arises from the necessary preliminary to the presentation of the petition for winding the society up, namely, an authorisation given to the member who presents the petition by three fourths of the members present at the general meeting of the society which should have been called for the purpose. As I have already indicated, the problem with which we are faced is how some 120 members can be served within the meaning of the rules, or at all, when their names and addresses are not known.

In my judgment, I have power to say that a meeting of members should be called by the plaintiffs to consider, and, if thought fit, pass, the resolution contemplated by s. 32 (4) of the Act of 1874. I think that that meeting should be called in accordance, so far as possible, with r. 23, which says :

Notice of all meetings of the members shall be sent to all members at least 7 days before such meetings.

Where the names and addresses of the members are known, the meeting must be convened by notices sent to them, but, as regards the members whose identities and addresses are unknown, it seems to me that the only way is for me to authorise steps to be taken to bring the matter to the notice of those persons by means of public advertisement in the ordinary manner. I think that there should be a notice published in some appropriate newspaper or newspapers in England indicating the purposes of the meeting and calling on the members to attend that meeting after a proper interval of time. It is not always easy to get these notices into the Press at any particular date, and I think that a considerable time, much exceeding the minimum of seven days, should elapse between the publication of the notice and the sending out of the notices to the known shareholders. I will not at the moment say what that interval of time should be, nor what should be the precise form of the notice nor in what newspaper or newspapers it should appear. Those matters must be referred to chambers, and the appropriate order should be sought from the master. I hope that the plaintiffs and the defendant, who is being sued as a representative shareholder, will unite in making such submissions in regard to those matters as they think will enable justice to be done.

When the petition comes before the court, if such a petition is sanctioned and authorised by the meeting, it will be for the judge before whom that petition comes to make sure that the requisite preliminaries have been complied with. There may be a difficulty, because that petition will be dealt with, not in the Chancery Division, but in the Companies Court, and I suppose that in strictness it will be in the power of the judge to say that a meeting, convened as I have indicated, was not a meeting sufficiently authentic to enable the petition to be treated as well-founded. I do not, however, anticipate any difficulty of that kind. Indeed, I am not sure that it would not be proper for me to say that it might be convenient, if at the time I am doing company work, for the petition to be brought before me, as I have already some seisin of the circumstances in which it will have been presented. I cannot direct that

a non-existent petition should be heard by me, but I can indicate that I should not regard it as improper for an application to be made to me after the petition is on the file that I should hear and consider the matter. I do not think it would be safe to appoint the defendant to represent the other shareholders. He is here in a *quasi* representative capacity, but I do not see any point in making anything in the nature of a representation order.

Costs of all parties to date to be taxed as between solicitor and client and paid out of the assets.

Solicitors: *Callingham, Griffith & Bate* (for all parties).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

Re A RECEIVING ORDER (IN BANKRUPTCY).

B [CHANCERY DIVISION (Roxburgh, J.), March 11, April 15, 1947.]

Bankruptcy—Receiving order—Registration at Land Registry—Re-registration—Discharge of bankruptcy—Re-registration 16 years later—Land Charges Act, 1925 (c. 22), s. 6 (1) (c), 3—Bankruptcy Rules, 1915 r. 181A.

Land Charges—Vacation of entry in register—Receiving order in bankruptcy made in 1927—Discharge of bankruptcy in 1930—Re-registration by Official Receiver in 1946—Land Charges Act, 1925 (c. 22), s. 6 (1) (c), 3, 5.

C In 1927, a receiving order was made against C. and he was adjudicated bankrupt. He was at that time entitled to an absolute reversionary interest in two real properties and he disclosed this interest to his trustee in bankruptcy. By a deed of release and assignment made in 1929, the trustee assigned this interest to C.'s mother in consideration of certain payments. In 1930 C. obtained his discharge, and the registration of the receiving order under the Land Charges Act, 1925, expired in 1932. The properties were assigned to C. by his mother, and, in 1934 and 1942 respectively, he was registered as proprietor of the two properties with an absolute title at the Land Registry. In 1946 C. entered into a contract to sell the properties, but the purchaser repudiated the contract and (after proceedings for specific performance had been begun by C.) wrote to the Official Receiver questioning C.'s right to be registered with an absolute title in view of the receiving order of 1927. On Dec. 13, 1946, after only one day's inquiry and without communicating with C., the Official Receiver applied for the re-registration of the receiving order of 1927 at the Land Registry, although he knew that the asset had been disclosed and that the trustee's file had been destroyed by enemy action:—

F HELD: (i) the Bankruptcy Rules, 1915, r. 181A (which provides that, on the making of a receiving order, the Official Receiver shall give notice thereof to the Chief Land Registrar with a request for it to be registered on the register of writs and orders affecting land), could not justify registration in 1946 of a receiving order made in 1927.

G (ii) since no rules for re-registration of receiving orders had ever been made, although the Land Charges Act, 1925, s. 19 (2), provided that such rules could be made under the Bankruptcy Act, 1914, it was doubtful whether the Official Receiver had power to re-register a receiving order, but, assuming that he had this power, he should exercise it with great care and sense of responsibility, especially after the bankrupt had been discharged.

H (iii) the registration of the receiving order should be vacated and, since the Official Receiver had acted without sufficient care, without adequate inquiries, and with undue haste, he must pay C.'s costs.

[AS TO REGISTRATION OF RECEIVING ORDERS AT LAND REGISTRY, see HALSBURY, Hailsham Edn., Vol. 19, pp. 349-352, paras. 723-729.]

Case referred to:

(1) *Re Combe, Combe v. Combe*, [1925] 1 Ch. 210; 94 L.J.Ch. 267; *sub nom. Re Combe, Combe v. Combe*, 133 L.T. 473; 37 Digest 527, 1181.

MOTION for an order to vacate the registration of a receiving order in bankruptcy which had been re-registered by the Official Receiver in the register of writs and orders at the Land Registry under the Land Charges Act, 1925,

s. 6, 16 years after the applicant had obtained his discharge. The facts appear in the judgment.

Harman, K.C., and *J. Platts Mills* for the applicant.
Aronson for the Official Receiver.

Cur. adv. vult.

Apr. 15. ROXBURGH, J. read the following judgment. This is an originating motion to vacate the registration of a receiving order in bankruptcy which the respondent, the Official Receiver, has registered under the Land Charges Act, 1925, s. 6. A

A receiving order was made against the applicant on May 10, 1927, and he was adjudicated bankrupt on July 26, 1927. He was at those dates entitled to an absolute reversionary interest in certain properties known as Oaklands Park and Brook Meadows, and this interest was duly disclosed by him to F.S., Salaman, his trustee in bankruptcy. By a deed of release and assignment dated July 24, 1929, and made between Mr. Salaman, of the first part, Mrs. Combe (the applicant's mother), of the second part, and the applicant, of the third part, Mr. Salaman (since deceased), in consideration of certain payments of which he thereby acknowledged receipt, assigned the applicant's said reversionary interest to Mrs. Combe. On June 29, 1930, the applicant obtained his discharge, and the original registration of the receiving order under the Land Charges Act, 1925, expired on May 10, 1932. Mrs. Combe assigned the properties in question to the applicant and he was registered as proprietor of Oaklands Park on Apr. 11, 1934, and of Brook Meadows on June 4, 1942, with an absolute title at the Land Registry. In June, 1946, the applicant entered into a contract to sell these properties to Lord Swaythling, but Lord Swaythling repudiated the contract, and on Aug. 27, 1946, the applicant began proceedings for specific performance. B C

On Dec. 6, 1946, Lord Swaythling's solicitors, Gilbert Samuel & Co., addressed the following letter to the Chief Land Registrar: D

We are acting for Lord Swaythling, who in June, 1946, contracted to purchase the above property [i.e., Oaklands Park and Brook Meadows] from Capt. Harvey A. B. Combe. The matter is now the subject of litigation as our client claims rescission of the contract on the ground that he was induced to sign the contract by a misrepresentation, and Capt. Harvey A. B. Combe is claiming specific performance . . . It appears from a search of the register of title that Capt. H. A. B. Combe secured registration of himself with an absolute title to the Sedlescombe Estate on Apr. 11, 1934. We are unable to understand how Capt. Combe would have been in a position to obtain such registration having regard to the vesting of his interests in the estate in the trustees and/or Official Receiver by reason of his bankruptcy. Inquiries at the Bankruptcy Court have elicited the fact that the interests that came to the trustees and/or Official Receiver have not been disposed of although they may well have been regarded as of no value at the time having regard to the charges secured thereon, but the existence of the charges would not of course affect the title to the equity. We should be much obliged if you would kindly investigate the matter, if possible without referring to Capt. Combe himself, or informing us before you contemplate communicating with him. If it would be of assistance we should be happy to call upon you by appointment. E F

On Dec. 11, 1946, Lord Swaythling's solicitors addressed the following letter to the Official Receiver: G

Dear Sir, We are acting for Lord Swaythling and enclose herewith a copy of a letter which we addressed on the 6th instant to the Chief Land Registrar. . . . The chief Land Registrar in answer to our letter of the 6th instant adopted the attitude that Capt. Harvey Combe had an absolute title, that the Registry could do no wrong, and if the Official Receiver had any claim he would have exercised that claim before now. The Land Registrar also pointed out that if he proved to be wrong in registering the absolute title the persons who had taken interests after the date of registration could be compensated out of the fund under his control. We trust that you will regard this letter as confidential and not communicate with Capt. Combe—at any rate without reference to us. If you decide to contest the registration on the information available then the matter will clearly come to Capt. Combe's knowledge, but if you do not contemplate taking any action then we should appreciate your not bringing the matter to Capt. Combe's attention. H

On Dec. 13, 1946, the day following the receipt of this letter, the Official Receiver applied for re-registration of the receiving order under the Land Charges Act, 1925, on a form which I will scrutinise later, but I will first describe the procedure for obtaining registration and its effect. I will then consider the powers of the

Official Receiver in connection with registration, and the circumstances in which he exercised or assumed the power to re-register the receiving order in question. Finally, I will give my reasons for vacating the registration and for making the order as to costs which I feel bound to make.

By the Land Charges Act, 1925, s. 6 (1), (3) and (5) :

A (1) There may be registered in the register of writs and orders . . . (c) any receiving order in bankruptcy made after the commencement of this Act, whether or not it is known to affect land. (3) The registration of a writ or order in the said register ceases to have effect at the expiration of 5 years from the date of registration, but may be renewed from time to time, and, if renewed, shall have effect for 5 years from the date of renewal. (5) The registration of a writ or order affecting land may be vacated pursuant to an order of the court or a judge thereof.

By s. 23 (1) :

B As respects pending actions, writs, orders, deeds of arrangement and land charges (not including local land charges) required to be registered or re-registered after the commencement of this Act, this Act shall not apply thereto, if and so far as they affect registered land, and can be protected under the Land Registration Act, 1925, by lodging or registering a creditor's notice, restriction, caution, inhibition or other notice.

By s. 19 (2)—and this is a very important provision :

C As respects the registration and re-registration . . . (b) of a receiving order in bankruptcy as an order affecting land ; rules may be made under and in the manner provided by the Bankruptcy Act, 1914, s. 132, as if the registration and re-registration were required by that Act.

By the Land Registration Act, 1925, s. 61 (3) and (4) :

D (3) The registrar shall, as soon as practicable after registration of a receiving order in bankruptcy under the Land Charges Act, 1925, enter an inhibition (in this Act called a bankruptcy inhibition) against the title of any proprietor of any registered land or charge which appears to be affected. (4) From and after the entry of a bankruptcy inhibition (but without prejudice to dealings with or in right of interests or charges having priority over the estate or charge of the bankrupt proprietor), no dealing affecting the registered land or charge of the proprietor, other than the registration of the trustee in bankruptcy, shall be entered on the register until the inhibition is vacated as to the whole or part of the land or charge dealt with.

E Section 144 (1) provides : " Subject to the provisions of this Act, the Lord Chancellor may " with certain advice and assistance which I need not particularise " make general rules " for the purposes mentioned in that section.

The Land Registration Rules, 1925, r. 180, provides :

F A bankruptcy inhibition shall be entered in the Proprietorship Register in the following form, " Bankruptcy Inhibition. No disposition or transmission is to be registered until a trustee in bankruptcy is registered," and notice of the entry shall be given to the proprietor.

By r. 181 :

Where . . . (e) the bankruptcy proceedings do not affect or have ceased to affect the statutory powers of the bankrupt under the Act, the registrar shall, as soon as practicable after receiving notice thereof and after making such inquiry and giving such notice (if any) as he shall deem necessary, take such action in the matter as he shall think advisable.

G The Bankruptcy Rules, 1915, r. 181A, provides :

On the making of a receiving order the Official Receiver named therein shall as soon as he is notified of the making of such receiving order or in the case of a stay of advertisement forthwith after such stay has ceased to operate give notice of the same to the Chief Land Registrar with a request that such receiving order may be registered in the register of writs and orders affecting land.

H Form 33A is the form applicable to such a notification. After formal parts it states :

A receiving order was made on the (—) day of (—) against the above-named debtor. The petitioner is (—). I hereby apply for registration thereof in the register of writs and orders affecting land pursuant to the Land Charges Act, 1925, s. 6.

Then it is dated and signed by the " Official Receiver attached to the above-named court," i.e., the court in the title, and it is addressed to the Chief Land Registrar.

Counsel for the applicant has submitted that the Land Charges Act, s. 6 (3), is only available if the application for renewal is made before the expiration of the original registration, but I shall assume, without deciding, that this is not so. The Official Receiver, however, derives his powers as such from the Bankruptcy Act, 1914, and while the Land Charges Act, 1925, contemplates that rules may be made under the Bankruptcy Act, 1914, not only with regard to registration, but also with regard to re-registration, it is conceded that no rules of the latter class have ever been made. Rule 181A could not justify registration in 1946 of a receiving order made in 1927. The absence of any rule providing for re-registration is remarkable. It may well be that in certain circumstances the Official Receiver ought to be given an express power of re-registration, but, if so, its use after the discharge of a bankrupt might require restriction, because discharge ought, so far as practicable, to allow the bankrupt to rebuild his reputation, and it is a strong measure automatically to attach to any registered land which he may acquire after his discharge an inhibition in the following form: "No disposition or transmission is to be registered until a trustee in bankruptcy is registered"—an inhibition couched in language singularly inappropriate to the case of a bankrupt already discharged. Moreover, if it is desirable to empower the Official Receiver to take this serious step merely by way of precaution pending inquiry even in cases where there is no suggestion that any asset has been concealed in the bankruptcy, there would seem to be a need for some easier method of vacating the registration in circumstances such as have arisen in the present case than an application to this court, and, admittedly, there is none. In these circumstances the absence of rule suggests absence of power. Again, Mr. Jackson, the examiner who deals with revived cases, has never known a case of re-registration before, and he proceeded to adapt for the purpose of this case a form which is not appropriate to re-registration. This is the form, as he adapted it: "*Re Harvey Alexander Combe*. Surname, Combe. Christian names, Harvey Alexander. Address and description: Oaklands, Sedlescombe, in the county of Sussex. A receiving order was made on May 10, 1927, against the above-named debtor. The petitioner is M. Dunn, Ltd., whose registered office is situated at . . ." They were the petitioners in 1927, and I suppose technically still are, though the bankrupt has been discharged. "I hereby apply for"—and then "registration" is struck out and "re-registration" is written in its place—"re-registration in the register of writs and orders affecting land pursuant to the Land Charges Act, 1925, s. 6. Dated Dec. 13, 1946." That is signed by "the Official Receiver attached to the above-named court" and it is addressed to the Chief Land Registrar. Accordingly, I am doubtful whether the Official Receiver had power to do what he did, and the general question of re-registration of receiving orders appears to merit consideration and elucidation.

If, however, the Official Receiver has power to re-register receiving orders, it is a power which ought to be exercised with great care and a sense of responsibility, at any rate after the bankrupt has been discharged. How was it exercised in the present case 16 years after discharge? Mr. Jackson received Lord Swaythling's solicitors' letter on Dec. 12, 1946, and he immediately started to search available records. He ascertained from a record book that the asset had been disclosed and from the court file that there was no entry in the trustee's accounts to represent any proceeds of sale of the asset. He then sent a requisition to the records keeper for the trustee's file and was informed that it had been destroyed by enemy action. When he found that the file, which should either confirm or remove his suspicion that the asset had been overlooked or treated as worthless, had been destroyed, it never occurred to him to ask the admittedly honest discharged bankrupt for an explanation or to look for other sources of information. In fact, there were at least two other possible sources, the Official Receiver's file which was in store at Ponders End and a certain book which Mr. Jackson thought of after the re-registration had been effected and which did contain some relevant entries. Instead, he went off to the solicitors who have advised the Official Receiver in this case, and on their advice, after only one day's inquiry, re-registered this ancient receiving order on Dec. 13, 1946. A novel step of this serious character could hardly have been more lightly taken. It appears that Mr. Jackson knew (i) that the reversionary interest had been disclosed by the applicant in his bankruptcy, (ii) that his informants were by

no means disinterested, (iii) that Mr. Salaman's papers had been destroyed by enemy action. He had, it is true, one ground for suspicion, in that Mr. Salaman's account which he had found showed nothing which could represent the price of the reversionary interest. This is still unexplained, but he knew that it had been Mr. Salaman's duty to realise the asset for the benefit of the creditors and that he was an experienced trustee, and he knew that the applicant had obtained registration with an absolute title at the Land Registry, and he knew how to get in touch with him to ask for an explanation. Moreover, there was no special reason for urgency seeing that (as he knew) litigation was pending about the sale of the land. He ought, in my judgment, in such circumstances to have made inquiries of the applicant, and to have completed his own investigations, before attempting to re-register this very old receiving order. The haste with which he acted puzzles me. I acquit him without hesitation of any intention to assist Lord Swaythling's solicitors to the detriment of the applicant, but he should, in my judgment, have been on his guard against such a possibility, and he was not. Moreover, he clearly underrated the serious consequences of the unique step which he was taking. It is only fair to him to recall that he told me that he acted on the advice of solicitors. As he stated in evidence that the registration of the receiving order no longer served any useful purpose, I can have no hesitation in ordering it to be vacated. Its presence on the register to-day and the inhibitions at the Land Registry which automatically flow from it cannot but damage the credit of the applicant and violate the spirit of the bankruptcy law. The applicant was discharged some 16 years ago, and the Official Receiver has expressly disclaimed any suggestion that he concealed any assets in his bankruptcy.

The only question of any difficulty is whether I ought to order the Official Receiver to pay the applicant's costs. The Official Receiver, through one of the officers of his department and on legal advice, having or assuming a power which ought always to be exercised with particular care, exercised it without sufficient care, without adequate inquiry, and with undue haste. Moreover, when it became apparent to him or his officer or advisers that the maintenance of the registration was unnecessary for any purpose of his, but was embarrassing the applicant, he gave him no assistance to secure its removal, but, on the contrary, at the outset opposed this motion. On these grounds I must order him to pay the applicant's costs.

Order accordingly.

Solicitors: *N. A. Woodiwiss & Co.* (for the applicant); *Tarry, Sherlock & King* (for the Official Receiver).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

DAILEY v. DAILEY (otherwise SMITH).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), Mar. 26, Apr. 2, 1947.]

Divorce—Nullity—Maintenance—Conduct of parties—Matters to be taken into consideration—Refusal of intercourse by wife without contraceptives—Assent of husband—Ignorance of parties of legal position—Age of wife at time of decree—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190 (1).

The parties went through a ceremony of marriage on Dec. 22, 1926, and on Aug. 16, 1946, the husband's decree *nisi* of nullity on the grounds of the wife's refusal to consummate the marriage was made absolute. The husband, whose petition was based on the wife's refusal to permit sexual intercourse without the use of contraceptives, had reluctantly agreed to this course for the first 2 years, but afterwards had always desired full intercourse, but the wife persistently refused, and intercourse with the use of contraceptives continued.

The husband had an income of about £1,500 a year, mainly derived from his business, and the wife was able to earn £260 a year as a shorthand typist. In his report on an application by the wife for maintenance, the registrar submitted that the husband should secure to her, for her life *dum sola*, the nominal sum of £52, less tax, and, in addition, should pay her during joint lives *dum sola* or till further order, maintenance at the rate of £75

a year, less tax. On a motion to affirm the registrar's order for maintenance:—

HELD: in considering the conduct of the parties, as directed by s. 190 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, it was necessary to have regard to the whole history of the case including the facts that for 19 years the husband had assented to the conditions made by the wife and had taken advantage of such limited intercourse as she would permit; that, the wife, at the age of 43, having devoted 19 years of her life to her husband, found herself, after all, still a single woman, having lost, or, at any rate, gravely impaired, such opportunities as she might otherwise have had of contracting another marriage or of following a career; that, until the decision in *Cowen v. Cowen* (4) ([1945] 2 All E.R. 197), the conduct of the wife was not known to either party to be a ground for relief, and this was relevant both to the degree of "guilt" on the part of the wife, which it was material to consider, and to the true appreciation of the husband's conduct for so many years. Both parties were unfortunate victims of their ignorance as to their true rights and obligations, and it would be unjust to treat the case as a simple one of a "guilty" wife who by her conduct had forfeited any right to ask for more than a compassionate allowance to save her from utter destitution. The husband should make some substantial provision for her, and the registrar's report would be confirmed.

[AS TO PROVISION FOR GUILTY WIFE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 787, 788, paras. 1246, 1247; and FOR CASES, see DIGEST, Vol. 27, pp. 500-502, Nos. 5357-5370.]

Cases referred to:

- (1) *Ashcroft v. Ashcroft and Roberts*, [1902] P. 270; 71 L.J.P. 125; 87 L.T. 229; 27 Digest 501, 5360.
- (2) *Gullan v. Gullan* (otherwise *Goodwin*), [1913] P. 160; 82 L.J.P. 118; 109 L.T. 411; 27 Digest 509, 5469.
- (3) *Edwards v. Edwards* (otherwise *Cowtan*), [1934] P. 84; *sub. nom.* *E.V.E.* (otherwise *C.*) (1934), 103 L.J.P. 37; 151 L.T. 36; Digest Supp.
- (4) *Cowen v. Cowen*, [1945] 2 All E.R. 197; [1946] P. 36; 114 L.J.P. 57; 173 L.T. 176; Digest Supp.
- (5) *Synge v. Synge*, [1901] P. 317; 70 L.J.P. 97; 85 L.T. 83; 27 Digest 375, 3631.

MOTION by the wife to confirm a registrar's report as to maintenance. The facts appear in the judgment.

R. Law (*R. J. A. Temple* with him) for the wife.

Laskey for the husband.

Cur. adv. vult.

Apr. 2. WILLMER, J., read the following judgment. In this case the material facts are as follows. The parties went through a ceremony of marriage on Dec. 22, 1926. On Oct. 9, 1945, the husband filed a petition for nullity on the ground of the wife's refusal to consummate the marriage. On Feb. 20, 1946, a decree *nisi* of nullity was pronounced by BARNARD, J., and this was made absolute on Aug. 16, 1946. The husband's petition, which was undefended, was based on the wife's refusal to permit sexual intercourse without the use of contraceptives. His case was that for the first 2 years he agreed, albeit reluctantly, to the use of contraceptives, but after that time he always desired, and his wife persistently refused, full intercourse. I understand, however, that sexual intercourse with the use of contraceptives continued—the husband unwillingly accepting this as the best that he could get. On Aug. 19, 1946, the wife obtained leave to enter an appearance limited to ancillary relief, and in consequence the present application has come before the court. The matter came before a registrar in the first instance, and he has made a report by which he submits that the husband should secure to the wife, for her life *dum sola*, the nominal sum of £52, less tax, to be secured as agreed between the parties, or (in default) as decided by a registrar, and that, in addition, the husband should pay during joint lives *dum sola*, or till further order, maintenance at the rate of £75 per annum, less tax. The registrar finds that the husband, who is a glucose and general produce merchant, has an income of about £1,500 a year, mainly derived from his business. He finds that the wife, who has

experience as a shorthand typist, is earning and able to earn £260 a year. The wife is now 43 years of age, and the husband 46. The wife, although contending that the registrar's report errs on the side of leniency to the husband, invites me to confirm the report. The husband, however, alleges that the registrar's report proceeds on an entirely wrong basis, and contends that, in view of the circumstances of the parties, as they exist at present, the wife should receive no more than a nominal sum, and that, in any event, this is not a case for secured maintenance.

A The application is, of course, made under s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, and it is conceded on behalf of the husband that the court has jurisdiction to make the order proposed by the registrar, including an order for secured maintenance, even in favour of a "guilty" wife. It is contended, however, that to make such an order in favour of the wife in the present case would be a wholly novel departure from the previous practice of the court and irreconcilable with the principles previously applied. B The argument for the husband may be summarised as follows. The wife in this case is a "guilty" wife, in the sense that it was due to her fault that the marriage was never consummated. It is not material to enquire as to the degree of her fault. It is enough that she is a guilty wife, and she can be in no better position than a wife who has committed adultery or has been guilty of any other matrimonial offence. C A "guilty" wife is not entitled as of right to come to the court and ask for maintenance. All she can expect is a compassionate allowance, and such an allowance ought to be no more than will be sufficient to save her from absolute destitution. In the present case there is no question of the wife being destitute since she is a trained shorthand typist, is at present in lucrative employment, and is still of an age when she can look forward to earning her own living for many years to come. In the circumstances the most that should be awarded to the wife is a nominal amount, sufficient to preserve her right to come back to the court hereafter and ask for an increase in the event of her ceasing to be able to earn her own living. D Reliance was placed on *Ashcroft v. Ashcroft* (1) in which an order for secured maintenance was, indeed, made in favour of a wife proved guilty of adultery, but only on proof that she was unable to earn her own living and was without means of subsistence.

E I was referred in the course of the argument to a number of other cases, but I confess that I have not been able to derive much assistance from them. I should, perhaps, mention two cases in which orders of one sort or another were made in favour of the wife in nullity suits. In *Gullan v. Gullan* (2) where the husband's income was about £1,050 a year, and the wife's about £40, an order was made for maintenance at the rate of £100 a year of which £50 a year was to be secured for the life of the wife. In this case both parties had alleged incapacity on the part of the other, and a decree was made against both. F In *Edwards v. Edwards* (3), after a decree of nullity on the ground of the incapacity of the wife due to invincible repugnance, the court made an order for payment of 10s. per week to be limited *dum sola* and to be reviewed in not more than two years' time. In this case, however, the court was dealing with parties of very limited means. The husband's income was only some £300 a year. The wife had no means, but she was only 31 years of age and was living with her mother. G The facts of these two cases were widely different from those of the present case, and, save that they show that the court has power in nullity cases to make an order of the type asked for, I can extract from them no statement of principle which will guide me in the decision of the present case.

The fact is that the present case is one of a type which has only recently—since the decision of the Court of Appeal in *Cowen v. Cowen* (4)—come into prominence, and it is not to be expected, therefore, that much guidance can be obtained from past decisions in other types of cases. My duty is to apply the provisions of the Act of 1925 to the new situation which has arisen in regard to cases of this type, and, more particularly, to the special facts of this particular case. The material words of s. 190 of the Act of 1925 are as follows :—

H (1) The court may, if it thinks fit . . . order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable . . .

Sub-section (2) provides that, in addition to or instead of an order for secured maintenance, the court may, if it thinks fit

... direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as the court may think reasonable ...

The court, therefore, has in each case a discretion to do what it thinks reasonable in the circumstances of the particular case, and in exercising that discretion it is enjoined to have regard to these particular circumstances: (1) the fortune of the wife, if any, (2) the ability of the husband, and (3) the conduct of the parties. I proceed, therefore, to examine the facts of this particular case with regard to these three points.

First, the wife has no fortune. She has nothing but her skill as a shorthand typist which enables her in present circumstances to earn £5 a week. She is, however, 43 years old, and her capacity to earn will not go on for ever. When, through age, sickness or infirmity, she ceases to be able to earn her own living, she will have nothing, and, unless an order is made, there will be no provision for her old age. She may or may not re-marry, but, in considering the probability or otherwise of this, her age must be taken into account. Secondly, the husband is earning a substantial income, and, having regard to his age, there is no reason why he should not continue to do so for many years to come. Such capital as he possesses, however, appears to be almost wholly invested in his business, and it must be remembered that any withdrawal of capital from the business to provide secured maintenance for the wife will adversely affect his capacity to maintain his income. Subject to this, however, the husband is clearly in a financial position to make substantial provision for the maintenance of the wife, if required. Thirdly, as to the conduct of the parties, it is, in my judgment, necessary to look at the whole history of the case. For the first 2 years after the ceremony the use of contraceptives was by consent, and the husband clearly had no ground for complaint against the wife's conduct. For the next 9 years of the marriage the wife's conduct was not such as to afford the husband any legal grounds for claiming relief. On the authority of *Synge v. Synge* (5) he could, if so minded, have left her without being deemed to have been guilty of desertion, but so far as I understand the facts he did not do so. He continued to live with her and to enjoy such intercourse as she would permit on her terms. On Jan. 1, 1938, the Matrimonial Causes Act, 1937, came into force, and for the first time the husband obtained a legal right to claim relief. Both parties, however, in common with the rest of the world, remained in ignorance of the true effect of s. 7 (1) (a) of the Act of 1937 until after the decision in *Cowen v. Cowen* (4) in the summer of 1945. Consequently, it was not until October of that year that the husband took any steps to seek relief. For 19 years, therefore, the husband assented to the continuance of the marriage, taking advantage of such limited intercourse as his wife would permit. In the result, the wife, at the age of 43, having devoted 19 years of her life to the husband, finds herself, after all, still a single woman, having lost, or, at any rate, having gravely impaired, such opportunities as she might otherwise have had of contracting another marriage or of following a career. It is true that this result has been brought about by her own conduct, but I think it must be stressed that it was conduct which neither party recognised as conduct affording the husband grounds for relief until late in 1945. When, therefore, I am invited to take into consideration the conduct of the parties, I must say that I see a considerable distinction between the conduct of this wife and that of a wife who commits adultery or any of the well recognised matrimonial offences. I reject the argument that, in considering the conduct of a so-called "guilty" wife, it is not material to consider degrees of guilt. It seems to me vital to pay due regard to the fact that the conduct of the wife was not recognised by either party as affording grounds for relief until late in 1945. This is relevant both to the degree of "guilt" on the part of the wife and to the true appreciation of the husband's conduct in allowing the union to continue for 19 years before seeking relief. Both parties are, to my mind, unfortunate victims of their ignorance as to their true rights and obligations.

In these circumstances it would be, in my judgment, unjust to treat this as a simple case of a "guilty" wife who by her conduct has forfeited any right to

ask for more than a compassionate allowance to save her from utter destitution. I think it is a case in which the husband can and should make some substantial provision for the woman whom, for 19 years, he recognised and treated as his wife, and, in particular, I think it is a case in which proper provision should be made for the wife's old age, when she will cease to be able to earn her own living. I have carefully considered the terms of the order proposed by the registrar, and, paying due regard, as I am directed by the statute to do, to the fortune of the wife, the ability of the husband, and the conduct of both parties over the whole history of the case, I am not prepared to dissent from the proposals contained in the report. My order, therefore, will be that the registrar's report is confirmed.

Report confirmed.

Solicitors: *Whitfield, Byrne & Dean* (agents for *Whitley & Co.*, Liverpool (for the wife); *Layton & Co.* (for the husband).

[Reported by R. HENDRY WHITE, Esq., *Barrister-at-Law.*]

ROBINSON AND OTHERS v. MINISTER OF TOWN AND COUNTRY PLANNING.

C [COURT OF APPEAL (Lord Greene, M.R., Somervell and Wrottesley, L.JJ.), April 21, 22, 23, 24, May 12, 1947.]

Town and Country Planning—War damage—Re-development of land—Compulsory purchase—Order by Minister—Powers of Minister—Town and Country Planning Act, 1944 (c. 47), s. 1 (1).

D An order, under s. 1 (1) of the Town and Country Planning Act, 1944, declaring that land in an area of extensive war damage shall be subject to compulsory purchase for dealing with war damage, is made by the Minister of Town and Country Planning as an executive authority, and he is at liberty to base his opinion on whatever he thinks fit, whether obtained in the ordinary course of his executive functions or derived from what is brought out at a public inquiry, if there is one, and the Minister cannot be compelled to disclose the source of his information. The executive act, *i.e.*, the making of the order, is not a judicial or quasi-judicial decision, and cannot be controlled by the courts by reference to the evidence or lack of evidence at the inquiry, if one is held. The words "requisite" and "satisfactorily" in the sub-section clearly indicate that the question whether the Minister is satisfied that it is requisite for the purpose of dealing satisfactorily with extensive war damage that all or some part of the land in question should be laid out afresh and redeveloped as a whole is one of opinion and policy, matters which are peculiarly for the Minister himself to decide, and as to which, assuming always that he acts *bona fide*, he is the sole judge. No objective test is possible. It is a misconception of the purpose and effect of the order, of the powers of the Minister with regard to the making of the order, and of the relevance of the proposals of the planning authority, to say that the Minister can only be "satisfied" if at the time of the order he has before him evidence sufficient in law to entitle him to be so "satisfied." Different considerations apply in a case where a Minister can be shown to have overstepped the limits of his powers, as, *e.g.*, where the conditions in which they may be exercised are laid down in the statute and he purports to act in a case where those conditions do not exist. Section 1 (1) provides that the Minister must be satisfied that it is requisite that the land should be laid out afresh and redeveloped as a whole, and this need may exist although an existing building is not to be touched or is to be retained with a change of user.

Phoenix Assurance Co., Ltd. v. Minister of Town and Country Planning (2) ([1947] 1 All E.R. 454, not approved).

[EDITORIAL NOTE. In *Phoenix Assurance Co., Ltd. v. Minister of Town and Country Planning* (2) HENN COLLINS, J., held that the decision of the Minister, when making an order under the Town and Country Planning Act, 1944, was open to review by the court on the ground that he could not have been satisfied on reasonable grounds that

such an order was requisite for the purposes to which the section refers. In the present case the duty put on the Minister by s. 1 (1) of the Act is stated by the Master of the Rolls to be "one of opinion and policy as to which the Minister, assuming always that he acts *bona fide*, is the sole judge." In other words, his decision is purely administrative and he can base his opinion on whatever material he thinks fit, whether obtained in the ordinary course of his executive function or derived from the evidence at a public enquiry if there is one. In the court below a distinction was sought to be drawn between such cases as *Liversidge v. Anderson* (3), where the interpretation of the Defence Regulations was in question, and that of the Housing Acts, the Town and Country Planning Act, 1944, and the New Towns Act, 1946. HENN COLLINS, J., distinguished the two classes of cases on the basis that the Defence Regulations were temporary measures designed to meet the national emergency, while the statutes mentioned were part of the ordinary law, but SOMERVELL, L.J., points out in the present case that Parliament can confer the same unlimited discretion on a Minister for purposes other than war purposes. LORD GREENE, M.R., finds no assistance in the authorities stated. All the members of the court base their decision on the particular wording of s. 1 (1) of the Act of 1944. The Court of Appeal gave the applicants leave to appeal to the House of Lords.

FOR THE TOWN AND COUNTRY PLANNING ACT, 1944, see HALSBURY'S STATUTES, Vol. 37, p. 420.]

Cases referred to :

- (1) *Local Government Board v. Arlidge*, [1915] A.C. 120; 84 L.J.K.B. 72; 111 L.T. 905; 79 J.P. 97, H.L.; 38 Digest 217, 518; *revsg.* S.C. *sub nom.* R. v. *Local Government Board, Ex p. Arlidge*, [1914] 1 K.B. 160, C.A.;
- (2) *Phoenix Assurance Co., Ltd. v. Minister of Town and Country Planning*, [1947] 1 All E.R. 454; 176 L.T. 318.
- (3) *Liversidge v. Anderson*, [1941] 3 All E.R. 338; [1942] A.C. 206; 110 L.J.K.B. 724; 116 L.T. 1; Digest Supp.
- (4) *Point of Ayr Collieries v. Lloyd-George*, [1943] 2 All E.R. 546; Digest Supp.
- (5) *Re Bowman, South Shields (Thames Street) Clearance Order*, 1931, [1932] 2 K.B. 621; 101 L.J.K.B. 798; 147 L.T. 150; 96 J.P. 207; Digest Supp.
- (6) *Re Ripon (Highfield) Housing Order*, 1938, *White and Collins v. Minister of Health*, [1939] 2 K.B. 838; 108 L.J.K.B. 768; 161 L.T. 109; 103 J.P. 331; *sub nom.* *Re Ripon (Highfield) Housing Order*, 1938, *White and Collins' Application*, [1939] 3 All E.R. 548; Digest Supp.
- (7) *Errington v. Minister of Health*, [1935] 1 K.B. 249; 104 L.J.K.B. 49; 152 L.T. 154; 99 J.P. 15; Digest Supp.
- (8) *Price v. Minister of Health*, [1947] 1 All E.R. 47; [1947] L.J.R. 291; 176 L.T. 305.
- (9) *Minister of Health v. R., Ex p. Yaffe*, [1931] A.C. 494; 100 L.J.K.B. 306; *sub nom.* *R. v. Minister of Health, Ex p. Yaffe*, 145 L.T. 98; 95 J.P. 125; Digest Supp.

APPEAL by the Minister of Town and Country Planning from an order of HENN COLLINS, J., dated Feb. 20, 1947. The learned judge applied, in favour of the present respondents, Robinson and others, the principles laid down by himself in *Phoenix Assurance Co., Ltd. v. Minister of Town and Country Planning* (2), viz., that the Minister, before making an order under s. 1 (1) of the Town and Country Planning Act, 1944, must be satisfied on reasonable grounds that such an order was requisite for the purposes to which the section refers, the matter not being so peculiarly within the administrative capacity of the Minister that the making of the order was purely a matter for his discretion with the result that a court of law could not inquire into the grounds on which he satisfied himself or call his jurisdiction into question. The Minister appealed.

The Attorney-General (Sir Hartley Shawcross, K.C.) and H. L. Parker for the Minister.

J. Scott Henderson, K.C., and J. T. Molony for the applicants (the present respondents).

Cur. adv. vult.

May 12. The following judgments were read.

LORD GREENE, M.R.: This is an appeal by the Minister of Town and Country Planning from an order of HENN COLLINS, J., by which he ordered that the City of Plymouth (City Centre) Declaratory Order, 1946, being an order of the Minister made on the application of the city council of Plymouth as the local planning authority under sub-s. (1) of s. 1 of the Town and Country Planning Act, 1944 (which I will call "the Act") should be quashed in so far as it affected the freehold properties of the applicants situated in The Crescent in the City of Plymouth.

A Before the aerial bombardments of the city which took place during the late war, The Crescent consisted of a row of eighteen houses, numbered consecutively from east to west, which were approached by a private road running from Athenaeum Street to George Street. Beyond this private road there lay a private garden which was held by trustees for the benefit of the owners of the houses in The Crescent. The houses were, from the point of view of construction, residential in character although at all relevant times they were to a large extent used for professional purposes, mostly by members of the medical profession, or as flats and private hotels as well as for private residential purposes. Of these eighteen houses, six, *viz.*, Nos. 13 to 18 inclusive, were destroyed and one, No. 12, was badly damaged by enemy action. The nine houses or sites of houses owned by the several applicants are numbered 4, 8 to 12 inclusive and 14 to 16 inclusive. The applicants, therefore, between them own five undamaged houses, one damaged house and B the sites of three destroyed houses. The effect of the order of the Minister, of which the applicants complain, is to make all these nine houses or sites of houses, as part of a very large area in the centre of the city, subject to compulsory purchase.

C The provisions of the Act which are relevant to this appeal are of a very special character designed, as they were, to meet an unprecedented situation. At the time when the Act was passed many cities and towns in this country had suffered extensive damage over considerable areas from enemy action. It was obviously impossible, or, at any rate, most undesirable, to leave the rebuilding of these areas to the owners of the properties concerned, since the result of doing so would have been to destroy any possibility of proper and orderly replanning. The existing town planning legislation was clearly inadequate to cope with this state of affairs. The legislature evidently D thought (for the Act so provides) that the task of reconstruction on such an extensive scale should be committed to suitable local planning authorities and that they should be armed with compulsory powers of purchase as being the only satisfactory method of dealing with the situation. There was another circumstance which the legislature obviously had to bear in mind. When the Act was passed the war was not over. The task of formulating and settling a comprehensive scheme for the lay-out of considerable areas might be expected E to take a long time and a long time would be bound to elapse before work could be put in hand. Something clearly had to be done in the meantime in order to ensure that, when the time came to put a scheme into operation, the planning authority should not find that owners of property in the area had taken steps in relation to their property which might make it difficult or impossible to carry out. The situation demanded something in the shape F of what may, perhaps, be called a standstill order which could be made comparatively quickly and would effectively preserve, so to speak, the *status quo*. The particular machinery provided for this purpose by the Act is the power given to the Minister under s. 1 (1) to make an order declaring an area to be subject to compulsory purchase. Such an order must, under s. 17, be registered as a local land charge, and the effect of it is, of course, that no owner can deal with his land in the area save subject to the rights of compulsory G purchase conferred on the local planning authority. This is the position in which the applicants were placed by the order of which they complain and their object in these proceedings is to remove from their property the threat of compulsory acquisition by the city council of Plymouth.

The Act provides for a variety of other matters with which it is unnecessary to deal. The provision most immediately relevant to the present controversy is contained in s. 1 (1) and is as follows :

H Where the Minister of Town and Country Planning (in this Act referred to as "the Minister") is satisfied that it is requisite, for the purpose of dealing satisfactorily with extensive war damage in the area of a local planning authority, that a part or parts of their area, consisting of land shown to his satisfaction to have sustained war damage or of such land together with other land contiguous or adjacent thereto, should be laid out afresh and redeveloped as a whole, an order declaring all or any of the land in such a part of their area to be land subject to compulsory purchase for dealing with war damage may be made by the Minister if an application in that behalf is made to him by the authority before the expiration of five years from such date as the Minister may by order appoint as being the date when the making of such applications has

become practicable. A part of the area of a local planning authority as to which the Minister is satisfied as aforesaid is in this Act referred to as an "area of extensive war damage."

The procedural provisions in connection with the obtaining of an order under the sub-section may, so far as relevant, be summarised as follows: (a) Under sub-s. (4) at least two months before the application is made the authority must publish a notice in a local newspaper; (b) under sub-s. (5) the application must "designate" the land to which the application relates by reference to a map with or without descriptive matter; (c) under sub-s. (6) the application must be accompanied by a statement illustrated by a map, "for indicating the manner in which it is intended that the land in the area of extensive war damage should be laid out as respects its internal arrangement and in relation to the existing or intended lay-out of the surrounding locality, and the manner in which it is intended that such land should be used whether for purposes requiring the carrying out of development or otherwise"; (d) under sub-s. (7) if the Minister is satisfied that these particulars are adequate for enabling the "expediency of the making of an order" to be properly considered, he notifies the authority who must then advertise for objections; (e) under sched. I unless the Minister, apart from an objection (which must be accompanied by a written statement of its grounds), decides to refuse the application or to make an agreed modification to meet the objection, he must "consider the grounds of the objection as set out in the statement" and may call for a further statement. Under para. 4 of the schedule the Minister, "if satisfied that he is sufficiently informed, for the purpose of his deciding as aforesaid (sc. whether or not to make the order applied for), as to the matters to which the objection relates" he may decide to make the order without further investigation. Subject to this, the Minister (para. 5) must give the objector an opportunity of appearing before a person nominated by the Minister and, if the objector avails himself of this, a similar opportunity to the authority. Under para. 6, if it appears to the Minister that the matters to which the objection relates call for investigation by a public inquiry, he must cause such an inquiry to be held, in which case the requirements of para. 5 as to a private hearing need not be complied with; (f) under s. 1 (8), subject to the provisions of sched. I, the Minister may make the order with or without modification, except that he cannot extend the area unless all persons interested consent.

These requirements as to procedure were duly carried out in the following manner. The application was dated Feb. 8, 1946. There was annexed to it a map called a "designation" map (*i.e.* the map required by sub-s. (5) of s. 1 of the Act to "designate the land to which the application relates") on which the area comprised in the application, namely, 178 acres in the centre of the city, was shown edged and coloured red. For reasons which will be explained when I come to consider the language of sub-s. (1) this map was the only map which was referred to in the order now under challenge. Pursuant to sub-s. (6) the application was accompanied by a statement illustrated by four maps of which two only are before us—one of which shows, among other things, the then existing condition of the area as regards destruction or damage, and the other various purposes for which the buildings, etc., within the area were used before the damage occurred—and a lay-out plan. The statement and the lay-out plan show comprehensive proposals for laying out the area in a novel manner as the shopping, business and civic area of the city with various new streets and open spaces. The plan purports to show standing undamaged buildings by unbroken hatching, damaged buildings by broken hatching, and destroyed buildings by unhatched spaces. The plan shows a substantial number of existing buildings on which no work was proposed, including the houses Nos. 2-12 (inclusive), The Crescent. It also shows a proposed new road of a width (including foot-paths) of between 50 and 60ft. running roughly along the line of the existing private road and taking in part of the private garden and also part of the site of No. 1, The Crescent. Between the houses and the proposed foot-path a crescent-shaped space varying in depth from nil at the two ends to some 20ft. in the middle is shown. I should mention that the houses and sites of destroyed houses in The Crescent with their curtilages and what appear to be garages are situate at the extreme south-west corner of the area.

The applicants and other owners of land within the area sent in their objections, and the Minister caused a public local inquiry to be held by Mr. Warren, an inspector of the Ministry, whose report was duly made to the Minister. In his affidavit, the Minister states that, before deciding to make the order, he personally considered the objections and the report with a transcript of the shorthand notes of the proceedings at the inquiry. One paragraph of his affidavit is as follows :

- A** Before deciding to make the said order I personally carefully considered the objections of the applicants and the said report of the said Henry George Warren and the said transcript. I was satisfied that the premises known as Nos. 4, 8, 9, 10, 11, 12, 14, 15 and 16, The Crescent, Plymouth, had sustained war damage or were contiguous or adjacent to land which had suffered war damage and that it was requisite for the purpose of dealing satisfactorily with extensive war damage that the land included in the order should be laid out afresh and redeveloped as a whole.
- B** The order, which is dated Nov. 6, 1946, recites that the Minister was satisfied that an order should be made in respect of the land shown edged and coloured red on the " designation map " and ordered that the said land should be subject to compulsory purchase by the city council for the purposes of s. 1 of the Act.
- C** I need not set out the objections originally raised by the applicants since it will be sufficient to state their argument before this court. Their application to quash the order so far as it affected these houses and sites was made under s. 16 of the Act on the ground that the order was not within the powers of the Act and was invalid accordingly. Before I state the grounds on which the applicants attack the validity of the order, I must refer to certain statements in the evidence given at the public inquiry on which their whole case really rests. Mr. James Paton Watson, the city engineer, who was called on behalf of the city council, explained, in his evidence-in-chief, the defects of the pre-war
- D** lay-out of the city and the general principles on which the proposed lay-out shown in the lay-out plan had been designed. The statement submitted with the application indicated, he said, the use to which the area would be put. In cross-examination by counsel for the applicants, he made the statements with regard to the council's proposals in relation to The Crescent on which the applicants rely. They are set out in the affidavits of James Foulds Knappe and Alec Edward Sanders sworn on the motion and may be concisely summarised as follows :—The council liked the facades of the surviving buildings and proposed to leave them intact, and with regard to the destroyed buildings the intention was to reinstate as far as possible, but, with regard to interiors, it might be that The Crescent would be reconstructed behind the existing facade since the houses would not remain as dwelling-houses, but would be likely to develop into professional offices, hotels and boarding houses. It was very common
- E** practice to take the building depth adjacent to a road frontage. The land was being laid out afresh by bringing the road round the front. The proposal was to offer leases to the existing owners at rents based on the price to be paid by the council to acquire their property.
- F** I will now explain as best I can the reasons put forward on behalf of the applicants for saying that the order was invalid. Under sub-s. (1) of s. 1 of the Act, it was said, the Minister's power to make an order only arises when he is " satisfied " that for the purpose stated it is " requisite " that the area comprised in the order " should be laid out afresh and redeveloped as a whole."
- G** The purpose stated is that of " dealing satisfactorily with extensive war damage," and the area comprised in the order must consist of land as to which the Minister is satisfied that it has sustained war damage, either without or together with land contiguous or adjacent thereto. On this last-mentioned matter no question arises since the right of the Minister to be so satisfied is not challenged, the applicants'
- H** land consisting, as it does, of land which has suffered war damage together with land contiguous or adjacent thereto. But with regard to the other requirements specified in the sub-section it is said that the Minister can only be " satisfied " if at the time of the order he has before him evidence sufficient in law to entitle him to be so " satisfied." Here it is said that there was no such evidence before the Minister, but rather the only evidence brought to his mind so far as the court is informed, *sc.* the evidence given at the inquiry, is all the other way since, with regard to the surviving houses, they are to remain, while with regard to the destroyed houses, they are to be rebuilt ; that in neither

case was the Minister entitled to be satisfied, since, to leave standing houses as they are and to rebuild destroyed houses, does not involve a "layout afresh" or a "redevelopment," even if the intention is to change their user; and that, accordingly, the Minister was not entitled to take the view that The Crescent should be included in the area since he cannot in law have been satisfied that it was requisite to lay it out afresh or redevelop it.

These contentions are, in my opinion, based on certain fundamental misconceptions as to the purpose and effect of an order made under sub-s. (1) of s. 1, as to the powers of the Minister with regard to the making of an order, and as to the relevance of the proposals of the planning authority with regard to fresh layout and redevelopment as revealed in the statement and map which accompany the application or in the evidence given on their behalf at a public inquiry if the Minister decides to order one.

The first thing to notice is that the order of the Minister under sub-s. (1) is in no respect an order approving or confirming any proposals of the local planning authority as to fresh layout or redevelopment. The approval or confirmation of such proposals is not in any sense the issue submitted to him. Whether he approves or disapproves of any such proposals in whole or in part he may still make an order since the only thing of which the sub-section requires him to be satisfied is the requisiteness of laying out afresh and redeveloping as a whole an area of war damaged land (with or without contiguous or adjacent land) for the purpose of dealing satisfactorily with extensive war damage. He may well be satisfied as to this whatever the planning authority may propose as being its actual plans at the time of the application. Under the Act the Minister has effective control of the form which the layout and redevelopment ultimately is to take since at a later stage he can, *e.g.*, refuse to give authority for compulsory purchase (as to which see s. 31) and can withhold money grants under s. 5. But at this stage all he is concerned with is the making of what I have roughly described as a standstill order declaring the land to be subject to compulsory purchase. It is true that by sub-s. (6) of s. 1 the planning authority must indicate the manner in which it intends to lay out the land and the manner in which it is intended that it shall be used, but this indication is not for the purpose of obtaining the approval of those intentions. It can only be for assisting the Minister in coming to the conclusion which sub-s. (1) requires him to come to before making an order, *viz.*, the requisiteness of laying out afresh and redeveloping the land for the purpose of dealing satisfactorily with extensive war damage, or, to quote the language of sub-s. (7) "for enabling the expediency of the making of an order to be properly considered." The fact that a practical proposal is put before him will clearly help him in his deliberations even though it may not be the proposal finally adopted. In the present case the "designation map" referred to in the order illustrates exactly what the order does and what it does not do, since it consists of a map of the relevant portions of the city as it existed before the war with the area subjected to compulsory purchase marked in red, and has no indication whatever of any proposed fresh layout or redevelopment. If the order had purported to sanction any such layout or redevelopment it would clearly have been *ultra vires* the sub-section.

The extraordinary result to which the argument would lead can be seen from the fact that it was admitted that the intentions of the council as to layout and redevelopment can always be changed. The result of this admittedly would have been that, had they indicated an intention to pull down the surviving houses and build, *e.g.*, municipal offices on the site of The Crescent—an unquestionably fresh layout and redevelopment—they could, the day after obtaining an order, have changed their minds and decided to do what they now are proposing to do, in which case the validity of the order could not have been impugned.

There is another matter worth pointing out. An area may, apparently, be constituted an "area of extensive war damage"—*sc.* an area as to which the Minister is satisfied that it is requisite that it should be laid out afresh and redeveloped as a whole for the purpose of dealing satisfactorily with extensive war damage—quite independently of the making of the application for an order under sub-s. (1). This appears from, *e.g.*, sub-ss. (2) and (3) of s. 2. Such an area is so constituted by the mere fact of the Minister being, in fact, satisfied as to the matters specified. As in such a case no procedure is laid

down in respect to the process of bringing about the state of satisfaction, it is manifest that it may be brought about by, *e.g.*, inquiries made on behalf of and advice given to the Minister from within or without his department. What, according to the argument for the applicants, is to be the position where the Minister has so satisfied himself and an order under sub-s. (1) is subsequently applied for and a public inquiry is directed? Is he to put out of his mind altogether the conclusion that he has already formed and start *de novo*? That is the answer given by counsel for the applicants, but, in my opinion, it stands self-condemned. Such a requirement would be completely impractical and might result in the position that an area might be an area of "extensive war damage" for the purposes of sub-ss. (2) and (3) of s. 2, but could not become such an area for the purposes of sub-s. (1) of s. 1. I do not mean that it is not competent to the Minister to change his mind as the result of matters ascertained in the course of dealing with the application and objections thereto. Theoretically he could, no doubt, do so, although it is for obvious reasons highly improbable that he would, since it is not to be expected that he would lightly have allowed himself to be satisfied in respect of an area when in his position as Minister he must clearly have been able to procure for himself all relevant material and command all necessary expert advice. The point, however, is not whether theoretically he might change his mind, but whether he would be bound to do so, or rather, whether the court would be bound as a matter of law, as the applicants say, to treat him as not having been satisfied for the purposes of sub-s. (1) unless he was prepared to disclose to the court his reasons for being satisfied, with the consequence that the court would be left to judge whether in those reasons was to be found sufficient evidence to support the order.

I will now turn to the matters with regard to which the Minister must be satisfied before he makes the order. They fall into two classes. First, it must be shown to his satisfaction that a particular state of facts exists, *viz.*, that a part (or parts) of the area of the local planning authority consists of land which has sustained war damage or of such land together with other land contiguous or adjacent thereto. As I have said, no question is raised as to the propriety of the Minister's conclusion on this point, and I need say nothing more about it. The other class of matter is, in my view, one of opinion and policy as to which the Minister, assuming always that he acts *bona fide*, is the sole judge, *viz.*, he must be satisfied that it is requisite for the purpose of dealing satisfactorily with extensive war damage that all or some part of the land in question should be laid out afresh and redeveloped as a whole. The words "requisite" and "satisfactorily" clearly indicate that the question is one of opinion and policy, matters which are peculiarly for the Minister himself to decide. No objective test is possible. If confirmation of this view is sought, it is to be found, *e.g.*, in the provisions of sched. I under which the Minister, although bound to consider objections, is entitled to make his decision without any private hearing or public inquiry. In making his decision, he may obviously be guided by his own views as to what is "expedient" for the purpose of dealing "satisfactorily" with extensive war damage, assisted, of course, by any advice which he may obtain from his own staff or from outside advisers, but the decision and the principles and policy which lead him to it are such as commend themselves to him. This cannot be affected by the fact that he decides to order a public inquiry. The object of such an inquiry under sched. I can only be to elucidate matters upon which he desires to be better informed. Nothing that is said or done at it can bind his discretion although it may have some bearing on the question of *bona fides*. In exercising his discretion he cannot be confined to the evidence given at the inquiry. Such matters form only part of the considerations which he is entitled to take into account. He may have and is entitled to have present to his mind his own views as to general policy as well as material acquired in a purely executive capacity, such as reports and opinions obtained from sources within or outside the Ministry.

In the end counsel for the applicants was constrained to admit the right of the Minister to be guided by matters brought to his mind in his executive capacity, even if they are different from and inconsistent with evidence given at the public inquiry, but he put his argument in this way. The matter as to the requisiteness of which for the purpose indicated the Minister is to be

satisfied is the necessity of laying out the land afresh and redeveloping it as a whole. On the face of the lay-out plan itself, coupled with the evidence given on behalf of the city council at the inquiry, it appears (so the argument runs) that there is no intention of laying out or redeveloping The Crescent, that, so far as the court is informed, the Minister had no other materials before him, and that on these materials alone it was impossible in law for him to be satisfied as to the stipulated requisiteness. Then it was said that, admitting his right to take into consideration other materials obtained *dehors* the inquiry, he was only entitled to be guided by them if he had communicated them to the objectors so as to give them an opportunity of dealing with them. If his obligation did not go so far as this, then it was said that when his order was challenged the court was bound to assume that he had no other materials unless he condescended to give evidence to the effect that he did have them and as to what they were. In the result, as no such evidence was given in the present case, the court had no option save to hold the order to be invalid as not having the necessary foundation to give it validity in point of law.

There are, as it appears to me, a variety of grounds on which this argument should be rejected. It imports an objective test into a matter to which such a test is entirely inappropriate, since it leaves it to the court to decide what matters are and what are not sufficient to justify a conclusion as to requisiteness. This is necessarily so, since the question which, according to the argument, the court has to propound to itself will be: Was the evidence before the Minister such as to entitle him to be satisfied on the point of requisiteness?, and this is to substitute a test formulated, in some unexplained manner and according to some unascertainable principle, by the court itself for the opinion of the Minister to which the language of the sub-section commits the decision. Again, the argument is based on the misconception, to which I have already referred, as to the part to be played by the proposed layout which, at the time of the inquiry, is in the mind of the planning authority. Evidence given as to that has, for reasons already explained, which I need not repeat, a purely collateral bearing on the matter as to which the Minister has to decide. Further, the suggestion that in such a case as the present the Minister is bound to fail before the court unless he leads evidence as to the materials which he has before him over and above those used or given in evidence at the inquiry is, in my opinion, quite inadmissible. Let it be granted that the inquiry, if and when ordered, must be conducted on proper principles as being what is loosely called a "quasi-judicial" proceeding—an expression well adapted to mislead unless the context in which it is used is kept closely and accurately in mind—but the fact that an inquiry has been held and certain evidence given at it cannot, in my judgment, be used to force the Minister, directly or indirectly, to reveal matters of fact or opinion which come to his knowledge in his administrative capacity. The quasi-judicial capacity in which he is loosely said to stand in relation to the inquiry is non-existent as regards matters not connected with the inquiry. Such matters concern, and concern only, his administrative capacity and the use that he makes of them in coming to his decision is a matter for him and him alone. I am speaking, of course, of the meaning and effect of this particular statute, but the proposition is in general true that a minister cannot be compelled to disclose to the court material which has come to him in his executive capacity. If this were not so, consequences most detrimental to the public interest would ensue as was pointed out by LORD SHAW in *Local Government Board v. Arlidge* (1) ([1915] A.C. 137). The argument in the present case is, in effect, that, unless the Minister satisfies the court that he had sufficient material *dehors* the inquiry to justify his satisfaction, he must inevitably fail, which amounts to saying that he must choose between disclosing at least the general nature of what it might be most detrimental to the public interest to disclose and losing his case.

I have dealt, on this branch of the argument, with what is the point of importance, but it must not be taken from this that I accept the initial proposition that the layout plan coupled with the evidence given at the inquiry did, in truth, negative any present intention on the part of the city council to lay out afresh and redevelop The Crescent. On this matter I need only mention the following considerations. The sub-section deals with the laying out afresh and redevelopment of the area as a whole. These words

could not, in my opinion, mean that an existing building which it is not intended to touch would have to be excluded. As the Attorney-General put it in reply, it is not the redevelopment of the whole area but the redevelopment of the area as a whole which is contemplated. An existing building may well be worked into a fresh layout of the area as a whole. Indeed, there are provisions in the Act which contemplate that an undamaged building may be included in an area subjected to an order under sub-s. (1)—see, *e.g.*, the opening words of the proviso to sub-s. (4) which refers to land comprised in an order which “has not sustained war damage.” Again, I cannot accept the proposition submitted by counsel for the applicants that a change of user provided for under a scheme cannot amount to a fresh layout or redevelopment. The concluding words of sub-s. (6) of s. 1 appear to shew that it can. Again, the evidence given on behalf of the council at the inquiry appears to shew the proposal to be to keep only the facade of The Crescent. Lastly, I must not be taken to agree to the proposition that the reconstruction of a destroyed building in its original form cannot form part of a fresh layout and redevelopment as a whole of an area of extensive war damage. I will not take up time in a more detailed discussion of these matters.

A number of authorities were referred to in which the powers and duties of Ministers under statutes dealing in different language with different classes of subject-matter were discussed and observations were made as to their powers and duties when acting in a quasi-judicial capacity. I am basing this judgment on the particular provisions of this statute in their application to this particular subject-matter, and I do not find anything in the decisions cited which either assists or impedes me to such an extent as to make it necessary for me to examine them. As an example of the difference to be found in the subject-matter dealt with in different statutes, I may point out that this case is different from a case where a Minister is given the duty of hearing an appeal from an order such as a closing order made by a local authority. This is not the case of an appeal. It is the case of an original order to be made by the Minister as an executive authority who is at liberty to base his opinion on whatever material he thinks fit, whether obtained in the ordinary course of his executive functions or derived from what is brought out at a public inquiry if there is one. To say that, in coming to his decision, he is in any sense acting in a quasi-judicial capacity is to misunderstand the nature of the process altogether. I am not concerned to dispute that the inquiry itself must be conducted on what may be described as quasi-judicial principles, but this is quite a different thing from saying that any such principles are applicable to the doing of the executive act itself, *i.e.*, the making of the order. The inquiry is only a step in the process which leads to that result, and there is, in my opinion, no justification for saying that the executive decision to make the order can be controlled by the courts by reference to the evidence or lack of evidence at the inquiry which is here relied on. Such a theory treats the executive act as though it were a judicial decision (or, if the phrase is preferred, a quasi-judicial decision) which it most emphatically is not. How can this Minister, who is entrusted by Parliament with the power to make or not to make an executive order according to his judgment and acts *bona fide* (as he must be assumed to do in the absence of evidence to the contrary), be called on to justify his decision by proving that he had before him materials sufficient to support it? Such justification, if it is to be called for, must be called for by Parliament and not by the courts, and I can see no ground in the language of the Act, in principle or in authority, for thinking otherwise. As I have already indicated earlier in this judgment, the argument on behalf of the applicants necessarily involves in the last resort substituting the opinion of the court for that of the Minister. Different considerations, of course, apply in a case where a Minister can be shown to have overstepped the limits of his statutory powers, as, *e.g.*, where the conditions in which they may be exercised are laid down in the statute and he purports to act in a case where those conditions do not exist. The applicants’ attempt to bring the present case into that category fails, as I have said, on the true construction of the statutory powers conferred.

HENN COLLINS, J., delivered a very short judgment, since, in his opinion, the principle which he had considered to be applicable in the case of another objector, the Phoenix Assurance Co., Ltd., (see *Phoenix Assurance Co., Ltd. v.*

Minister of Town and Country Planning (2)), also applied to the present case. My reasons for differing from the view taken by the learned judge will, as I think, be sufficiently clear from what I have already said and I hope that I shall not appear disrespectful if I do not subject it to any further examination. The appeal is allowed with costs here and below.

SOMERVELL, L.J. : On Feb. 8, 1946, the council of the city of Plymouth, being the local planning authority (hereinafter referred to as the authority), applied to the Minister of Town and Country Planning for a declaratory order under s. 1 (1) of the Town and Country Planning Act, 1944, in respect of an area in the centre of the city which had suffered extensive war damage. The application was, in accordance with s. 1 (6), accompanied by a map "indicating the manner in which it is intended that the land in the area" should be laid out. It has also to be accompanied by a map under s. 1 (5) "designating" the area to be covered by reference to a map.

The Minister, under s. 1 (1), can, on application by a local planning authority, make an order covering an area shown to his satisfaction to consist of land which has sustained war damage together with other land contiguous or adjacent thereto, if he is satisfied that it is requisite for the purpose of dealing with extensive war damage in the area that it should be laid out afresh and redeveloped as a whole. The effect of the order is to declare all or any of the land in the area to be land subject to compulsory purchase. If the Minister is satisfied that the particulars submitted are adequate for enabling the expediency of the making of the order to be properly considered there are provisions under s. 1 (7) for publication and notices. Objections can then be submitted and sched. I provides for various procedures which the Minister can adopt when objections are made. It is not necessary to refer to all of them. Under para. 4 of the schedule, if he is satisfied that he already has sufficient information as to the matter to which the objection relates for the purpose of deciding whether to make the order with or without modifications, he can so decide without further investigation. Under para. 5 he can afford the objector an opportunity of being heard by a person appointed by him, the authority making the application being given the opportunity of being heard on the same occasion. Under para. 6, if it appears to the Minister that the matters to which the objection relates are such as to require investigation by public local inquiry "he shall cause such an inquiry to be held." These provisions are on the basis that the Minister may have information, irrespective of any inquiry, which he may regard as sufficient for dealing with the objection. It is only if, in his opinion, that information is or may be insufficient that he causes a public inquiry to be held. It is a means by which he can, if he thinks fit, obtain further information before coming to his decision.

In the present case there was a number of objectors including the applicants in the present proceedings. The Minister decided to have a public local inquiry which was held at the end of April and beginning of May, 1946. On May 27 Mr. Warren, who held the inquiry, reported to the Minister. On Nov. 6, 1946, the Minister made the order covering the area as originally submitted by the authority. On Dec. 5, 1946, the present applicants applied to the High Court for an order "that the declaratory order be quashed so far as it affects the freehold property of the applicants." The applicants are the owners of nine houses in a block known as The Crescent. Three of their properties were destroyed by war damage, one other was damaged, the other five were undamaged. The notice states that the order is not within the provisions of the Act and that the requirements of the Act have not been complied with in that there was no evidence before the Minister on which he could have been satisfied, (c) that any of the applicants' said properties were within an area of extensive war damage within the meaning of the Act, (d) that it was requisite, for the purpose of dealing satisfactorily with war damage in the area embraced by the said declaratory order, or any part thereof, or, alternatively, in the city of Plymouth, that any of the applicants' said properties should be laid out afresh and redeveloped, and (e) that it was requisite for the purpose mentioned in (d) that any of the applicants' said properties should be laid out afresh and redeveloped in conjunction with adjoining lands. Counsel for the applicants did not rely on (a) and (b). The other paragraphs of the notice allege affirmatively that the

evidence established that the purpose of the authority was not to lay out the applicants' property afresh but to obtain the benefit of increased land values; that the applicants' property could be excluded without detriment to the laying out afresh and redevelopment; and that the only decision in law open to the Minister was to exclude the applicants' property.

A The relevant facts as to The Crescent are as follows. At present it abuts on a private road on the further side of which is a garden vested in trustees for the use of the owners of the houses in The Crescent. The various premises were, before the war, used partly as consulting rooms for doctors, partly for residential purposes, one wholly as offices and one as a private hotel. Under the authority's intended layout the private road and garden disappear, and The Crescent, which is on the boundary of the area, will abut on a main thoroughfare, on the other side of which will be a public open space. The intention of the authority, as appearing in the map and in the evidence given at the public inquiry, was to reconstruct the demolished houses with the old facade and probably in other respects as before. No. 1 (not owned by any of the applicants) was to be demolished as the proposed new road was to occupy part of the land on which it stood. The undamaged houses were to remain as at present.

B To return to the parts of the notice of motion which I have quoted. The form is one with which the courts are familiar in, e.g., appeals from decisions of the Special or General Commissioners on a Case Stated under the Income Tax Acts or on an appeal to this court from a decision of a county court judge. It would need, to my mind, clear words to entitle an aggrieved person to raise such issues before the court in challenging what is, in my opinion, under the words of the section a purely administrative decision by the Minister. The words relied on are the words in s. 16 which provide that the validity can be challenged on the ground that it is not within the powers of the Act. I think the Act gives the Minister the power to come to his decision as an administrative decision, which, no doubt, he can be called on to justify in Parliament, but which he cannot be called on to justify in a court of law on the ground that there was either insufficient or no evidence on which a reasonable man in the position of the Minister could so decide.

E Before considering the authorities I will refer to other provisions of the Act which seem to me to support this view. The applicants in submitting that there was no evidence, base their case on the documents and map submitted by the authority and the evidence given at the public inquiry. The Minister is not, as it seems to me, confined to this evidence. I have already referred to the provisions of sched. I. It is also clear that the fresh layout as submitted has no finality about it. The authority can alter it, and it in no way binds the Minister who has effective powers of control under s. 2 when an actual compulsory purchase order is asked for and under ss. 19 and 20. The Minister is not confirming an order made by an authority. He has to decide himself under the duties imposed on him by s. 1 of the Minister of Town and Country Planning Act, 1943. It is, as it seems to me, open to the Minister at this stage to take the view that the whole area should be included, although he may not regard the authority's plan for layout as final or necessarily adequate. He might think that The Crescent in this case, adjoining, as it now will, a main thoroughfare, should not be left as it is. It is, therefore, I think, impossible for the applicants to establish that there is no evidence unless the Minister can be compelled to produce his files and the report made to him, and disclose what was in his own mind. This, in my opinion, would be contrary to the provisions of the Act and to authority.

G The Attorney-General referred to and relied on *Liversidge v. Anderson* (3) and *Point of Ayr Collieries, Ltd. v. Lloyd George* (4). LORD ATKIN, in his dissenting opinion in *Liversidge's* case (3) ([1941] 3 All E.R. 353, 354), cites the expressions "is satisfied" or "satisfied . . . that . . . it is necessary or expedient" from defence regulations, other than that being considered, as expressions which made it "plain that unlimited discretion is given to the Secretary of State, assuming as everyone does that he acts in good faith." If reg. 18B which was under consideration had contained these words it is clear that LORD ATKIN would have agreed with the majority, and it is equally clear that the arguments on behalf of the appellant in that case were based on the fact that the regulation did not contain these words or words of similar

import, but the words "if the Secretary of State has reasonable cause to believe," words which, as LORD MAUGHAM said (*ibid.* 345), "in the absence of a context" should *prima facie* be construed as meaning "if there is, in fact, reasonable cause for believing." He and the other noble and learned Lords took the view that the words were capable of giving the Secretary of State an unlimited discretion and in their context did so. The other case referred to shows that the words "if it appears to the competent authority" give an unlimited discretion although dealing with matters in which the safety of the State was not, at any rate, so directly involved as in the regulation dealt with in *Liversidge's case* (3).

Counsel for the applicants submitted that the principle laid down in these cases must be restricted to Defence Regulations made under the Emergency Powers (Defence) Act, 1939, which gave power to make defence regulations for what may be described as war purposes. I do not so construe these authorities. Words in a statute, of course, must be construed in their context. It must, however, be obvious that Parliament can confer the same unlimited discretion on Ministers for purposes other than war purposes. Construing the words in their natural meaning and in the light of the authorities, I think Parliament has done so in this part of this Act.

In *Re Bowman* (5), SWIFT, J., left open the question whether under the Housing Act, 1930, the Minister's confirmation of a clearance order made by a local authority could be challenged by a person aggrieved on the ground that there was no evidence or material on which the Minister could have been reasonably satisfied. There are, to my mind, important differences between that Act and the present Act, which may result in a different construction on this point. I am not suggesting one way or the other whether they do, but there is nothing in what was said by SWIFT, J., in that case which assists the applicants here. We were also referred to *White and Collins v. Minister of Health* (6), but in the section being construed in that case there were no words such as "if the Minister is satisfied" or "if it appears to the Minister." The section relied on clearly limited the Minister's jurisdiction to authorise the acquisition of land by excluding certain lands, and it was open to a party to establish before the courts that land of which the Minister had purported to authorise the acquisition was within the excluded category. The case is worth a reference as showing the difference in language when matters are for a decision by the court on evidence and when matters are primarily, at any rate, to be decided by a Minister as a matter of his discretion and policy.

There is a further objection which on the particular facts of this case might logically come first. The argument for the applicants assumes that a unit of ownership cannot be included in the area covered by the order if it is to be left in its present condition, or, if it has been demolished, is to be reconstructed as it was before. I agree with the argument of the Attorney-General that this is to disregard the words "as a whole" in the phrase "should be laid out afresh and redeveloped as a whole." In other words, if the Minister is satisfied that the area as a whole should be laid out afresh, the whole area can be covered by an order although, in the Minister's view at this stage, certain buildings here and there might well be incorporated in the fresh layout in their existing or pre-damage condition. There is obvious convenience in this as the ideas of the Minister or the authority at the time when a s. 1 order is made are not final, and will take a considerable period before they can be acted on and the new layout completed. Circumstances may change and make a different layout desirable and some inconvenience might be caused if isolated units of ownership were omitted and had to be made the subject of further applications under other provisions of the Act. Counsel for the applicants based part of his argument on a submission that the Minister, having ordered a public local inquiry, became in a quasi-judicial position. This does not affect the point which I have already dealt with that the Minister is not confined to the evidence given at that inquiry. Reliance was placed on *Errington v. Minister of Health* (7). Under the Housing Act in question there the Minister had to hold a public inquiry if objections were not withdrawn. The position was different in this and other respects. The court held that the Minister could not, after the public inquiry had been held, receive *ex parte* statements from the local authority which were not communicated to the objectors, dealing with the subject-

matter of the objection as investigated at the inquiry. I am prepared to assume, without deciding, that that principle would apply to this Act, although there are considerable differences on which an argument that it is inapplicable could be based. There is, however, no evidence or suggestion that the Minister did in this case that which was held to invalidate the order in *Errington's* case (7). There are other cases, such as *Price v. Minister of Health* (8), in which documents received by the Minister from the authority some time before the public inquiry did not have to be disclosed to objectors.

A The learned judge delivered his main judgment in *Phoenix Assurance Co., Ltd. v. Minister of Town and Country Planning* (2), heard before this case. There is no appeal in that case, but the learned judge, in deciding in favour of the applicants in the present case, applied the principles he had laid down in the *Phoenix* case (2). He held that the words "is satisfied" *prima facie* mean satisfied on reasonable grounds. No doubt, Parliament always intends that a Minister should act reasonably, but this is a matter on which opinions may differ and the question is whether it is for the Minister or the courts to impose the standard. The learned judge took the view that he was entitled to inquire into the sufficiency of the grounds, and that, taking the evidence to which I have referred as the only evidence before the Minister, there was no evidence that the applicant's property was to be freshly laid out. I have, I think, sufficiently stated my reasons for coming to a different conclusion.

C It would be undesirable and impossible to formulate precisely what evidence and in what circumstances the courts might examine the Minister's decision under this Act or Acts with similar provisions. It has often been said in this class of case that the court will interfere if there is evidence of bad faith in the steps which lead up to the making of an order. LORD DUNEDIN, in dealing with an Act under which the Minister had power to confirm a scheme submitted by a local authority, said that, if one can find that the scheme is inconsistent with the provisions of the Act which authorises the scheme, the scheme will be bad (*Minister of Health v. R.* (9) ([1931] A.C. 503)). To take, no doubt, an impossible example under the present Act, if an authority submitted an application under s. 1 which shewed on the face of it that the area covered had suffered no or very little war damage and the Minister purported to make an order, it might be said that the application was not in accordance with the provisions of the Act, and, therefore, could not found the Minister's jurisdiction. I have added these observations in case anything I have said might be construed as laying down that in no case can a party succeed in proceedings under s. 16 except where some definite provision of the Act, such as the giving of notices, has not been complied with, or where he takes upon himself the burden of establishing bad faith. For the above reasons I think this appeal should be allowed.

F WROTTESLEY, L.J.: The Minister is entitled to make the order set out in s. 1 (1) in the following circumstances. It can only be made on the application of a local planning authority. It must deal with a part or more than one part of that authority's area. There is no question that both these conditions were fulfilled in this case. There must be shewn that the part under discussion consists of land which has sustained war damage. If other land is included in the part of the area, then it must be shewn that that other land is contiguous or adjacent to the land which has sustained war damage. These conditions also were fulfilled. Finally, the Minister must be satisfied that, for the purpose of dealing satisfactorily with extensive war damage to the authority's area, the part of the area, the subject of the application, should be laid out afresh and redeveloped as a whole. Once the Minister is satisfied as to this, he may make an order declaring the whole of the land in the part of the area subject to compulsory purchase for dealing with war damage, or he may so declare in regard to any part of the land inside the area. In this case he made an order comprising the whole of the area covered by the application.

H It is to be noted that the Minister, before making an order, must be satisfied that the part of the area designated needs to be laid out afresh and developed as a whole, and not that every piece of land inside the area should need this treatment. Even so, speaking for myself, I think that where a crescent of

dwelling-houses, with a private road running along the front of it, and a private garden beyond the private road, kept for the use and enjoyment of the householders, is so dealt with that the private road is abolished and a public ring road for industrial traffic substituted for it, the private garden is swept away to make room, partly for the ring road and partly for a public recreation ground, then that very area will have been laid out afresh and redeveloped. And that will be the case even if the existing facade be retained and the demolished houses replaced.

I test the matter in this way. I will suppose that the financial interest of the owners of the houses in The Crescent had lain in the opposite direction that that contended for. Can anyone picture that the town planning authority could claim successfully that The Crescent with its private approach road and its private garden was not laid out afresh, and so redeveloped as a whole, when both private approach road and private garden were swept away and a new thoroughfare at a different level was constructed so as to subtend what is left of the arc of The Crescent after abolishing one of its horns. If I am right in this, the applicants fail in what I may call the raw material of their objection. At the same time, had this not been the case, I agree with the MASTER OF THE ROLLS that the inquiry which the Minister chose to hold was an inquiry, not into the merits or demerits of the town planning authority's plan, but into the objections lodged by the applicants, among others, not to the layout plan, but to the designated area. And the propriety of the Minister's decision to declare this part of the authority's area subject to compulsory purchase is not to be challenged or tested in the courts by reference to what emerged in that inquiry as to the authority's proposed layout or the objects aimed at by the authority in designating the area. The Minister has other sources of information, and is not in any sense tied to that layout. I am far from saying that occasions may not arise where it will be demonstrated to the court that the conditions laid down in the Act under which the Minister may make a declaratory order have not been fulfilled, or even that the Minister has made an order which does not conform with the provisions of the Act. But this is not such an occasion. I agree that the appeal succeeds.

Appeal allowed with costs.

Solicitors: *Treasury Solicitor* (for the Minister of Town and Country Planning); *Gregory, Rowcliffe & Co.*, agents for *Bond, Pearce, Elliott & Knape*, Plymouth (for the applicants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Dictum of LORD GREENE, M.R., at p. 866, applied. SWINDON CORPN. v. PEARCE. [1948] 2 All E.R. 119.

TAYLOR v. BRIGHTON CORPORATION.

[COURT OF APPEAL (Lord Greene, M.R., Wrottesley, L.J., and Lynskey, J.), May 5, 6, 1947.]

Town and Country Planning—Resolution to prepare scheme—Scheme to include prohibition of use of land for certain purposes without consent of local authority—Validity—Town and Country Planning Act, 1932 (c. 48), ss. 1, 11.

The respondent council passed a resolution to prepare a planning scheme under the Town and Country Planning Act, 1932. While the resolution was still in force the appellant proposed to use as a fun fair premises in an area covered by the scheme. The council, as interim development authority, served on the appellant a notice under the Town and Country Planning (Interim Development) Act, 1943, s. 5, that it was their intention to prohibit the use of the premises as a fun fair on the ground, *inter alia*, that it was intended to provide in the scheme that the use of land for a fun fair should not be commenced without the consent of the council. It was contended on behalf of the appellant that, although the council could provide in a scheme for the absolute prohibition of the use of a site as a fun fair, it was not within their powers to prohibit such use conditionally on their consent being obtained:—

HELD: (i) since the legislative permission given by s. 1 of the Act of 1932 to make a scheme with the general object of controlling development of the land comprised in the area to which the scheme applied was in

extremely wide terms and would include the control of user of land by prohibiting a particular user, it would similarly include prohibition of user without consent, because to prohibit use without consent was just as much a manner of controlling development as was an absolute prohibition, and, therefore, on the true construction of the Act, the provision was one that could lawfully be included in the scheme.

(ii) provided a provision which was proposed to be inserted in a scheme was one that could lawfully be inserted therein, the question whether it was necessary or expedient (under s. 11 (1) (a) of the Act of 1932) to insert it was a matter, not for the court, but for the authority who had the ultimate control of the scheme (*i.e.*, the Minister, or, in the last resort, Parliament), and the court could decide only whether the proposal in question could lawfully be inserted in the scheme and not whether it was reasonable.

(iii) the fact that neither the authority who had control of the scheme nor the Minister was bound to insert in the scheme, when it was made, any provision for an appeal against a refusal of permission by the council for use of the land as a fun fair was not sufficient to limit the general language of the Act of 1932.

Decision of the Divisional Court ([1946] 2 All E.R. 492) *affirmed*.

[FOR THE TOWN AND COUNTRY PLANNING ACT, 1932, see HALSBURY'S STATUTES, Vol. 25, p. 470; and FOR THE TOWN AND COUNTRY PLANNING (INTERIM DEVELOPMENT) ACT, 1943, see *ibid.*, Vol. 36, p. 239.]

APPEAL from a judgment of a Divisional Court of the King's Bench Division (LORD GODDARD, C.J., HENN COLLINS and CASSELS, JJ.), dated July 30, 1946, and reported [1946] 2 All E.R. 492, by the appellant on a CASE STATED by Brighton justices on an appeal under the Town and Country Planning (Interim Development) Act, 1943, sched. I, para. 2. The facts appear in the judgment of LORD GREENE, M.R.

H. A. Hill and *D. P. Kerrigan* for the appellant.

H. B. Williams for the corporation.

LORD GREENE, M.R.: When the Town and Country Planning (Interim Development) Act, 1943, came into operation, there was in preparation under the necessary resolution a town planning scheme (known as the "Old Borough No. 2 Planning Scheme") for a certain area in Brighton. It was proposed to include in that scheme certain matters provided for in a resolution which the council had passed in Dec., 1944. The resolution was to the effect that the use of land for a fun fair should not be commenced without the consent of the council. The resolution defined what was meant by "fun fair." In 1945 the appellant started a fun fair on certain property, of which he was the lessee, which lay within the area of the proposed scheme, and on Jan. 16, 1946, the council of the county borough, pursuant to the provisions of s. 5 of the Act of 1943, served a notice on the appellant in which they stated that they were satisfied that it was necessary and expedient to do so and that they proposed not less than 28 days from the date of the service of the notice to prohibit the use of the appellant's land for the purpose of a fun fair on certain grounds, of which I need only mention the first, namely:

That it is intended to provide in the last-mentioned scheme [*i.e.*, the old Borough scheme] that the use for a fun fair of land . . . shall not be commenced without the consent of the council.

Under s. 5 (1) of the Act of 1943, the council may, where they are satisfied that it is necessary or expedient so to do:

. . . having regard to the provisions then proposed to be included in the scheme . . . (b) where the development consists of any use of the land or any building thereon, by order prohibit that use . . .

That is what they gave notice they were intending to do. .

One question only arises in this appeal, and it is whether it is competent to the council to include in its scheme a prohibition of this character restricting the use of land within the area as a fun fair without the consent of the council. The question really is whether such a restriction can lawfully be included in a scheme because, if it cannot lawfully be included in a scheme, it cannot fall within the words of s. 5 (1) of the Act of 1943, as being a provision proposed

to be included in the scheme. Those words must mean "proposed to be lawfully included in the scheme." Therefore, the question that we have to decide is whether or not this proposal is one which could lawfully be included in the scheme.

The appellant appealed to a court of summary jurisdiction, in accordance with the provisions of sched. I to the Act of 1943. That court decided against his contention and a Case was stated which came before a Divisional Court of the King's Bench Division, consisting of LORD GODDARD, C.J., HENN COLLINS and CASSELS, J.J., who dismissed the appellant's appeal. The question whether or not such a provision can lawfully be included in a planning scheme under the relevant Act, which is the Town and Country Planning Act, 1932, depends on the true construction of that Act. It is to be borne in mind that the ultimate sanction to a scheme under that Act falls to be given by the Minister subject to the control by Parliament for which the Act provides, and, provided a scheme comes within the language of the Act, the question whether or not a particular provision should be included in it must depend, under s. 11 (1) (a) of the Act of 1932, on the question whether the appropriate authority considers it to be :

... necessary or expedient for prohibiting or regulating the development of land in the area to which the scheme applies and generally for carrying out any of the objects for which the scheme is made, and in particular for dealing with any of the matters mentioned in sched. II to this Act.

The words "such provisions as are necessary or expedient" must, in my judgment, mean "necessary or expedient in the opinion of the authority who has the ultimate control of the scheme," *i.e.*, the Minister, or, in the last resort, Parliament. The test which is set up by those words "necessary or expedient," in my opinion, is not an objective test in the sense that it is for the court to say whether a provision is necessary or expedient. Provided a provision which is proposed to be inserted in a scheme is one that can lawfully be inserted in that scheme, the question whether it is necessary or expedient to insert it is not a matter for the court. The question, therefore, here is not whether the present proposal is necessary or expedient, but whether it can lawfully be inserted in a scheme at all. It, therefore, becomes necessary to consider what are the limits laid down by Parliament on the extent and scope of a planning scheme under the Act of 1932. The Act starts off with a most comprehensive power. It is as follows. The rubric, which includes only s. 1, is "Scope of Planning Schemes," and s. 1 is as follows :

A scheme may be made under this Act with respect to any land, whether there are or are not buildings thereon, with the general object of controlling the development of the land comprised in the area to which the scheme applies, of securing proper sanitary conditions, amenity and convenience, and of preserving existing buildings or other objects of architectural, historic or artistic interest and places of natural interest or beauty, and generally of protecting existing amenities whether in urban or rural portions of the area.

As was pointed out by LORD GODDARD, C.J., in the Divisional Court, those words are extremely wide. It is a legislative permission to make a scheme with the general object of controlling the development of the land comprised in the area to which the scheme applies. The word "development" is defined by s. 53 of the Act of 1932 as including :

... any building operations or rebuilding operations, and any use of the land or any building thereon for a purpose which is different from the purpose for which the land or building was last being used.

This particular land and building was being used as a garage before it was converted into a fun fair. If the enabling provisions of the Act had finished there, I cannot entertain any doubt that the restriction proposed to be imposed in this case would have fallen within the words "general object of controlling the development of the land." It seems to me that one can control user of land, just as much as by prohibiting a particular user, by saying : "It shall only be used in a certain way in certain conditions," or : "It shall not be used for a particular purpose without the consent of the authority." It seems to me it is a pure matter of English. To prohibit use without consent is a manner of controlling development, just as much as an absolute prohibition.

The next section to which I need refer is s. 10 of the Act of 1932, and I refer to this more or less in parenthesis. Under s. 10 the appellant could, if he had liked to do so, have applied, under what is known as the "interim development order" made by the Minister, for the necessary permission to use his property as a fun fair, and, if permission had been refused by the local authority, he could have appealed to the Minister under s. 10 (5) of the Act of 1932. That he did not do, and his not having done that brought the powers of s. 5 of the Act of 1943 into operation. I need not say anything more about that. Sections 11 and 12 of the Act of 1932 come under the rubric: "Contents and Effect of Schemes." Section 11 (1) lays down certain obligatory provisions which must be obtained in a scheme. It is as follows:

Every scheme shall define the area to which it applies, and specify, in accordance with the provisions of the next succeeding sub-section, the authority or authorities who are to be responsible for enforcing and carrying into effect the provisions of the scheme, and—(a) shall contain such provisions as are necessary or expedient for prohibiting or regulating the development of land . . .

Sub-section (1) (b) provides for certain matters which are not relevant to this appeal. It is, therefore, compulsory for the scheme to contain such provisions as are necessary or expedient for prohibiting or regulating the development of land. Then s. 11 (2) empowers the scheme to provide who shall be the responsible authority, as it is called, for the purposes of the scheme. Section 11 (3) I need not read. In s. 12 (1) come certain provisions which may be inserted in a scheme. It will be observed that they are permissive and not obligatory, and they are, as it seems to me, already covered by the general language of ss. 1 and 11 (1) (a), but the legislature has thought it desirable, as so frequently happens in legislation, to specify expressly certain specific matters to which it desires to call attention. It is as though the section had started with the words: "Without prejudice to the generality of the provisions of ss. 1 and 11 (1), a scheme may provide for the following matters." The provisions contained in s. 12 (1) are "(a) prescribing the space about buildings; (b) limiting the number of buildings"; and then "(d) imposing restrictions upon the manner in which buildings may be used . . ." all of which are obviously covered already by the general words—" (e) prohibiting building operations, or regulating such operations in respect of matters other than those specified in this subsection."

If that had been all that s. 12 (1) provided for, the principal argument for the appellant would have been denied him. Confronted with the difficulty that the general words are, in their ordinary meaning, sufficient to make legitimate the present proposal, he seeks in the Act for a context which will be sufficient to cut them down, and that context he finds principally in s. 12 (1) (c), which says that the scheme may include provisions:

. . . regulating, or enabling the responsible authority to regulate, the size, height, design and external appearance of buildings.

It is pointed out that the legislature there appears to be drawing a distinction between "regulating" and "enabling the responsible authority to regulate," and from that it is said that, except in cases where the Act specifically allows a provision to be inserted in a scheme enabling the responsible authority to regulate, as distinct from regulating, the scheme must lay down once and for all the regulations or restrictions to which the owners of land in the area are to be subjected—in other words, that this means that the scheme must have a final and defined set of regulations from which anyone can see exactly what he may or may not do, and that it is not legitimate to insert in the scheme something which enables the local authority in its discretion at some future date to say whether or not, and to what extent, and where and by whom, a particular regulation shall or shall not be observed. It seems to me impossible to extract from this phrase any such elaborate restriction on the general words of the Act. It is to be observed that the subject-matter with which s. 12 (1) (c) deals is not the particular subject-matter with which we are concerned. The only words relevant to that subject-matter in this sub-section are the words in para. (d):

imposing restrictions upon the manner in which buildings may be used . . .

A restriction saying that a building may not be used for a particular purpose without consent, I should have thought, falls clearly within the words "imposing restrictions." Is it legitimate, according to proper principles of construction, to extract from the phrase, "regulating, or enabling the responsible authority to regulate," some limitation on the *prima facie* broad general meaning of the words "imposing restrictions"? I do not think that it is. It is said: "What can have been the object of the legislature to put in those words 'or enabling the responsible authority to regulate,' if it was always possible to achieve the same result merely by the word 'regulating'?" It is not always possible to give a satisfactory answer to a question of that kind, but I can see an answer which seems to me to be a satisfactory reason for putting in that distinction. Precisely the same phrase appears in s. 19 (1) of the Act. That is a sub-section dealing with the question of compensation and enabling compensation to be excluded in certain classes of case. One class of case is a provision of the scheme which:

. . . (c) regulates, or empowers the responsible authority to regulate, the size, height, design or external appearance of buildings.

That is merely repeating what is provided for by s. 12 (1) (c). But in s. 19 (1) (h), another case is referred to, namely, a provision of a scheme which:

. . . in the interests of safety regulates or empowers the responsible authority to regulate the height and position of proposed walls, fences or hedges near the corners or bends of roads . . .

There are two observations which arise out of that provision. First, nowhere in the Act is there given, in express terms, a power to insert a provision which empowers the responsible authority to regulate the height and position of walls, fences or hedges unless it is to be found in the general words. A wall might be called a "building," it is true, under s. 12 (1) (c), but a fence, and certainly a hedge, cannot. Therefore, as this paragraph clearly contemplates that a scheme may give power to regulate the height of a hedge, that power is only to be found in the general provisions of the Act to which I have referred. The second point is this, and, I think, it very likely explains why the legislature put in that particular provision relating to empowering the regulation of these matters. When s. 19 (1) (h) and the provisions of s. 12 (1) (c), as to size, height, design and external appearance of buildings, are looked at, they have this common characteristic. They are all matters where each particular case has got to be dealt with according to its own particular circumstances. The height of a building is dependent on its own particular circumstances, its location, its relation to the other buildings near it, the breadth of the road, and so forth. The height of the fence or hedge at the corner of the road is dependent on the measure of visibility at that particular corner and whether or not the corner is a right-angle or a curve, or whatever it may be. Anyhow, both those classes of matters are cases where a particular direction or restriction with regard to a particular matter would be required, and the legislature, as it appears to me, thought it desirable to make it clear beyond possibility of doubt that in that class of case, which is not susceptible of a general provision such as we have here, the local authority should be given that power expressly. Whether that be the true explanation in the mind of Parliament or not, I cannot find in those words a sufficient indication to justify me in cutting down the generality of the governing words, particularly when, as I have said, under s. 19 (1) (h) it is clearly contemplated that there may be power to regulate the height of fences or hedges.

I should refer to one point which comes out in the judgment of LORD GODDARD, C.J., and I do so because with all respect, although agreeing entirely with his conclusions, I do not find it possible to accept this particular reasoning which he gives as his explanation of the insertion of the words of s. 12 (1) (c) "enabling the responsible authority to regulate." He points out that there are special provisions for appeal in that case which are laid down in the sub-section, but, as a matter of fact, that particular procedure does not go as far as LORD GODDARD, C.J., thought, for the reason that it does not apply to all the matters in s. 12 (1) (c), namely, size, height, design and external appearance, but only to two of them, design and external appearance. Therefore, I cannot, with all respect, quite follow the reasoning of LORD GODDARD, C.J.,

there. I think he, perhaps, failed to have pointed out to him the circumstance that the particular procedure did not apply to the whole of that particular provision.

A There are two other matters to which I must refer on the construction of the Act. One was that it was said that such a provision as this would give rise to certain inconveniences in the matter of compensation. It was pointed out that a person whose land is absolutely restricted can show what injury he has suffered by way of depreciation of his property, but a person on whom a restriction falls, which is capable of being lifted by a consent given by the authority, is in a much more difficult position because it may be extremely difficult to evaluate the depreciation of his property. To a certain extent every restriction, even if it can be lifted under some dispensing power, depreciates—technically, at any rate—the value of property. If you own a dwelling-house, to be told you must not use it as a fun fair without the consent of the local authority is a restriction which—theoretically, at any rate—depreciates its value. If, on the other hand, it is a building that could conveniently be used as a fun fair, the depreciation may be greater. On the other hand, the depreciation in such a case may be very great indeed if an application has been made and refused, and will be *nil* if the application is, in fact, granted. It is said: “What is the landowner to do and how is he to get his compensation fixed?” I do not feel very much difficulty about that. The precise quantification of the amount of depreciation in value of land is a matter for experts, and they are quite capable in reference to the circumstances of each particular case, I should have thought, to put a figure on it. In any case, if a man wants to use his property as a fun fair, or thinks he would like to do so in the near future, he can easily discover what his position is by applying for permission and seeing whether he gets it or not. At any rate, any inconveniences that may arise are not sufficient to cut down the broad general words of the Act.

D The other matter that is relied on particularly is the absence of any right of appeal against a refusal of permission by the local authority for use of land as a fun fair. It is perfectly true that at the present moment the only right of appeal in the case of the interim period is what I have already mentioned. It is said: “When the scheme comes to be made, there is no obligation under the statute either on the authority or on the Minister to make provision for an appeal from a refusal by the local authority.” That is perfectly true. I think that when LORD GODDARD, C.J., said there was a right of appeal to the Minister against the withholding of the consent, what he was thinking of was rather the probability and virtual certainty, as was conceded by counsel for the appellant, that either the authority will provide a right of appeal in the scheme or the Minister will insist on it, and that may very well be so. But it is pointed out—and, I think, correctly, so far as our attention has been called to the language of the Act—that neither the authority nor the Minister is bound to insert any provision for an appeal, and that has appeared to me the most weighty argument that has been brought forward by the appellant. The scheme of the Act and the policy of the Act, so far as one can see, is to provide at most important points, at any rate, for a right of appeal from decisions of the authority under these Acts. The right of appeal is very jealously guarded and provided for. In this case there is no obligation to do so, but, there again, although that is not unimportant, it is, in my judgment, quite insufficient to enable us to read into the general language of the Act some such limitation as has been suggested by the appellant.

G There are certain other passages in the Act on which counsel for the corporation relied as indicating that in the contemplation of Parliament there could be a power to impose restrictions of this character which could be lifted at the discretion of the local authority. I need not go through them. They do tend to support, I think, the view which I have expressed, but I do not find it necessary to rely on them. My opinion in this case is based on the broad consideration that Parliament has chosen to use language so comprehensive, and comprehensive enough to include a provision of this kind, and has not indicated expressly or impliedly any intention that that language should be cut down in the manner for which the appellant contends. It was said that some restriction ought to be read into the language of the Act prohibiting this particular provision on some principle of what is called reasonableness and

that a delegated power such as this must be used reasonably, rather on the same principle as the power to make a bye-law. In my judgment, the analogy of the bye-law, even if it could carry the appellant as far as it is suggested it could carry him, is quite out of place in the present circumstances. We are dealing with a totally different class of subject-matter and one in which the ultimate *arbiter* is the Minister himself. In my judgment, not only does the argument of unreasonableness break down on the facts, but the attempt is an attempt to introduce it into a subject-matter for which it was never designed. In my opinion, the decision of the Divisional Court was quite right and the appeal must be dismissed with costs. A

WROTTESELEY, L.J.: I agree that the appeal should be dismissed with costs and for the reasons given by the MASTER OF THE ROLLS. As to the last matter, if what is sought to be introduced under the heading of reasonableness is that the use of the power must be reasonable in the opinion of judges of the High Court, I think that argument is not well founded. B

LYNSKEY, J.: I agree.

Appeal dismissed with costs.

Solicitors: *Kenneth Brown, Baker, Baker* (for the appellant); *Sharpe, Pritchard & Co.*, agents for *J. G. Drew*, Town Clerk, Brighton (for the corporation). C

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

BOUCHER v. ROWSELL. D

[KING'S BENCH DIVISION (Lord Goddard, C.J., Atkinson and Oliver, JJ.),
May 7, 1947.]

Gaming and Wagering—Lottery—Forecast of scores of football teams—Prizes for forecast of highest scores, lowest scores, and combinations of high and low scores—Betting and Lotteries Act, 1934 (c. 58), s. 22 (1) (b) (f). E

The appellant conducted a scheme by which he published weekly a list of football teams which were playing on the following Saturday. The names of the opposing teams were not published. On payment of sixpence a competitor received a card on which he entered a combination of three teams which he had selected, or, alternatively, a card on which a combination had been inserted by the appellant. A competitor could change his combinations of teams every week or retain them over a period. Prizes were offered as follows: 40 per cent. of the money available for distribution was paid to competitors whose combination of teams scored more goals than any other combination; 24 per cent. was paid to competitors whose combination scored the second highest number of goals; 16 per cent. went to those whose teams failed to score or scored least; 10 per cent. to those whose combination included the two teams which had scored the greatest number of goals and the team which had scored the lowest number of goals; and 5 per cent. to those whose combination included the team which had scored the greatest number of goals and two teams which had failed to score or had scored fewer goals than any other two teams. F

HELD: the scheme was a lottery and the appellant had been rightly convicted by justices of selling chances in a lottery, contrary to s. 22 (1) (b) of the Betting and Lotteries Act, 1934, and of using premises for purposes connected with the promotion of the lottery, contrary to s. 22 (1) (f) of the Act. G

[As to LOTTERIES, see HALSBURY, Hailsham Edn., Vol. 15, pp. 525-528, paras. 928, 929 and Supplement, and FOR CASES see DIGEST, Vol. 25, pp. 454-456, Nos. 434-449 and pp. 463-464, Nos. 496-500, and Supplement.] H

Case referred to:

(1) *Moore v. Elphick*, [1945] 2 All E.R. 155; Digest Supp.

CASE STATED by Exeter justices.

A The appellant was charged on informations preferred by the respondent under s. 22 of the Betting and Lotteries Act, 1934, (i) in connection with a lottery known as "The Victory Skill Pool," with unlawfully selling chances in the said lottery at Exeter in Oct. and Nov., 1946; and (ii) in connection with the said lottery, with unlawfully using certain premises situate at 33, Monks Road, Exeter, for purposes connected with the promotion of the lottery on or about the same dates. Before the justices it was proved or admitted that the appellant was the occupier of premises at 33, Monks Road, Exeter, from which he promoted a scheme called "The Victory Skill Pool." He published weekly a list of 44 professional football teams all of which had engagements to play matches the following Saturday. The names of the opposing teams were not published. The teams were numbered consecutively, the numbers of the teams being changed each week but not on any ascertained principle. On payment of sixpence, a competitor received a card on which he entered a combination of three teams which he had selected, or, alternatively, a card on which a combination had already been inserted by the appellant. A competitor could make as many entries at sixpence each as he wished. Competitors were free to change their selections each week, but the great majority of them retained their combinations unchanged, in some cases from the commencement of the football season and in others up to two months before the date of the offences charged. The money available for distribution in any week was divided into five lots or "dividends." Each entry entitled a competitor to participate in the opportunity to obtain the whole or a share of any one of the five dividends according to the performances of the football teams identified by his combination as applied to the published list that week. The dividends were: (1) 40 per cent. to competitors whose combination of teams scored in the aggregate a greater number of goals than any other combination; (2) 24 per cent. to those whose teams scored the second greatest number of goals; (3) 16 per cent. to those whose teams failed to score or scored least; (4) 10 per cent. to those whose combination included the two teams which had scored the greatest number of goals and the team which had scored the lowest number of goals; and (5) 5 per cent. to those whose combination included the team which had scored the greatest number of goals and two teams which had failed to score at all or had scored a smaller number of goals than any other two teams. The justices were of the opinion that the scheme was a lottery. They convicted the appellant on both charges, fined him £200, and ordered him to pay the costs. He now appeals.

Stewart Bates for the appellant.

F *Casswell, K.C.*, and *P. Malcolm Wright* for the respondent, were not called on to argue.

LORD GODDARD, C.J.: The appellant invited people, who had to pay an entrance fee for so doing, to forecast which of any combination of three football teams would score the highest number of goals in a week, as compared with any other combination of three that might be selected. Speaking for myself, I should say that that alone was a lottery of the clearest description. G It is not forecasting which teams will win. It is forecasting which teams will score the largest number of goals, and a combination of losing teams might score a larger number of goals than a combination of winning teams, because each team in a combination of winning teams might score only one goal whereas three losing teams might each score five goals while their opponents scored seven. I should have thought that that was a complete and absolute lottery in itself, but, even assuming that there was an element of skill in that competition, other prizes are offered. H The combination sent in may get a prize either because the teams failed to score a goal between them or scored least, and so on. The allocation of the prizes distinguishes this case from *Moore v. Elphick* (1) because there there was only one prize, and, although some of the combinations which might be sent in depended on chance and not on skill, some of the entries sent in for the one prize did depend on skill. Without going through the whole of the elaborate reasons and contentions which were argued and the careful findings of the justices, it seems to me that this is about as clear a

lottery as can be found, and, therefore the justices came to a right decision and the appeal fails.

ATKINSON, J.: I agree. The definition of a lottery is that set out in *Moore v. Elphick* (1), by HUMPHREYS, J. ([1945] 2 All E.R. 156):

The Act has been interpreted in accordance with the obvious meaning of the term as applying only to distributions of money by chance, and nothing but chance, that is, by doing that which is equivalent to drawing lots.

So the real question here, is: Is a substantial part—I will not say only “part,” but a “substantial part”—to be distributed entirely by chance? The first two dividends amount to 64 per cent. of the total sum distributed, and it may be said that the distribution of those dividends depends, at any rate in part, on the skill of the competitor. I say nothing about that, but it is clear that 31 per cent. of the money is distributed simply and solely by chance, and that makes it a lottery. What was said in *Moore v. Elphick* (1), had no regard to separate distributions. The one prize distributed there depended in part on skill and a great part, maybe, on chance, but still the distribution did not depend solely on chance. That is quite a different case from the one with which we have to deal, where 31 per cent. of the money received was distributed entirely by chance. It is possible that, if the appellant changes the nature of his scheme and only distributes prizes on the basis of the first dividend, he will be able to conduct that competition on a legal basis. I do not know, but it is quite clear that the third, fourth, and fifth dividend money is being distributed purely by chance, and, in my opinion, to that extent this is undoubtedly a lottery. The appellant was doing something illegal, and was properly convicted.

OLIVER, J.: I am of the same opinion. I entirely agree with my Lords' view that there is a difference between forecasting the result of a football match in the sense of prophesying who will win, or forecasting the result of a horse race, in which skill, experience and study play a considerable part, and forecasting how many goals will be scored, not by one, but by a combination of three teams, or by how many yards a horse will win a race. It seems to me that when one enters on the latter task, one gets into the realm of pure chance. Assuming, however, that that view is wrong, what can be said about the last three prizes? It was admitted by counsel for the appellant that they are lotteries, but he argued that they must be considered separately. I fail to understand why. They form part of the scheme as a whole, each part of the scheme offers a prize and commands a definite percentage of the total to be distributed. The classical definition of lottery is “the distribution of prizes by lot or chance,” and I agree that this appeal fails.

Appeal dismissed with costs.
Solicitors: *Ridner, Heaton, Meredith & Mills*, agents for *Bobbett Brothers*, Bristol (for the appellant); *Arnold Carter & Co.*, agents for *Dunn & Baker*, Exeter (for the respondent).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

PERRINS v. PYE.

[KING'S BENCH DIVISION (Lord Goddard. C.J., Atkinson and Oliver, JJ.), May 2, 1947.]

Juries—Qualification—Householder—Rateable value—Aggregation of properties—Juries Act, 1825 (c. 50), s. 1.

In considering the qualification of a householder for jury service under s. 1 of the Juries Act, 1825, the rateable value taken into account in accordance with the section must be that of the house of which he is the holder. It is not permissible, where the householder also occupies another property, e.g., a shop, to aggregate the value of the two properties.

[AS TO QUALIFICATION OF JURORS, see HALSBURY, Hailsham Edn., Vol. 19, p. 283, para. 583].

CASE STATED by Southport justices.

The respondent preferred a complaint before the justices on the ground

that she had been marked as a juror in the electors' lists, whereas she ought not to have been so marked, being a householder rated in respect of premises at Southport the annual value of which was less than £20. She had applied to the registration officer within the time allowed for making a claim to be registered as an elector to have the mark removed, but he had refused to remove it. She applied to the justices under s. 1 (4) (5) of the Juries Act, 1922, and s. 11 (2) of the Elections and Jurors Act, 1945, for a declaration that she ought not to be registered as a juror. Before the justices it was proved

A that the respondent occupied two sets of premises in Southport, a self-contained flat assessed at £19 net annual value and a separate lock-up shop assessed at £48 net annual value.

The justices were of the opinion that the respondent was not qualified for or liable to jury service, not being a householder of premises of not less than £20 net annual value, and that the mark against her name should be removed.

B The registration officer appealed.

Vernon Gattie for the appellant.

Squibb for the respondent.

LORD GODDARD, C.J. : This Case raises a point which does not seem hitherto to have been the subject of a decision. The Juries Act, 1825, which

C sets out in s. 1 the qualifications for a common juror, provides that any person who :

... being a householder shall be rated or assessed to the poor rate or to the inhabited house duty in the county of Middlesex on a value of not less than £30 a year, or in any other county on a value of not less than £20, or who shall occupy a house containing not less than 15 windows, shall be qualified and shall be liable to serve on juries

D The respondent, whose name was marked as a juror and put into the jury book, satisfied the justices that she was a householder and was rated and assessed in respect of the house in which she lived at £19, and, as her house was in the borough of Southport, she was occupying a house which was less than the relevant qualification, namely, £20. The registration officer's contention was that, as she occupied also a lock-up shop in Southport which

E was rated at £48, the total assessment to the poor rate in Southport was more than £20.

The question is whether or not, in considering the respondent's qualification, one is entitled to aggregate those two properties. In my opinion, it is clear that one is not. I think the statute, fairly read, refers to a householder who is rated or assessed in respect of the house of which he or she is a householder. My reading of this section is fortified, I think, by the terms of the Juries Act, 1870, which was an Act to "amend the laws relating to the qualifications, summoning, attendance, and remuneration of special and common juries." Section 6, in which is set out the qualification of special jurors, provides :

F

Every man whose name shall be in the jurors book for any county in England or Wales . . . or who shall occupy a private dwelling house rated or assessed to the poor rate or to the inhabited house duty on a value of not less than £100 . . . or who shall occupy premises other than a farm rated or assessed as aforesaid on a value of not less than £100, or a farm rated or assessed as aforesaid on a value of not less than £300, shall be qualified and liable to serve on special juries . . .

G

Therefore, it is clear that special jurors must be in the jurors book as householders occupying premises of the rateable value of £20 or £30, and then, if they occupy any premises in the district of the value of £100, they are qualified as special jurors. That goes to show that, when Parliament means to take into account something more than the house in which the householder lives, it says so in clear terms. In my opinion, the qualification specified in s. 1 of the Juries Act, 1825, must be the rateable value of the house of which the person concerned is the holder and, therefore, the justices came to a right decision in point of law and this appeal fails.

H

ATKINSON, J. : I agree. It seems to me that the meaning of the words in the relevant section is not open to doubt. I think it is "who being a householder as such shall be rated or assessed to the poor rate," etc. If that is right, the appeal must fail.

OLIVER, J. : I agree. I think the only possible way of reading the words "who being a householder shall be rated," is "rated in respect of the house he holds," while the later words make liable a person occupying a house containing not less than fifteen windows.

Appeal be dismissed with costs.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *R. Edgar Perrins*, Town Clerk, Southport (for the appellant); *Walbrook & Hosken*, agents for *Brighthouse, Jones & Co.*, Southport (for the respondent).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

BARNESLEY v. MARSH.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Atkinson and Oliver, JJ.), May 1, 1947.]

Bastardy—Application for order—Adjournment—Procedure—Poor Law Amendment Act, 1844 (c. 101), s. 4—Summary Jurisdiction Act, 1848 (c. 43), s. 16.

Justices—Constitution of bench—Desirability of uneven number of justices.

On Sept. 11, 1946, a summons was issued, based on a complaint by the respondent against the appellant alleging that he was the father of her bastard child. The summons was served on the appellant on Sept. 17, and it came before the justices on Oct. 7, within the 40 days prescribed by s. 4 of the Poor Law Amendment Act, 1844. Six justices sat, there was an equal division of opinion, and the chairman announced that "another court must hear the case." He said nothing about when and where the other court would sit, or how it would be constituted. The case was heard and determined by different justices of the same petty sessional division on Dec. 23.

HELD : (i) it was not necessary, for a court to adjourn a case, that it should use any particular form of words, and, as it was clear that on Oct. 7 the justices intended the case to stand over for another hearing, the hearing on Dec. 23 was an adjournment of the hearing on Oct. 7 and the respondent's application for an order was made within the time limited by s. 4 of the Poor Law Amendment Act, 1844.

(ii) the procedure in bastardy proceedings forms a code of its own unaffected by the general provisions of the Summary Jurisdiction Acts, and, therefore, the adjournment of the case was not illegal and without effect because the requirements of s. 16 of the Summary Jurisdiction Act, 1848, as to the appointing and stating forthwith of the time and place of the adjourned hearing had not been complied with.

(iii) it is highly desirable that a bench should be constituted of an uneven number of justices so that, in the event of a difference of opinion, the view of the majority shall prevail.

[AS TO THE HEARING OF AFFILIATION PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 2, p. 588, para. 810; and FOR CASES see DIGEST, Vol. 3, pp. 394-400, Nos. 313-340.]

Case referred to :

- (1) *Fussell v. Somerset Quarter Sessions Licensing Committee*, [1947] 1 All E.R. 44; [1947] 1 K.B. 276; 176 L.T. 304.

CASE STATED by Flint justices.

On a complaint made by the respondent under the Bastardy Laws Amendment Act, 1872, and the Affiliation Orders Act, 1914, the justices adjudged the appellant to be the father of the respondent's bastard child born on Feb. 23, 1945, and ordered him to pay the sum of 10s. per week towards the maintenance and education of the child until it attained 16 years of age, together with £5 5s. costs incidental to the birth and £6 8s. costs of obtaining the order. The appellant appealed. The facts appear in the judgment of LORD GODDARD, C.J.

Cartwright Sharp, K.C., and *Denis Verne* for the appellant.

Arthian Davies for the respondent.

LORD GODDARD, C.J. : On Sept. 11, 1946, a summons was issued, based on a complaint by the respondent against the appellant alleging that he was the father of her bastard child. That summons was served on Sept. 17. By s. 4 of the Poor Law Amendment Act, 1844, no bastardy order shall be made unless applied for at petty sessions within 40 days from the service of

the summons after the birth of the child. The summons came before the justices on Oct. 7, 1946, within 40 days from the service of the summons. There were six justices and, as sometimes happens where the court is composed of an even number, there was an equal division of opinion. This is only another illustration of how desirable it is that, if it can possibly be avoided, an even number of persons should never sit to adjudicate in any court. That rule is observed in the highest courts of the land. It is a fixed rule of practice in the House of Lords and in the Judicial Committee of the Privy Council that the tribunal shall consist of an odd number. The House of Lords is always constituted of five members, and the Judicial Committee (although in some Indian appeals it sits with three members) endeavours also to have five members sitting. If it so happens that a member of their Lordships' House falls ill and is unable to appear so that there are only four Lords of Appeal in attendance, their Lordships do not sit till there are five. This is a very good rule for every court to endeavour to observe, so that when the tribunal comes to adjudicate on the matter before them the view of the majority, if there is a difference of opinion, will prevail. The magistrates here being equally divided, the chairman announced that fact, and said that another court must hear the case. He did not say whether the other court should consist of the existing bench and another justice or that they would re-hear the case with an uneven number of justices. It would not have been a satisfactory thing for one justice to have retired and for an uneven number of members then to hear it, nor would it have been very satisfactory if they had merely added another magistrate to their own number. In fact, they took the perfectly proper course of seeing that the case came before different justices of the county of Flint.

The case came before these different justices on Dec. 23, 1946. The delay was caused by observing the convenience of the parties. On that day objection was taken by the appellant that the proceedings were out of time because more than 40 days had elapsed since the date of service of the summons. The answer made on behalf of the respondent was that she had applied for the order within 40 days of the service of the summons and that the hearing before the justices on Dec. 23 was merely an adjournment of her application. It was, however, objected by counsel for the appellant that in fact there was no adjournment, and he further submitted that, if there were an adjournment, it was not in accordance with the law, because the provisions of s. 16 of the Summary Jurisdiction Act, 1848, had not been complied with.

This court is of opinion that there clearly was an adjournment. It is not necessary for the purpose of adjourning a case to use any particular form of words. Where it is clear that the court intends a case to stand over from one hearing to another obviously the court are adjourning the case whether they say: "We adjourn it," or whether they say: "The case will go to another day," or use any other words which show that what they mean to do is to adjourn the case. When justices have clearly given no decision, but refer the case to a further court, obviously they are adjourning it, and that is what they did in this case. There can be no doubt in this case that what the justices intended to do on Oct. 7, 1946, was to adjourn the case to a subsequent court having jurisdiction in the matter which would be held on a later date.

It is, however, said that, even if they did intend to adjourn, they did not adjourn in accordance with the law, because s. 16 of the Summary Jurisdiction Act, 1848, provides:

Before or during such hearing of any such information or complaint it shall be lawful for any one justice, or for the justices, in their discretion, to adjourn the hearing of the same to a certain time and place to be then appointed and stated in the presence and hearing of the party or parties, or their respective attorneys or agents then present

I desire to reserve my opinion whether an adjournment *sine die* can ever be granted by justices, in ordinary cases. I can see that it could be argued whether it would be a good adjournment under that section if the justices said: "We are going to adjourn this case to a subsequent court held here" (in the petty sessional court house) "to a date to be fixed of which we will give notice." It is not necessary to decide that in this case, for it is clear that the Summary Jurisdiction Act, 1848, does not apply to bastardy proceedings. It is to be

remembered that, only four years before the Act of 1848 became law, the Poor Law Amendment Act, 1844, was passed, and that Act dealt in a good many sections with bastardy proceedings and for some years was the only code of procedure in that class of matter. By s. 4 it was provided that: "The justices in petty session as aforesaid may adjourn the hearing of the case as often as to them may seem fit . . ." There is nothing in that Act which requires a certain time or place to be mentioned. When the Act of 1848 was passed, it was provided in s. 35:

. . . nor shall anything in this Act extend or be construed to extend to any complaints, orders, or warrants in matters of bastardy made against the putative father of any bastard child, save and except such of the provisions aforesaid as relate to the backing of warrants for compelling the appearance of such putative father or warrants of distress, or to the levying of sums ordered to be paid, or to the imprisonment of a defendant for non payment of the same . . .

That seems to me to say in the clearest possible way that, except in those matters of machinery as to backing of warrants and so forth, the Act of 1848 was not to apply to bastardy proceedings, because, although bastardy proceedings before the justices were summary proceedings and were instituted by complaint and the Act of 1848 undoubtedly dealt with various matters started by complaint, there was already in existence a statute which dealt with bastardy matters. Next, there is an express provision in s. 7 of the Bastardy Laws Amendment Act, 1873, with regard to adjournment where two justices are not present so that the case cannot be heard at all:

If at the time appointed for the hearing of any case in and by any summons issued under the [Bastardy Laws Amendment Act, 1872] or this Act two justices having jurisdiction to hear the same shall not be present, it shall be lawful for any one justice then present to adjourn the hearing to a certain time and place to be then appointed in the presence of the party or parties or their respective counsel, attorneys or agents then present . . .

So, for that purpose the legislature adopted much the same language as was used in the Act of 1848. It seems to me that there is very good reason for the appointment of a particular day for an adjournment of this sort because, by s. 4 of the Act of 1844, the order has to be applied for within 40 days from the service of the summons. It gives the court power to adjourn an application so as to prevent it being said: "You have not applied within the 40 days." No doubt, the legislature thought, as there was in existence a time limit of 40 days, that it was desirable, when the case had not been heard, to fix a particular time, so that the matter should not go on standing over more or less indefinitely. That section, however, does not apply to this case, because in this case there had been a hearing before the justices. The only other section to which I need refer is s. 54 of the Summary Jurisdiction Act, 1879, which provides for

. . . the levying of sums adjudged to be paid by an order in any matter of bastardy, or by an order which is enforceable as an order of affiliation, and to the imprisonment of a defendant for non-payment of such sums, in like manner as if an order in any such matter or so enforceable were a conviction on information, and shall apply to the proof of the service of any summons, notice, process, or document in any matter of bastardy, and of any handwriting or seal in any such matter, and to an appeal from an order in any matter of bastardy.

Again, I do not see the necessity for that section if bastardy was already a matter dealt with by the Summary Jurisdiction Acts. This case may serve the useful purpose of calling the attention of courts of summary jurisdiction to the fact that bastardy stands by itself so far as its code of procedure and so on is concerned, and does not come within the provisions of the Summary Jurisdiction Acts of 1848 or 1879 except in respect of the matters wherein those Acts specially apply to bastardy.

Accordingly, it follows, in my opinion, that on Dec. 23, 1946, the justices had power to deal with this case as a matter which had been adjourned from the previous hearing on Oct. 7, and the appeal must be dismissed with costs.

ATKINSON, J.: I agree. I will only add a word on two points. I am quite satisfied that there was an adjournment. The point has been made that the word "adjourn" was not used. It seems to me that no point can be made

on that since the decision in *Fussell v. Licensing Committee of the Justices of Somerset* (1). In that case LORD GODDARD, C.J., said ([1947] 1 All E.R. 45) :

There is no question that, if, at the hearing of an application for a licence, the justices are equally divided, and for that reason say that they refuse the application because a majority of the justices are not in favour of granting the licence, that amounts to an adjudication refusing the licence, but in the present case I think it is clear that what the justices meant was : " We are not going to give a decision on this case. We are going to adjourn it, so that it may be heard by a larger bench, and then a decision can be given."

It seems to me that exactly the same thing can be said of the present case. It is clear that the justices were not determining the complaint, but that they meant : " We are not going to give a decision because we are equally divided. We are going to adjourn the complaint and let it stand over to some future day so that it may be heard by a different bench and then a decision can be given."

That amounts to an adjournment. Even if it was not an adjournment, I do not see that the position is any different. The application for the order, not having been finally dealt with, remained in existence. It was not merely an application to the justices who were sitting on that day. It was an application to the petty sessional court, and the hearing on Dec. 23 was the hearing of the application which had been made in September and had not previously been finally dealt with. Therefore, it seems to me that the order which was made on Dec. 23, had been applied for within the space of 40 days from the service of the summons, and, on that ground, was a perfectly good order.

OLIVER, J. : I agree. I cannot interpret what the justices did at the first hearing as anything but an adjournment. They expressly did not adjudicate on the matter, but said that it would be adjudicated on by some other court of their own sessions. Any petty sessional court may fairly do that. If that is not an adjournment, I do not know what is. I also entirely agree that s. 16 of the Summary Jurisdiction Act, 1848, does not apply to this matter. That is due, not only to the express language of s. 35 of that Act, but also to the fact that the Poor Law Amendment Act, 1844, had, only four years previously, enacted a whole code of procedure in bastardy matters. It would be most natural for the legislature to say in 1848 : " We need not interfere with that. That is only recent legislation. We will leave it alone excepting with regard to certain matters which can be dealt with under this, the Act of 1848." I agree that the case had never been adjudicated on and this appeal must be dismissed.

Appeal dismissed.
Solicitors : *Nicholson, Graham & Jones*, agents for *Wayne & Co.*, Birmingham (for the appellant) ; *J. Kerfoot-Roberts & Son*, Holywell (for the respondent).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

med. C.A. [1948] 1 All E.R. 377.

HENDON BOROUGH COUNCIL v. STANGER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Atkinson and Oliver, JJ.), April 30, May 1, 1947.]

Town and Country Planning—Town planning scheme—Industrial building—Factory—Premises used for testing concrete—Town and Country Planning Act, 1932 (c. 48), s. 13 (1) (c)—Factories Act, 1937 (c. 67), s. 151 (1).

The respondent carried on business as a consulting engineer specialising in the testing of materials used in building and engineering construction. One process carried out by him was the making and crushing of concrete blocks to test their properties, for which purpose he used a laboratory concrete mixer, six feet six inches high and three feet wide, and a crushing machine, twelve feet high by four feet square. The respondent employed persons in manual labour to conduct these operations. The premises on which the process was carried out were within an area designated as wholly residential by the local authority in pursuance of a town planning scheme under the Town and Country Planning Act, 1932.

Held : although the main object of the process was the testing of materials, it involved the employment of " persons . . . in manual labour . . . for . . . the making of [an] article . . . or the demolition of [an] article " within the Factories Act, 1937, s. 151 (1), and, therefore, the premises were

an industrial building and their use as such contravened the provisions of the scheme.

[FOR THE FACTORIES ACT, 1937, s. 151 (1), see HALSBURY'S STATUTES, Vol. 30, p. 295.]

Cases referred to :

- (1) *Minister of Health v. R., Ex p. Yaffe*, [1931] A.C. 494; 100 L.J.K.B. 306; *sub nom. R. v. Minister of Health, Ex p. Yaffe*, 145 L.T. 98; 95 J.P. 125; Digest Supp.
- (2) *Grove (Dudley Revenue Officer) v. Lloyd's British Testing Co., Ltd.*, [1931] A.C. 450; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; *revsg.*, [1931] 1 K.B. 385, C.A.; Digest Supp.

CASE STATED by Hendon (Middlesex) justices.

Under the Town and Country Planning Act, 1932, s. 13 (1) (c), the appellant borough council served a notice on the respondent that, as the responsible authority under the Hendon Planning Scheme (No. 1), they proposed to prohibit certain premises, "Summerfield House," Barnet Lane, Elstree, from being used as an industrial building within the meaning of the scheme. The respondent preferred a complaint under s. 13 (4) of the Act against the appellants by way of appeal against the notice. The justices allowed the appeal, holding that the building was not used as an industrial building as defined in the scheme, and the borough council appealed. The respondent practised as a consulting engineer specialising in the chemical and physical testing of materials used in building and engineering construction, including concrete. To make the tests samples of concrete were mixed in a machine 6ft. 6ins. high and 3ft wide which was driven by an electric motor. The machine was a laboratory concrete mixer and would be of no use to a builder. The samples of concrete were moulded into cubes which, when set, were placed in a machine and crushed. The crushing machine was 12ft. high by 4ft. square and was operated by an electric motor driving an oil pump. It was a piece of scientific apparatus and a testing machine. The respondent employed persons in manual labour in the processes, and the information obtained from the operations was supplied by him for the purposes of gain. Under the Hendon Planning Scheme (No. 1) "industrial building" meant a building, other than a special industrial building, designed for use as a factory or workshop within the meaning of the Factory and Workshop Acts, 1901 to 1929 (repealed and replaced by the Factories Act, 1937), and included any office or other building within the same site the use of which was incidental to, and such as would ordinarily be incidental to, the use of such factory or workshop, and a building designed for use in connection with the winning of minerals, or as a water pumping station, depository, or store.

Rowe, K.C., and *Squibb* for the appellants.

H. A. Hill for the respondent.

LORD GODDARD, C.J. : The whole question depends on whether the premises which the respondent occupies are a factory within the meaning of the Factories Act, 1937. I daresay that many of the matters carried on by the respondent in his business would not make this building a factory, but the question is whether, when materials are sent to him to test and report whether they are suitable for making concrete, and he, to perform that task, makes blocks of concrete and subjects them to pressure, the result is to make these premises a factory. It is possible that different minds might take different views on that matter, but I feel one ought not to be astute in a case of this sort where we are dealing with town planning matters to find that a building in which, undoubtedly, something is being made by machinery is not an industrial building. The object of the Act is to separate industrial buildings from residential buildings, and when one finds machinery of this kind—not some small machine such as an amateur carpenter might have on his premises to drive a lathe, but big, substantial machines driven by electric motors—operated by employees on the premises, the building has all the appearance, whatever its outside may look like, of an industrial concern, and that is so although the primary purpose for which the respondent made concrete was testing.

By the Factories Act, 1937, s. 151 (1) :

Subject to the provisions of this section, the expression "factory" means any premises in which, or within the close or curtilage or precincts of which, persons are

employed in manual labour in any process for or incidental to any of the following purposes, namely :—(a) the making of any article or of part of any article ; or (b) the altering, repairing, ornamenting, finishing, cleaning, or washing, or the breaking up or demolition of any article ; or (c) the adapting for sale of any article ; being premises in which, or within the close or curtilage or precincts of which, the work is carried on by way of trade or for purposes of gain and to or over which the employer of the persons employed therein has the right of access or control : . . .

A Without question the work in the present case was carried on for the purposes of gain. That is not in dispute, nor is it in dispute that persons were employed in manual labour. What were those persons doing ? Some of them, at any rate, were making concrete. I cannot bring myself to say that concrete is not an article. They used a concrete mixer. Most people are familiar with the concrete mixers which one sees from time to time in the streets. No one supposes that the concrete mixer which is on the respondent's premises is as formidable a
B piece of machinery as that. It is found to be a laboratory machine, but it is none the less making concrete. The truth of the matter is that builders and contractors want to be told whether the materials they propose to use in a particular building or undertaking are satisfactory for the manufacture of concrete. They send them to the respondent for report, and one way he adopts of finding out whether or not the materials are satisfactory is to make that
C which the materials are designed to make. No doubt, he only makes it in small quantities. In what quantities he makes it we are not told, but I cannot say that he is not making an article. Concrete is an article as much as a brick is an article. If he is making an article, apart from the facts that he is making it by a machine, as he is, and his workmen are employed in manual labour in making that article, it seems to me that the premises come within the definition of a factory. Having made the concrete, the respondent, by another machine
D of considerable size, breaks up the concrete cubes which he has made to see what strain the concrete will bear and thus what its strength is. In my opinion, in doing this he is engaging in a process in which he employs manual labour in "the breaking up or demolition of any article."

In these circumstances, I think the appeal succeeds, and that we are bound to hold that these premises are a factory, and, therefore, an industrial building. It follows that the appellant authority were entitled to serve the notice which
E they did serve. One reason which influences my mind is that the purpose for which these premises are being used is in no sense residential. It is contrary to the atmosphere of residential premises to carry on a trade which involves concrete mixing on the premises. What is the purpose for which the concrete is used does not seem to me to matter. Accordingly, this appeal must be allowed.

F ATKINSON, J. : I agree, although, I must confess, with some hesitation. I think there is great force in the argument of counsel for the respondent that we have to look at the wording of this section very carefully. It is argued that everything is governed by the real purpose of what is going on at the supposed factory. The words are "employed in manual labour in any process for or incidental to any of the following purposes, namely . . ." One cannot
G just stop at the word "process" and say : "Here is a process which is of a manufacturing character." One must see whether the process is for or incidental to a purpose which comes within (a), (b) or (c). Counsel says that the real purpose here is the testing of certain materials, and that the testing involves a process which is not a manufacturing process because, though the respondent manufactures concrete, he does so, not to produce concrete for use as concrete, but merely as incidental to his testing operations, and, therefore, the process is
H not within the section. I think there is a good deal of force in that, but I can see no reason why we should give a narrow interpretation to these words. The process complained of is, in fact, making concrete in a particular form, *viz.*, that of briquettes which it is difficult to say are not articles. Therefore, something is manufactured, although it may be wanted not for its own sake, but only for the ultimate purpose of testing. For all that, however, something has been made. Having made it, the respondent proceeds to break it up and demolish it. On the whole, I am satisfied that it is not enough to say that the ultimate purpose of all that is merely testing, so that the process throughout is taken out of the

section. It seems to me that it is sufficient to bring the process—and, consequently, the premises—within the section if it be established, as it was here, that the process did involve the making of something and the demolition of something. It would be contrary to the whole spirit of the section if it were to be held that one is entitled to carry on operations of that sort in a residential area. Therefore, I am satisfied that the view expressed by my Lord is the true view.

OLIVER, J.: I agree.

Appeal allowed with costs.

Solicitors: *Leonard Worden* (for the appellants); *Coward, Chance & Co.* (for the respondent).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

R. v. LUDLOW, Ex parte BARNSELEY CORPORATION.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Atkinson and Oliver, JJ.), April 25, 1947.]

National Service—Reinstatement in civil employment—Decision of umpire—Dissatisfaction of employer—Certiorari—Reinstatement in Civil Employment Act, 1944 (c. 15), ss. 1 (1), 9 (1) (2), 10 (1) (2).

A deputy umpire to whom an appeal under s. 10 (1) of the Reinstatement in Civil Employment Act, 1944, is brought from a determination of a re-statement committee has power to decide the facts which give him jurisdiction, and *certiorari* will not lie to bring up and quash an order of a deputy umpire unless it is in excess of his jurisdiction.

[AS TO GROUNDS FOR CERTIORARI TO QUASH, see HALSBURY, Hailsham Edn., Vol. 9, pp. 880-889, paras. 1484-1493; and FOR CASES, see DIGEST, Vol. 16, pp. 417-431, Nos. 2763-2918.]

Cases referred to:

- (1) *R. v. Minister of Health, Ex p. Glamorgan County Mental Hospital (Committee of Visitors)*, [1938] 4 All E.R. 32; [1939] 1 K.B. 232; 159 L.T. 508; 102 J.P. 497; Digest Supp.
- (2) *R. v. Furnished Houses Rent Tribunal for Paddington and St. Marylebone*, [1947] 1 All E.R. 448; 176 L.T. 330.
- (3) *R. v. Income Tax Special Purposes Comrs.*, (1888), 21 Q.B.D. 313; 53 J.P. 84; *sub nom.*, *R. v. Income Tax Special Comrs., Ex p. Cape Copper Mining Co., Ltd.*, 57 L.J.Q.B. 513; 59 L.T. 455; 2 Tax Cas. 332, C.A.; 16 Digest 306, 1181.

MOTION for an order of *certiorari*.

The respondent had applied to a reinstatement committee under the Reinstatement in Civil Employment Act, 1944, s. 9 (1), to be reinstated in her former employment, but the committee refused the application on the ground that it was made out of time. She appealed to a deputy umpire who allowed the appeal and directed that she be reinstated. The employers against whom that order was made alleged that the respondent was not in their employment when she joined the forces, and applied for *certiorari* to bring up and quash the order of the deputy umpire. The facts appear in the judgment of LORD GODDARD, C.J.

Paull, K.C., and *J. Ramsay Willis* for the applicants.

The Attorney-General (Sir Hartley Shawcross, K.C.), and *Arthian Davies* for the Minister of Labour and National Service.

LORD GODDARD, C.J.: In this case, leave was obtained to apply for a writ of *certiorari* to bring up and quash an order made by a deputy umpire who was appointed under the Reinstatement in Civil Employment Act, 1944. The points which it was desired to argue in this court were whether or not a woman was employed by the Barnsley Corporation, and, if so, whether she left that employment and entered the employment of the Crown, or whether she remained in the employment of Barnsley Corporation before she was called up for service so that she was entitled, under the Reinstatement in Civil Employment Act, 1944, to reinstatement in the same position or in a position not less favourable than that which she previously held. The reinstatement committee

to whom she applied refused her application on the ground that it was made out of time. She then appealed under s. 10 of the Act to a deputy umpire, who reversed the decision of the reinstatement committee, holding that she had reasonable excuse for not having made the application in time. He decided that she was entitled to the benefit of the Act, and he made an order reinstating her in her employment from a certain date and ordering the corporation to pay her the appropriate wages as from the date from which she had been reinstated.

A There is no question that, if she was entitled to the benefits of the Act, the order made by the deputy umpire could not be attacked on any ground. The whole ground on which the *certiorari* was moved was that this woman, when she joined the Women's Royal Naval Service, was not an employee of Barnsley Corporation. In making the order, the umpire has, of course, found that she was an employee of the corporation, because, unless he found that fact, he could not have made the order he did.

B The question is whether the umpire was acting within his jurisdiction. If he was, it is a matter of no moment whether or not his decision would commend itself to this court because we are not sitting as a Court of Appeal from him. We are asked to grant a writ of *certiorari* to bring up his order to be quashed, and *certiorari* can only be granted for that purpose where the umpire is acting without jurisdiction. The Reinstatement in Civil Employment Act, 1944, s. 1 provides :

C (1) Subject to the provisions of this Act, where a person to whom this Act applies whose war service ends after the commencement of this Act makes an application to his former employer to be taken into his employment, the former employer shall, so long as the application remains in force, be under an obligation to take the applicant into his employment . . .

D Therefore, where an application of this sort is made, it must be decided whether the person is one to whom the Act applies, and also who his former employer is. By s. 9 :

E (1) A person who is or claims to be a person to whom this Act applies and claims that he has rights under this Act which are being or have been denied him, may, within the prescribed time, apply to a reinstatement committee for the determination of any question relating to his rights, if any, under this Act, and the committee shall determine that question. (2) Where the committee are satisfied that default has been made by the former employer of the applicant in the discharge of his obligations under this Act, the committee may make either or both of the following orders according as is in their opinion appropriate, having regard to all the circumstances of the case and the nature and extent of the default . . .

Section 10 provides :

F (1) An appeal may, within the prescribed time, be brought from any determination or order of a reinstatement committee, or from the refusal of such a committee to make an order, to the umpire or a deputy umpire, as follows :—(a) at the instance of an organisation of employers of which the employer concerned was a member on the date on which the application was made to the reinstatement committee ; (b) at the instance of [various other persons] . . . In this section, the expression " the employer " includes, in a case where different persons have at different periods been the former employer of the applicant, any person against whom an order was made by the reinstatement committee. (2) On any such appeal, the umpire or deputy umpire may make any determination or order which a reinstatement committee might make under the provisions of this Act or may dismiss the appeal, and his decision shall be final, . . .

G It is, therefore, clear that the deputy umpire had the same powers in this case as a reinstatement committee and had jurisdiction to decide all the questions which the reinstatement committee could decide. It is also clear that his decision is final and no appeal lies from it. It is obvious that in any case which H is brought to the reinstatement committee at least three questions may arise. The first is whether the person applying is a person to whom the Act applies and whether he has any rights under the Act ; the second is whether the person against whom the application is made was that person's employer at the relevant time ; the third is whether default has been made by the former employer of the applicant ; and it would be useless for the committee to decide that question unless they had previously decided that the applicant was a person to whom the Act applied and gave rights and that the person against whom the application was made was the applicant's employer.

It is clearly within the jurisdiction of the reinstatement committee, and, consequently, of the umpire, to decide those matters, for the committee are expressly given jurisdiction by s. 9 and the umpire by s. 10 (2). Many Acts of Parliament in recent years have given the decision of certain matters to tribunals or bodies that are not the King's courts, and it may be said that many statutes have taken away the right of the subject to come to the King's courts and to have the decisions of those tribunals or bodies challenged. This court has to consider whether in the present case the legislature has given the corporation a right to come to the court. A person who is aggrieved by a decision of one of these statutory tribunals can only apply to the court for relief by way of *certiorari* to bring up the order and quash it if the tribunal has acted outside its jurisdiction. It is now settled law that, if the tribunal is acting within its jurisdiction, absence of evidence does not affect its jurisdiction to deal with a case, nor does a misdirection of the tribunal to itself in considering the evidence, nor does a wrong decision in point of law. A

One of the recent cases which was decided was *R. v. Minister of Health, Ex parte Glamorgan County Mental Hospital* (1), which was referred to by this court in the still more recent *R. v. Furnished Houses Rent Tribunal for Paddington and St. Marylebone* (2). In delivering the leading judgment in that case, I quoted the passage in the judgment of GREER, L.J., in *R. v. Minister of Health, Ex parte Glamorgan County Mental Hospital* (1), where he said ([1938] 4 All E.R. 36): B

Where the proceedings are regular upon their face, and the magistrates had jurisdiction, the superior court will not grant the writ of *certiorari* on the ground that the court below has misconceived a point of law. When the court below has jurisdiction to decide a matter, it cannot be deemed to exceed or abuse its jurisdiction, merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or misdirects itself as to the weight of the evidence, or convicts without evidence. D

The reason is, of course, that, if Parliament has chosen to make the tribunal or body the absolute judges of certain matters, and to give no appeal, this court cannot interfere. We have been referred by counsel for the applicants to *R. v. Special Purposes Comrs. of Income Tax* (3), where LORD ESHER drew the distinction between two classes of matters (21 Q.B.D. 319): E

When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends, . . . F

In other words, Parliament may entrust the tribunal with the power of deciding whether or not they have jurisdiction, because they decide the preliminary state of facts which alone will give them jurisdiction. G

That, it seems to me, is what the tribunal—the deputy umpire—has done in this case, and it seems to me that he is clearly given the right to do so by the statute. I cannot see that the powers of the reinstatement committee could have been expressed in clearer language than they are by s. 9 (1) of the Act, and, by s. 10 (2), the deputy umpire is placed in the same position as the committee. The deputy umpire decided that the woman in question was a person to whom the Act applied and who had rights under the Act, that Barnsley Corporation were her employers at the relevant time, and that default had been H

made by them. It seems to me that he has decided the three things to decide which he has been clothed with jurisdiction by the statute, and that, therefore, the application for *certiorari* must be refused.

ATKINSON, J. : I agree.

OLIVER, J. : I agree.

Application refused.

A Solicitors : *Lewin, Gregory, Torr, Durnford & Co.*, agents for *A. E. Giffillan*, town clerk, Barnsley (for the applicants) ; the Solicitor, Ministry of Labour and National Service (for the Minister of Labour and National Service).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

B

ASKEW v. BOWTELL.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Atkinson and Oliver, JJ.), April 25, 1947.]

Street and Aerial Traffic—Tramway car—Unlawfully endangering safety of passengers—Injury through driver not stopping at compulsory stop—Conductor collecting fares on top of car—No negligence on part of conductor—Stage Carriages Act, 1832 (c. 120), s. 48.

C

An information was preferred by the respondent, a police officer, before a metropolitan magistrate, charging the appellant, a tramway car conductor, with unlawfully endangering the safety of a passenger through negligence, contrary to s. 48 of the Stage Carriages Act, 1832. The magistrate convicted the appellant and fined him 10s. with 6s. costs. D The appellant appealed to the County of London Sessions, where it was established that on July 20, 1946, while proceeding along Woolwich Church Street, the driver of the tramway car of which the appellant was the conductor slowed down to a pace of a mile an hour on approaching a compulsory stopping place. He passed the stopping place without coming to a standstill and continued at the same pace. When the car reached the stopping place an elderly woman passenger, who wished to alight and believed that the car had come to a standstill, began to get off the platform. While she was in the act of doing so, the driver accelerated and she was thrown into the road. At the time the appellant was collecting fares on the top of the car. He was unaware that any passenger wished to alight and he took no steps to see whether anyone was going to do so. It was contended for the appellant that the conductor of a tramway car was under no duty to see that passengers were descending safely, and that, when engaged in collecting fares, there was no duty on him, in the absence of notice, to do anything to assist passengers in alighting. The appeals committee dismissed the appeal, being of opinion that the appellant by negligence had unlawfully endangered the passenger. The appellant appealed.

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HELD : the appellant was entitled to assume that the driver would stop at the compulsory stopping place and that passengers would not get off before the vehicle came to a stop. There was, therefore, no evidence on which he could be found guilty of negligence, and the conviction must be quashed.

[AS TO NEGLIGENCE OF CONDUCTORS AND DRIVERS OF STAGE CARRIAGES see HALSBURY, Halsham Edn., Vol. 31, p. 703, para. 1052.]

H CASE STATED by the County of London Sessions Appeals Committee. The facts appear in the headnote.

Henry Newman for the appellant.

Maxwell Turner for the respondent.

LORD GODDARD, C.J. : This is a Case Stated by the appeals committee of the County of London Sessions who upheld a conviction by a metropolitan magistrate that the appellant, "being the conductor of a tramcar, through negligence, did unlawfully endanger the safety of a passenger." [His LORDSHIP stated the facts and continued :—] The conductor was entitled

to assume that the driver would stop at the compulsory stop. He was also entitled to assume that passengers would not get off before the car came to a stop. If passengers do get off before a tramway car comes to a stop—as many, of course, do—they do so at their own risk. If the appellant had been on the platform, no doubt he would have stopped the passenger alighting, but in the course of his duties on the top deck, he was entitled to assume, it being a compulsory stop, that the car would stop. Once it had stopped, there was a duty on him to see that it did not go off again before passengers were safely on or off the car, but it never stopped. I do not think there was any evidence on which either the magistrates or the sessions could find the appellant guilty, and the result is that the conviction is quashed with costs.

ATKINSON, J. : I agree.

OLIVER, J. : I agree. This accident was caused entirely by the negligence of the driver.

Appeal allowed with costs.

Solicitors : *Geoffrey Gush & Co.* (for the appellant); *Solicitor to the Metropolitan Police* (for the respondent).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

Applied. COCKRAM v. TROPICAL
PRESERVATION CO., LTD. [1951]
2 All E.R. 520.

A. RICHARDSON & SON v. MIDDLESBROUGH ASSESSMENT COMMITTEE.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Atkinson and Oliver, JJ.),
April 23, 24, 1947.]

*Rates and Rating—Derating—Industrial hereditament—Egg packing station—
Adapting for sale—Rating and Valuation (Apportionment) Act, 1928 (c. 44),
s. 3 (1).*

Under a licence granted by the Minister of Food, home-produced eggs were taken to an egg-packing station in bulk, being ungraded and very dirty. They were cleaned, tested for soundness, sorted and graded by machinery according to weight, stamped, and packed in crates for collection by wholesalers to whom they were sold. It was an offence to sell home-produced eggs which had not been graded and stamped.

HELD : these processes were an adaptation for sale in that they made the eggs legally saleable and produced an article different in bulk from the original, and, therefore, the premises were an "industrial hereditament" within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 3 (1).

Kaye v. Burrows ([1931] A.C. 477) and *Hines v. Eastern Counties Farmers' Co-operative Association, Ltd.* ([1931] A.C. 456) followed.

[FOR THE RATING AND VALUATION (APPORTIONMENT) ACT, 1928, s. 3 (1), see
HALSBURY'S STATUTES, Vol. 14, pp. 715, 716.]

Cases referred to :

- (1) *Kaye (Dewsbury Revenue Officer) v. Burrows & Dewsbury Assessment Committee*, [1931] A.C. 454; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; Digest Supp.
- (2) *Hines (Ipswich Revenue Officer) v. Eastern Counties Farmers' Co-operative Association, Ltd.*, [1931] A.C. 456; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; Digest Supp.
- (3) *Inland Revenue v. Easson Bros.*, [1930] S.C. 480.
- (4) *Grove (Dudley Revenue Officer) v. Lloyd's British Testing Co., Ltd.*, [1931] A.C. 450; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; Digest Supp.

CASE STATED by the Recorder of Middlesbrough.

The ratepayers were the occupiers of a hereditament described in the rating valuation list as an "egg-packing station." Under a licence granted by the Minister of Food pursuant to the Eggs (Control and Prices) (Great Britain) Order, 1942, and subject to the conditions in such licence, they were authorised to buy and sell eggs as licensed packers and to mark home-produced eggs with approved marks. The eggs were bought by the ratepayers and collected and conveyed to the hereditament. They were often mixed and always ungraded and many were dirty. After any necessary washing each egg was inspected by light for defects, any defective egg being rejected. All other eggs were then passed

through a grading machine, which sorted, graded and grade-stamped each egg automatically. It was an offence to sell home-produced eggs which had not been graded and stamped. By the terms of their licence, the ratepayers were required to pack all eggs after grading in clean containers. On an appeal by the ratepayers from a decision of the Middlesbrough Assessment Committee, the recorder held that the premises were "an industrial hereditament" within the Rating and Valuation (Apportionment) Act, 1928, s. 3 (1). The assessment committee appealed.

H. B. Williams for the assessment committee.

Rowe, K.C., and *D. H. Robson* for the ratepayers.

LORD GODDARD, C.J.: This is a Special Case stated by the Recorder of Middlesbrough, to whom the ratepayers, Messrs. Richardson & Son, appealed from a decision of Middlesbrough Assessment Committee on the determination of a proposal made by the ratepayers for the amendment of the valuation list for the rating area of the county borough of Middlesbrough in respect of certain premises occupied by the ratepayers as an egg-packing station, on the ground "that the said premises ought to be treated as an industrial hereditament" under the Rating and Valuation (Apportionment) Act, 1928. If they were so treated, they would, of course, not be liable to be rated in full. The short point in the case is whether the premises had become a "factory" within s. 149 of the Factory and Workshop Act, 1901 (and, therefore, an "industrial hereditament" within s. 3 (1) of the Act of 1928) by reason of the fact that they were used for the adapting for sale of an article by manual labour exercised for the purposes of gain.

The ratepayers carry on an egg-packing station under a licence issued by the Ministry of Food to collect eggs and send them from the station for sale to various wholesalers. The eggs have to be cleaned, they have to be inspected by means of light to see that they are sound, they have to be sorted and graded, and then they are packed in crates which are made on the premises, and sent out. I lay no stress on the fact that the crates are made on the premises, because that is not the primary purpose for which the premises are used, nor do I pay any attention to the fact that certain eggs which are thrown out for various reasons, not because they are rotten, are made into a substance called "Melange" which is sent to confectioners. I base my judgment on the ground that there is here a process of adapting for sale. The eggs have to be cleaned and sorted into various grades. They are marked according to the grade and packed according to the grade. The result of these processes is that the sorted results may be sold, whereas the original bulk could not be sold, because it would be illegal to sell the eggs until these various processes, including the process of grading which was done by machinery, had been carried out.

In a group of cases which went to the House of Lords in 1931, a large number of industrial premises, in which different processes were carried on, were considered. We must see if we can find in the judgments and opinions in the various cases—one dealing with bottled beer, another with seeds, another with rags, another with cables, and so on—a principle enunciated which will govern cases dealing with other articles. The principle that I find laid down most clearly as applicable to the present case is in *Kaye v. Burrows* (1) which was heard and decided with *Hines v. Eastern Counties Farmers' Co-operative Association, Ltd.* (2). There rags were sent into a building and cleaned, sorted and baled. SCRUTTON, L.J., in the Court of Appeal, said ([1931] 1 K.B. 508): "The sorted results are sold, where the original bulk could not be sold." That was approved by the House of Lords. They also approved the dissenting judgment of LORD SANDS in *Inland Revenue v. Easson Bros.* (3), in which he said (1930 S.C. 485):

On the counter emptied out of collecting carts there is a huge amorphous mass of waste paper, rags, etc., mixed with dirt and rubbish, which no paper manufacturer would look at. The workers produce a number of orderly bales in 80 different classes, which the paper-makers readily buy for substantial sums.

In the present case what is brought in is a great mass of eggs collected from farmers all over the district. As I have said, it would be illegal for any consumer to buy the eggs, and it would be illegal for the ratepayers to sell them until they had been graded, sorted, cleaned and marked. In my opinion, *Kaye v. Burrows* (1) entirely covers this case, and I agree with the recorder

that it was a decision which bound him. He came to the right determination in point of law, and this appeal fails.

ATKINSON, J.: I agree. The question is whether the process carried on in this factory was one for adapting any article for sale. When the eggs reached the factory they were unsaleable. When they left it they were saleable. It seems to me that the two tests which clearly govern this case are put in *Grove v. Lloyd's British Testing Co., Ltd.* (4) ([1931] A.C. 467 where SCRUTTON, L.J., is quoted with approval as saying: "The cables are not adapted for sale, but tested to see if they are fit for sale." LORD HEWART, C.J. is also quoted (*ibid*): "Their task . . . is not to adapt the cables for sale, but to see that they have been so adapted." That was the test. To put the test the other way round, in *Hines v. Eastern Counties Farmers' Co-operative Association, Ltd.* (2), SCRUTTON, L.J., is quoted ([1931] A.C. 483) with approval as having said in the Court of Appeal ([1931] 1 K.B. 504):

In my view, there was both alteration of substance and adapting for sale in sorting, making a substantially different article in bulk from that which existed before the processes were applied. In my opinion, you cannot deal with the case by saying there was a seed before the process and the same seed after the process. The process has altered the bulk and made it [*i.e.*, the bulk] legally and commercially saleable. The process being, therefore, a factory process . . .

In *Kaye v. Burrows* (1), SCRUTTON, L.J. said ([1931] 1 K.B. 508): "The sorted results are sold, where the original bulk could not be sold." This passage was also quoted with approval when the case came before the House of Lords ([1931] A.C. 484). I cannot conceive of anything more applicable to this case than that, and I agree that the appeal fails.

OLIVER, J.: I agree. If what the ratepayers did was not an adaptation for sale, then language has no meaning.

Appeal dismissed with costs.
Solicitors: *Cunliffe & Airy*, agents for *Meek, Stubbs & Barnley*, Middlesbrough (for the appellant Assessment Committee); *Herbert Smith & Co.*, agents for *R. M. Beckwith*, Middlesbrough (for the respondent company).

Reported by F. A. AMIES, Esq., Barrister-at-Law.

Dictum of WALLINGTON, J., at p. 887, not approved. *FAIRMAN v. FAIRMAN*. [1949] 1 All E.R. 938.

SPRING v. SPRING AND JIGGINS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Wallington, J.), April 30, May 1, 2, 1947.]

Divorce—Evidence—Admission by wife of adultery with co-respondent—Admissibility against co-respondent.

In a husband's petition for divorce on the ground of his wife's adultery and for damages against the co-respondent, the wife admitted the adultery but unsuccessfully pleaded connivance and conduct conducing the adultery. The co-respondent, by his answer, said nothing about the adultery, but denied that the husband had suffered any damage. The only evidence against the co-respondent on the question of adultery was the sworn evidence of the wife, given in the witness box, that she had committed adultery with him.

HELD: (i) the wife, as a witness, was not in any different position from that of any other witness, and her evidence did not cease to be effective against the co-respondent merely because she was the respondent in the case, and, consequently, the court being satisfied as to the truth of her evidence in respect of the adultery, the evidence established adultery by the co-respondent.

(ii) the wife's evidence did not require corroboration.

Rutherford v. Richardson, ([1925] A.C. 1), distinguished.

[AS TO CONFESSIONS OF ADULTERY, see HALSBURY, Hailsham Edn., Vol. 10, p. 660, para. 973; and FOR CASES, see DIGEST, Vol. 27, pp. 300-302, Nos. 2766-2792.]

Case referred to:

(1) *Rutherford v. Richardson*, [1923] A.C. 1; 92 L.J.P. 1; 128 L.T. 399; 27 Digest 488, 5196.

PETITION by the husband for divorce on the ground of the wife's adultery, and for damages against the co-respondent. The wife admitted the adultery, but pleaded that the husband connived at and by his conduct conducted thereto. The co-respondent put in an answer in which he made no reference to the adultery, but denied that the husband had suffered any damage.

L. McLaren for the husband.

Baskerville for the wife and the co-respondent.

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WALLINGTON, J. [after finding that adultery had been proved against the wife, continued]: That leaves the matter in this position, that the only evidence against the co-respondent on this question of adultery is that of the wife in the witness box. Counsel for the co-respondent has suggested an argument—founded, in the main, on the speech of LORD BIRKENHEAD in *Rutherford v. Richardson* (1)—that, even though the wife should assert in the witness box on oath as a witness in the case that she has committed adultery and given the circumstances in which the adultery was committed, that is not admissible evidence against the co-respondent. In my judgment, that is a submission to which I ought not to give effect. It seems to me that *Rutherford v. Richardson* (1) dealt with evidence of admissions, not made by the respondent as a witness in the case, but admissions, often in writing, made in the absence of the co-respondent. Such admissions are hearsay, and, although they can be put in evidence as part of the petitioner's case against the respondent, they clearly cannot be evidence affecting the co-respondent. The case against him must be proved independently of the question whether the respondent has admitted adultery with him.

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Counsel tells me that this view of the matter is not generally understood, and, in those circumstances, I will shortly express my opinion about it. It is that, if a petitioner's case against the co-respondent consists partly of written or spoken admissions said to have been made by the respondent out of court in circumstances in which the co-respondent cannot be shown to have had any part, those admissions, although they are evidence, if proved, against the respondent, and can be part of the body of evidence on which the petitioner would be entitled to a decree against the respondent, are no evidence against the co-respondent. They cannot be shut out of the case, because they are evidence against the respondent, but, although the court listens to them, if satisfied they were made in circumstances which make them admissible against the respondent, their effect can go no further. There may then be a finding against the respondent that she has committed adultery with the co-respondent, but there can be no finding that the co-respondent has committed adultery with the respondent.

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In the present case the wife said in terms more than once, and in circumstances which indicate that she was telling the truth, that she had committed adultery with the co-respondent. In whatever capacity she gave the testimony, whether on her own behalf or on behalf of the co-respondent, she did give it. She could not have committed adultery with the co-respondent unless he had also committed adultery with her, and, as a witness, she was not in any different position from any other witness. In my judgment, her testimony does not cease to be effective against the co-respondent merely because she is the respondent in the case. Suppose a witness says that on a certain date at a certain time in a certain room in a certain house he saw the wife commit adultery with the co-respondent, but does not say that he saw the co-respondent commit adultery with the wife. Suppose that for good reasons the court accepts that testimony as proving that he saw adultery committed by the wife. Can it be doubted that that would prove, if accepted, that the co-respondent had committed adultery with the wife, although he was not mentioned in the witness's testimony? In my view, it cannot be doubted. In this case the wife has said the same thing. She has said that over a long period she was the mistress of and has committed adultery with the co-respondent. Is her testimony to be ineffective because she is the respondent in the case? The position is wholly different from that in cases in which there is the type of confession or admission referred to in *Rutherford v. Richardson* (1). Here the wife is an oral witness on oath just as any other witness.

Counsel has argued that there ought to be corroboration, but corroboration of what? It can only mean corroboration of the wife's testimony. It cannot

corroboration
is required:
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mean that, if she is believed, the court cannot draw the irresistible inference from it that it involves necessarily adultery by the co-respondent with the wife. In my view, corroboration in such circumstances is not called for. If it is called for, there is abundant corroboration in the whole of the circumstances of this case.

Counsel then says that the court will not allow evidence like this, because it would put all men in danger, and they would never be safe from women who say they have committed adultery with this man and that, either for affiliation purposes or other purposes sometimes less meritorious than affiliation purposes. But I do not understand that; it seems to me to have no place in a case of this sort. The co-respondent is not in danger in this case because of his paramour. The wife here has told the truth about her relations with him. This is not a case in which there is any possibility of an untrue statement having been made on this part of it by the wife. The circumstances are clear from the documents, from the husband's testimony, and from all the testimony in the case. There is no question about it.

Nobody can have any doubt that when the wife said she committed adultery with the co-respondent she is quite clearly telling the truth. If she is telling the truth, why should the court be bound to say that, although she is truthful about her adultery with the co-respondent, it cannot hold that necessarily, therefore, the co-respondent must be proved to have committed adultery with her? It seems to me to be illogical; it has no secure basis. She could not commit adultery with him unless he committed adultery with her. I hold, therefore, that the evidence in this case establishes adultery by the co-respondent. [His LORDSHIP then dealt with the question of damages and continued:] The result is I grant to the husband a decree *nisi* against the wife with costs against the co-respondent and damages.

Decree nisi with costs and damages against the co-respondent.

Solicitors: *Davies Arnold & Co.* (for the husband); *H. Jones & Co.* (for the wife and the co-respondent).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

Re BENETT-STANFORD SETTLEMENT TRUSTS, ATWOOD AND ANOTHER v. BENETT-STANFORD AND OTHERS.

[CHANCERY DIVISION (Jenkins, J.), May 1, 1947.]

Settlements—Marriage settlement—Children of marriage to attain vested interest at 21—Covenant to settle after-acquired property on original trusts or "as near thereto as circumstances will permit"—Death of only child to attain a vested interest—Child's property left to mother—Whether property brought into settlement after death of child to be held for benefit of child or on ultimate trusts in default of issue attaining vested interest.

By a marriage settlement made in 1893, property was to be held on trust, subject to the interests therein of the husband and wife, for the children of the marriage as the husband and wife should appoint, and, in default of appointment, for all the children of the marriage who should attain 21 or, being daughters, marry under that age, and, if there should be no child who should attain a vested interest, there was an ultimate trust, in default of appointment by the wife, for the wife absolutely if she should survive the husband, or, should she die in the husband's lifetime, for the persons who would be entitled on her intestacy if she had died unmarried. The settlement contained a covenant by the wife to settle after-acquired property on the original trusts of the settlement "or as near thereto as circumstances will permit." The only child who attained a vested interest died a bachelor in 1922, having by his will left everything that he possessed to his mother (the wife). At his death, he was entitled, under another settlement, to an absolute interest in remainder in certain property and, this interest was caught by the after-acquired property clause in the marriage settlement. The question was whether, under the provisions of that clause, this interest should be held on trust, subject to the life interests of the husband and wife, for the son, who had attained

a vested interest under the original trusts of the marriage settlement, or whether, since it did not become subject to the after-acquired property clause until after the son's death, it should be held on the ultimate trusts of the settlement:—

HELD: on the true construction of the after-acquired property clause, since the son had already attained a vested interest under the original trusts, the fact that he had died before the property in question was caught by that clause did not prevent it being settled on the original trusts, and, therefore, in the events which had happened, it was to be held, subject to the life interests of the husband and wife therein and in the event of there being no further issue of the marriage, on trust for the wife absolutely.

Re Shelton's Settled Estates, Shelton v. Shelton ([1945] 1 All E.R. 283), and *Re Powell, Bodvel-Roberts v. Poole* ([1918] 1 Ch. 407) distinguished.

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[AS TO COVENANTS TO SETTLE AFTER-ACQUIRED PROPERTY, see HALSBURY, Hailsham Edn., Vol. 29, pp. 571, 572, paras. 833-835; and FOR CASES, see DIGEST, Vol. 40, pp. 493-496, Nos. 422-451.]

AS TO THE RULE IN *Lassence v. Tierney* (3), see HALSBURY, Hailsham Edn., Vol. 34, p. 214, para. 270; and FOR CASES, see DIGEST, Vol. 44, pp. 554-556, Nos. 3715-3724, and Vol. 43, pp. 643-645, Nos. 790-799.]

Cases referred to:

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- (1) *Re Shelton's Settled Estates, Shelton v. Shelton*, [1945] 1 All E.R. 283; [1945] Ch. 158; 114 L.J.Ch. 198; 172 L.T. 237; Digest Supp.
- (2) *Re Powell, Bodvel-Roberts v. Poole*, [1918] 1 Ch. 407; 87 L.J.Ch. 237; 118 L.T. 567; 43 Digest 605, 512.
- (3) *Lassence v. Tierney*, (1849), 1 Mac. & G. 551; 2 H. & Tw. 115; 15 L.T.O.S. 557; 43 Digest 643, 790.
- (4) *Re Currie's Settlement, Re Rooper, Rooper v. Williams*, [1910] 1 Ch. 329; 79 L.J.Ch. 285; 101 L.T. 899; 43 Digest 644, 793.

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ADJOURNED SUMMONS to determine the effect of a covenant to settle after-acquired property, contained in a marriage settlement, on a reversionary interest which the wife acquired under the will of her son, the only child of the marriage to attain a vested interest under the trusts of the settlement. The facts appear in the judgment.

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Hubert A. Rose for the plaintiffs, the trustees of the settlement.
Michael Bowles for the wife.
W. Haydn Hicks for the husband.
R. W. Goff for mortgagees of the reversionary interest.

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JENKINS, J.: The question raised by this summons concerns the effect of a covenant to settle after-acquired property, contained in a settlement made on the marriage of John Montague Benett-Stanford and Evelyn Benett-Stanford, on a reversionary interest which Evelyn Benett-Stanford acquired absolutely under the will of her son, who was the only child of the marriage to attain a vested interest under the marriage settlement trusts.

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The parties before the court are the present trustees of the settlement as plaintiffs, Mrs. Benett-Stanford, Mr. Benett-Stanford, and the Phoenix Assurance Co., Ltd., which is interested in the question as a mortgagee of the reversionary interest to which the wife is entitled or claims to be entitled. The marriage settlement, which was dated July 3, 1893, after introductory provisions of the usual character, from which it appears that the property settled was wholly provided by the wife, contained appropriate assignments and so forth of the property which she was settling, the usual trusts for her until the solemnisation of the marriage, provisions for investment and so on, and then, after the solemnisation of the marriage, provision that the property should be held on trust to pay the annual income of the trust fund to the wife during her life for her separate use without power of anticipation and, after her death, to pay the income to the husband, if he survive her, during the residue of his life, and, after the death of the survivor of either of them, a trust of the usual character for the children or remoter issue of the marriage as the spouses should jointly appoint by deed, and, in default of and until and subject to any such appointment, as the survivor should by deed or will or codicil appoint, with a provision to the effect that no child was, otherwise, than by way of advancement, to

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take a vested interest unless, being a son, he should attain the age of twenty-one years, or, being a daughter, attain that age or marry. Then there was the usual trust:

And in default of and until and subject to any such appointment in trust for all or any of the children or child of the said intended marriage (other than and except such child as hereinafter mentioned and excepted) who, being sons or a son, shall attain the age of 21 years or, being daughters or a daughter, shall attain that age or marry under it and if more than one in equal shares.

There was a provision of the usual character for hotchpot, and an exception from the scope of the trust in default of appointment of any child who, before attaining 21 (to put it shortly) should become entitled, whether in possession or in remainder, to the possession or to the receipt of the rents and profits of the Stanford estates. There was a further provision to the effect (again putting it very shortly) that, if the only child attaining a vested interest under the foregoing trusts was the child who was disqualified under the excepting provision to which I have referred, that child was to take notwithstanding the exception. The next provision to which I need refer relates to the ultimate trust, which was in these terms:

If there shall not be any child of the said intended marriage who shall attain a vested interest under the trusts hereinbefore declared in default of appointment then subject to the trusts and powers hereinbefore contained the trust fund and the income and statutory accumulations (if any) of the income thereof or so much thereof as shall not have become vested or been applied under any of the trusts or powers affecting the same shall after the death of [the husband] and such failure of children as aforesaid be held in trust for such person or persons and purposes as [the wife] shall while not under coverture by deed revocable or irrevocable or shall whether covert or sole by will or codicil appoint And in default of and until and subject to any such appointment upon the trusts following.

The trusts following, which were, I think, the usual ones in a settlement of that date, were for the wife absolutely if she should survive the husband, with a restraint on anticipation of her expectant interest, and an alternative trust, in the event of her dying in the lifetime of the husband, for the persons who would be entitled on her intestacy if she had died possessed thereof intestate and without ever having been married.

That brings me to the after-acquired property clause, to which the question raised by the summons relates. That clause, so far as material, was to this effect:

And it is hereby further agreed and declared that [the wife] hereby covenants with the trustees hereinbefore named that if [the wife] now is or if she shall at any time after the now intended marriage and during the same coverture become entitled in any manner and for any estate or interest to any real or personal property of the value of upwards of £500 at one time and from one and the same source . . . then and in every such case she and all other necessary parties will at the cost of the trust estate . . . convey such real or personal property to the trustees or trustee upon trust to sell . . . and so that a reversionary interest be not sold before it shall fall into possession unless the trustees or trustee shall see special reason for sale And it is hereby agreed and declared that the trustees or trustee shall stand possessed of the money to arise from such sale calling in or conversion and of any part of the said property received in money upon the trusts and with and subject to the powers and provisions hereinbefore declared concerning money forming part of the trust fund or as near thereto as circumstances will permit and so as to form one fund for all purposes with the trust fund.

There was issue of the marriage a daughter, who died in early infancy and, therefore, never attained a vested interest under the settlement. In addition, there was one son, Vere Benett-Stanford, who was born in 1894. He died a bachelor on May 30, 1922, having, by his will dated Dec. 12, 1921, so far as material left everything that he possessed to his mother. His mother, who was also appointed sole executrix by his will, duly proved that will on Aug. 4, 1922, so that she became, under her son's will, absolutely entitled to all of his property. The property to which she so became entitled included an interest in remainder in the Stanford estates in Sussex and elsewhere, which, by virtue of a number of instruments, to which I need not refer in detail, stood limited at the death of the son on trust for Dame Ellen Thomas-Stanford for life—she died on Nov. 11, 1932—and, after her death, subject to a general power of appointment, vested in the second defendant

(the husband), for the second defendant for life and, after his death, subject to a jointure in favour of the first defendant (the wife), to the son in fee simple. In those circumstances, it is not open to doubt that the interest of the son in the Stanford settled estates passed under his will to his mother, the first defendant, and was caught by the after-acquired property clause contained in the settlement.

A The question which I have to decide is the effect of that—the destination of this interest under the after-acquired property clause. The competing views are these. On the one hand, it is said that the effect of the after-acquired property clause was to bring this reversionary interest into the settlement so that, on its being realised, it would be held on trust for the wife (the first defendant) for life, subject to restraint of anticipation, with remainder to the husband, the second defendant, for life, and, after the death of the survivor of them, in trust for the son, who had attained an absolutely vested interest. The other view, which has been argued before me by counsel for the trustees, in their capacity as representing unascertained persons who may have some future interest in the property, is that, as the son was dead at the date when this property became subject to the after-acquired property clause, it would not be right to exclude the ultimate trusts in default of issue from the trusts brought into being by that clause. Counsel for the trustees invited me to hold that, in the events which have happened, the effect of the after-acquired property clause was to make the property so brought in subject to the trusts of the settlement, with some form of variation which would exclude the estate of the deceased son. He invited me to hold that largely, I think, on the strength of the words “or as near thereto as circumstances will permit.” He said that these words showed that it was not necessary slavishly to follow the trusts, and that, in certain events, the trusts could be modified to suit the circumstances as they stood at the date when the after-acquired property came in. With that I respectfully agree, to the extent that, no doubt, the inclusion of the words “or as near thereto as circumstances will permit” would give a certain latitude and might, in certain circumstances—though it is not altogether easy to see how they could arise in a settlement of this character—get over serious difficulties.

D An example of the way in which words of that kind can be called in aid to get over difficulties which otherwise arise out of referential settlements is to be found in *Re Shelton's Settled Estates* (1), cited to me by counsel for the trustees. But the fact that such words may be called in aid to get trustees or the court out of a difficulty does not, to my mind, make it necessary to hold that they must necessarily have the effect of getting the court into a difficulty; and I ask myself whether the circumstance of a son having attained a vested interest in the fund and then dying was a circumstance which had the result that the after-acquired property did not admit of being settled on precisely the original trusts of the settlement. In my judgment, it was not such a circumstance. I see no reason why this accretion to the trust fund should not have gone on precisely the same trusts as those which applied to the original fund, including the absolute interest taken in default of appointment by the deceased son when he attained 21. I think, therefore, that the effect of this clause was to carry the absolute interest in remainder under the settlement in the after-acquired property to the estate of the son.

G An ingenious argument was presented to me by counsel for the second defendant to the effect that the combined result of the son's will and of the after-acquired property clause was to produce an intestacy, and he referred me to *Re Powell* (2). In my judgment, there can really be no question of an intestacy here. In *Re Powell* (2) a testator left property on the trusts of a settlement which he himself had made and under which there was a resulting trust in his favour, and it was held that that was not an effective disposition. In this case there was an effective disposition of the whole of the son's interest in favour of his mother absolutely. If, therefore, the effect of applying to the absolute interest so given the trusts grafted on it by the after-acquired property clause was to bring some residual interest back to the son's estate, that would be a case in which, in my judgment, the principle of *Lassence v. Tierney* (3) would apply, that is to say, there would be an absolute gift with a trust grafted on it which did not exhaust the whole beneficial interest, with the result that the original absolute gift would remain. I think that an analogous, but not absolutely similar,

case is to be found in *Re Currie's Settlement* (4).

For these reasons, I hold that, on the true construction of the marriage settlement and, in particular, of the covenant to settle after-acquired property, and in the events which have happened, the reversionary interest in question ought to be held subject to the successive life interests of the spouses and, in the event of there being no further issue of the marriage, in trust for the first defendant absolutely, subject to the mortgages mentioned in the summons.

Declaration accordingly. Costs of all parties as between solicitor and client to be raised, retained and paid out of the marriage settlement fund.

Solicitors: *Martyns & Gane* (for the plaintiffs and the first and second defendants); *Walters & Co.* (for the third defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

BRAIN v. MINISTER OF PENSIONS.

[KING'S BENCH DIVISION (Denning, J.), April 17, 28, 29, May 5, 1947.]

Royal Forces—Pensions—Appeal tribunal—Determination of appeal—Need of unanimity—Pensions Appeal Tribunals Act, 1943 (c. 39), sched., para. 3 (1).

A claim to a war pension is not to be rejected by a pensions appeal tribunal unless the tribunal is unanimous in rejecting it. In case of disagreement, the claim must go before another tribunal.

Semble, On the rehearing the claimant can call fresh evidence if he wishes to do so.

[AS TO PENSIONS APPEAL TRIBUNALS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 788, 789, paras. 1117-1119.]

Cases referred to :

- (1) *Re Fourteen Appeals*, Reports of Selected War Pensions Appeals, Vol. 11, p. 465.
- (2) *Rex v. Klein* (1932) (unrep.)

APPEAL of the claimant from a decision of a pensions appeal tribunal, dismissing, by a majority, his claim for a pension. The facts appear in the judgment.

F. R. McQuown for the appellant.

H. L. Parker for the Minister of Pensions.

Cur. adv. vult.

May 5. DENNING, J. : In this case the tribunal by a majority (the chairman dissenting) decided against the claimant. It was submitted to me that there was no evidence to support the view of the majority, but I hold there was. The point remains whether, to reject a claim, the members of the tribunal must be unanimous or whether a majority vote will suffice. That point was raised, but not decided, by the Court of Session in *Re Fourteen Appeals* (1). The Pensions Appeal Tribunals Act, 1943, contains no express provision on the matter, and it must be decided on general considerations, having regard to the constitution of the tribunal and the matters which it has to decide.

The rule whereby decisions are reached according to a majority vote is firmly established in all cases where one body alone is competent to reach a decision. The very necessity of coming to a decision compels recourse to a majority vote, for in that way alone can finality be achieved. This sacrifice to necessity involves, however, the introduction of a considerable margin of error. When a decision is not unanimous, but is only reached by a narrow majority, it is almost as likely to be wrong as it is to be right. Its correctness depends more on the quality of the reasoning on either side than on the numbers. It is not satisfactory for the rights of parties to be finally determined by a tribunal of first instance with such a risk of error. The law has, therefore, devised two methods of avoiding or reducing the risk. One method is not to accept a majority vote at all, but to require every decision to be unanimous, and, in default, let the matter be re-heard with different persons sitting on the tribunal. That is the method adopted in trial by jury. Ever

since 1367 the law has required that the decision of a jury should be unanimous. If they cannot agree, even if one only dissents, the case must be tried before another jury. The other method is to accept a majority vote as a valid basis of decision, but to give a right of appeal. That is the method adopted in trials by magistrates. They have always been able to decide by a majority vote, but there is by statute a right of appeal to quarter sessions. In recent statutes creating special tribunals the two methods are sometimes found in combination.

A A right of appeal is given from a majority decision without leave, but only by leave from a unanimous decision. In the case of some other tribunals, however, neither method is applicable, and the only conclusion may be that the legislature intended to authorise a decision by majority vote with the risk of error that that entails.

A pensions appeal tribunal, despite its name, is a tribunal of first instance to which is entrusted the final decision of questions of fact. There is an appeal by leave from its decision on a point of law, but none from its decision on a question of fact. It is composed of three members each of whom has special qualifications, and in nearly all cases it is their duty to give the claimant the benefit of any reasonable doubt. If all three are unanimous in rejecting a claim on the facts, their decision can be accepted with confidence. If two are in favour of rejecting the claim and one for allowing it, and that one holds

C his view so strongly as to enter an express dissent, it raises a reasonable doubt as to the validity of the view of the majority, and, while I do not say that the view of the one dissident should prevail (for that would give effect to a minority decision), the possibility of error is so great as to make it unsafe to accept the view of the majority as final. The claimant (who has no possibility of appeal on the facts) should have an opportunity of going before another tribunal. There are a considerable number of pensions appeal tribunals, and, whenever D any difficulty arises in a part-heard case on account of illness or retirement, it is the usual and proper practice for the case to be heard afresh before another tribunal. So also, in the case of disagreement, there is no difficulty in the case going before another tribunal.

My conclusion, therefore, is that a claim to a pension is not to be rejected unless the tribunal is unanimous in rejecting it. In the case of disagreement, the claim must go before another tribunal. I must add a word, however, as E to what unanimity entails, and for this I draw on the practice under the jury system. If the need for unanimity led to many abortive trials, it would detract much from the value of that system, but that is not what happens. The cases in which a jury disagree are very few, owing to the common sense way in which the rule as to unanimity is applied. It does sometimes happen that a jury return and ask if they need be unanimous, or say they cannot agree or that F one or two do not agree with the rest. In such a case the judge directs them that they must be unanimous, but he usually goes on to explain what unanimity means on the lines of the direction of FINLAY, J. in *Rex v. Klein* (2), on Feb. 9, 1932. He reminds them that it is most important that they should agree if it is possible to do so; that, with a view to agreeing, there must inevitably be some give and take; that, if any member should find himself in a small minority and disposed to differ from the rest, he should consider G the matter carefully, weigh the reasons for and against his view, and remember that he may be wrong; that if, on so doing he can honestly bring himself to concur in the view of the majority, albeit hesitatingly or reluctantly, he should do so; but, if he cannot do so consistently with the oath he has taken, and he cannot bring the others round to his point of view, then it is his duty to differ, and, for want of agreement, there will be no verdict.

I remit this case, therefore, for a fresh hearing before another tribunal. H The claimant will be at liberty to call fresh evidence if he desires so to do.

Case remitted.

Solicitors: *Martyns & Gane*, agents for *Bickley & Lynex*, Birmingham (for the appellant); the *Treasury Solicitor* (for the Minister of Pensions).

[*Reported by W. J. ALDERMAN, Esq., Barrister-at-Law.*]

Re MERCHANT NAVY SUPPLY ASSOCIATION, LTD.

[CHANCERY DIVISION (Vaisey, J.), April 28, 1947.]

Companies—Winding up—Distribution of surplus assets—Clause in memorandum prohibiting transfer of income and property of company to members by way of profit—No provision in memorandum or articles in regard to disposal of surplus assets on winding up—Right of Crown to surplus assets as bona vacantia—Companies Act, 1929 (c. 23), s. 247.

By its memorandum a private company provided that its income and property should be applied solely towards the promotion of its objects and that no portion thereof should be transferred, directly or indirectly, by way of dividend, bonus or otherwise, to members of the company, but there was no provision, in either the memorandum or the articles, how the surplus assets should be applied on a winding up. By the Companies Act, 1929, s. 247, on the voluntary winding up of a company, surplus assets are to be distributed among the members according to their rights and interests in the company unless the articles otherwise provide:—

Held: (i) the provision in the memorandum related to the profits of the company while it was carrying on its business as a going concern.

(ii) if the provision was intended to apply to a winding up, it was inoperative, because it attempted to exclude the express provisions of the Companies Act, 1929, s. 247, without substituting any alternative provision.

(iii) the Crown was not entitled to the surplus assets as being *bona vacantia* by reason of the provision in the memorandum, because s. 247 must prevail and the surplus assets must be distributed among the members according to their rights and interest.

[As to DISTRIBUTION OF ASSETS, see HALSBURY, Hailsham Edn., Vol. 5, pp. 773, 774.]

ADJOURNED SUMMONS by the liquidator of a private company on a voluntary winding up to determine how the surplus assets should be applied.

The company was incorporated under the Companies Act, 1929, as a private company, on May 27, 1942, one of its objects being to provide for the material requirements of the Merchant Navy. By cl. 4 of the memorandum: "the income and property of the company whencesoever derived shall be applied solely towards the promotion of the objects of the company as set forth in the memorandum and no portion thereof shall be transferred directly or indirectly by way of dividend bonus or otherwise howsoever by way of profit to members of the company." There was, however, no provision, in either the memorandum or the articles, how the surplus assets should be distributed on a winding up.

Hector Hillaby for the liquidator.

Harold Christie, K.C., and *J. G. Strangman* for representative shareholders.

H. O. Danckwerts for the Attorney-General.

VAISEY, J. recited the facts and continued: It will be observed that the prohibition is against the transfer by way of profit of the income and property of the company to the members of the company and two questions arise: (i) Are these words limited to earned profit, *i.e.*, to the profit earned by the company while a going concern? (ii) If not, whether this purely negative provision is sufficient to exclude the express terms of the Companies Act, 1929, s. 247, which enacts:

Subject to the provisions of this Act as to preferential payments, the property of a company shall, on its winding up, be applied in satisfaction of its liabilities *pari passu*, and, subject to such application, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company.

Strangely enough, the section makes no reference to a provision to the contrary in the memorandum of a company, but only to such a provision in its articles. Here, even assuming—which I think is not the right view—that cl. 4 of the memorandum prohibits the payment of surplus assets to the members, it is silent as to what is to be done with them.

It seems to me first, that the provisions in cl. 4 relate solely to the profits of the company while it is carrying on its business as a going concern. Secondly, if it also extends to the profit or enhanced value which the shareholders may get in a winding up, it is inoperative because it attempts to exclude the express provision of the statute without substituting any alternative provision. Counsel for the Attorney-General has argued that this is a case in which the surplus profits ought to go to the Crown as being *bona vacantia*, because the only other claimants are subject to the prohibitive clause which provides that they are not entitled to any profit. It may well be that such was the intention of those who formed the company at a very critical moment of the war, but, if it was the intention, they should have put in an express provision to deal with the surplus assets in a winding up, *e.g.*, the common form provision which is to be found in the memorandum and articles of a company limited by guarantee and registered pursuant to s. 18 of the Act of 1929, without the word "limited"—in other words, the form, sanctioned by the Board of Trade, which says that on winding up any surplus assets shall be transferred to some organisation having comparable objects. I find nothing of that kind here, and in all the circumstances it seems to me that s. 247 must prevail, with the result that I must declare that the surplus assets of the company, after satisfying costs, ought to be distributed among the members of the company according to their rights and interests in the company. I will give general liberty to apply and I will direct that the costs of the present application shall be taxed as between solicitor and client and paid out of the assets in the hands of the liquidator.

Declaration accordingly.

Solicitors: *Edward and Childs* (for the liquidator); *Coldham, Birkett & Fleuret* (for the shareholders); *Treasury Solicitor* (for the Attorney-General).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

ROCHMAN v. J. & E. HALL, LTD, AND ANOTHER.

[KING'S BENCH DIVISION (Birkett, J.), April 21, 22, 23, 1947.]

Landlord and Tenant—Landlord's duty to licensee—Lift—Accident—Tampering by unauthorised person.

Negligence—Landlord—Lift in business premises—Accident to tenant—Liability for unauthorised tampering with lift.

By a lease for one year made on July 15, 1940, the landlords in occupation of certain premises let to the plaintiff's father, partner in a firm of tailors, the third floor of the premises, together with (*inter alia*) the use, in common with the landlords, of the lift and the staircase. There was no light in the lift or on the staircase. The lift was an automatic electric lift which went from the basement to the other floors to carry passengers, but it was also used to carry bales of cloth to the third floor. The landlords employed a firm of experienced engineers to look after the lift and, under the lease of July 15, 1940, the landlords were not to be liable for any accident to any person using it. On the evening of Nov. 14, 1940, the plaintiff, a partner and foreman manager of the tailoring firm, opened the outer gate of the lift on the ground floor, but the lift cage was not there and he fell into the well of the shaft and received severe injuries. The lift was fitted with safety devices and it should not have been possible for the outer gate to be open, or to be opened, unless the lift cage was on the same floor as the gate. There was no defect in the lift, which was in proper working order at the time, but the fact that the outer gate on the ground floor was open when the lift cage was not there was due, apparently, to some tampering with the lift by unknown persons, a fact of which the landlord was unaware. In an action for damages for negligence, the plaintiff contended that the landlords had a duty to him as a licensee to guard against any danger to the lift by unauthorised persons tampering with it, and that they had a duty to light the lift:—

HELD: (i) the duty of licensors could not be extended to their having

to consider and guard against every possible danger of which they were unaware but which might arise from the acts of unauthorised persons, and, on the facts of the case, the landlords had taken all reasonable precautions to see that the lift was safe.

Haseldine v. Daw & Son, Ltd. ([1941] 3 All E.R. 156) *applied*. *Ellis v. Fulham Borough Council* ([1937] 3 All E.R. 454) *distinguished*.

(ii) the absence of a light in the lift did not in any way contribute to the accident because, since the plaintiff had always been accustomed to the lift being in darkness, he was not misled by the fact that there was no light there, and, in the circumstances, the landlords were under no duty to put a light in the lift.

Huggett v. Miers ([1908] 2 K.B. 278) and *Lucy v. Bawden* ([1914] 2 K.B. 318) *applied*.

[AS TO LIABILITY OF LANDLORD OF FLATS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 337, 338, para. 405; and FOR CASES, see DIGEST, Vol. 31, p. 102, Nos. 2394-2397, and Supplement.

AS TO DUTY TO LICENSEES, see HALSBURY, Hailsham Edn., Vol. 23, pp. 609-612, paras. 859, 860; and FOR CASES, see DIGEST, Vol. 36, pp. 46-49, Nos. 288-306.]

Cases referred to :

- (1) *Ellis v. Fulham Borough Council*, [1937] 3 All E.R. 454; [1938] 1 K.B. 212; 107 L.J.K.B. 84; 157 L.T. 380; 101 J.P. 469; Digest Supp.
- (2) *Purkis v. Walthamstow Borough Council* (1934), 151 L.T. 30; 98 J.P. 244; Digest Supp.
- (3) *Haseldine v. Daw & Son, Ltd.*, [1941] 3 All E.R. 156; [1941] 2 K.B. 343; 111 L.J.K.B. 45; 165 L.T. 185; Digest Supp.
- (4) *Indermaur v. Dames* (1866), L.R. 1 C.P. 274; Har. & Ruth. 243; 35 L.J.C.P. 184; 14 L.T. 484; 36 Digest 35, 208.
- (5) *Huggett v. Miers*, [1908] 2 K.B. 278; 77 L.J.K.B. 710; 99 L.T. 326; 31 Digest 100, 2386.
- (6) *Lucy v. Bawden*, [1914] 2 K.B. 318; 83 L.J.K.B. 523; 110 L.T. 530; 31 Digest 100, 2382.

ACTION for damages for negligence.

The plaintiff was partner and foreman manager in a firm of tailors which had its factory on the third floor of a building of which the second defendants were landlords in occupation. By a lease for one year made on July 15, 1940, the landlords had let the third floor to the plaintiff's father, a partner in the firm, together with (*inter alia*) the use, in common with the landlords and other authorised persons, of the lift and the staircase, but the landlords were not to be liable for any accident to any person using the lift. The landlords employed a firm of experienced engineers, the first defendants, to look after the lift, and it was inspected, cleaned and lubricated by a maintenance engineer every month. If a breakdown should occur between the regular visits of the maintenance engineer, the first defendants would carry out repairs on being notified. The lift was not lighted, but BIRKETT, J., found that there had been no complaint by the plaintiff or his firm on that matter. The lift was an automatic electric lift which went from the basement to the other floors to carry passengers, but it was also used to carry bales of cloth to the third floor. It was fitted with several safety devices, and it should not have been possible for the outer gate to be open or for anyone to open the outer gate, unless the lift was on the same floor as the gate. On the evening of Nov. 14, 1940, the plaintiff, on entering the building, opened the outer gate of the lift on the ground floor, but the lift cage was not there and, it being dark at the time, he fell into the well of the shaft and received severe injuries. He brought an action for damages for negligence against the first defendants for their failure to maintain the lift in reasonable safety and proper order, and against the second defendants for their failure to take proper steps by warning, guarding, lighting or otherwise, to protect him against the danger arising from defects in the lift. After reviewing the evidence and examining the lift, BIRKETT, J., found that there was no defect in the lift and that it was in proper working order, but that, apparently, there had been some tampering with the lift by persons unknown, whereby the lift was loaded without any person being in it, the outer gate being kept open and a finger inserted where the beak of the gate lock was accustomed to go, and the lift was then sent up to the appropriate floor while the outer gate on the lower floor was still open. BIRKETT, J., held, accordingly, that there

was no case against the first defendants. The report deals with the case against the second defendants.

Glyn-Jones, K.C., and *J. Platts Mills* for the plaintiff.

Berryman, K.C., and *R. Marven Everett* for the first defendants, *J. & E. Hall, Ltd.*

Sandlands, K.C., and *C. G. Armstrong Cowan* for the second defendants, *Newstead House Estates, Ltd.*

[BIRKETT, J., after outlining the facts and reviewing the evidence, gave judgment for the first defendants and continued]: I now turn to the second defendants, the landlords. It is conceded by counsel for the plaintiff that the position here is that of licensor and licensee, and, therefore, there is no duty on me to enter into any detail in deciding that matter which is usually first decided in cases of this kind. In the cases to which I have been referred the duty of licensor and licensee is put quite clearly. The landlords had a duty not to expose the plaintiff to a trap, and they had a duty to warn him of dangers of which they knew. If, in fact, there was no defect in the lift apparatus, as I find there was no defect, then there was no danger (at any rate, from that source) of which they had a duty to give warning. They had no knowledge of any defect, and I find, in fact, that there was no defect, but counsel for the plaintiff says that that is not quite the limit of their duty, and he referred me to *Ellis v. Fulham Borough Council* (1). In that case the local authority provided in a public park a paddling-pool for children to paddle in, and loads of sand were put at the side of the pool to give the appearance of the seaside. The local authority themselves fixed a notice to a board near the pool stating: "Owing to the risk of cut feet, persons must not take into the paddling-pool any bottles, tins or other sharp materials." They also provided park-keepers who, under instructions, raked the pool every morning to see if any of these dangerous substances were there, but the rake used would not go into the sand but only over the surface, so that anything embedded in the sand would not be disclosed by the rake. The surface rake would not find it, reveal it, or move it. The plaintiff, a little boy who paddled in this pool, had his foot cut with a piece of glass that was, in fact, embedded in the sand, and another little boy a short time before had cut his foot in the same pool to the knowledge of the park-keeper looking after it. In the result, it was held that, on the assumption that the plaintiff was only a licensee, nevertheless the local authority were liable, as they knew that there was a possible danger to children paddling in the pool from articles in the pool and took measures to remove such articles, but such measures were inadequate. GREER, L.J., in dealing with this particular point, used these words ([1937] 3 All E.R. 458):

The position, I think, is that to which I referred in *Purkis v. Walthamstow Borough Council* (2): if it knew of the danger to which the children would be exposed by using this paddling-pool (a description which is taken from the notice that it put at the side of the pool) what was its obligation? Its obligation was surely to see that the danger, which it recognised existed, should be provided against, either by sufficiently removing all risk to which the children were likely to be subjected when they paddled in the pool, or by seeing that the children did not paddle in the pool at all.

The important words are "the danger, which it recognised existed." Counsel for the plaintiff used that case to support the proposition: "It is not enough that there was no defect in the apparatus of the lift. There was a potential danger—a possible danger—that somehow, in some unascertained way, between two visits of the inspecting engineer, the safety devices might become defective, and thereupon a lift purporting to have a safety device, which was, in fact, no safety device, becomes a trap of the deadliest kind, and that is a position you must guard against." It seems to me, however, to be extending the duty of a licensor some considerable way if he has to consider all the possible ways in which unauthorised people might bring his best endeavours to nought, and I do not know that there is any evidence in this case which would entitle me to hold that there was a real danger against which the landlords had a duty to guard. Indeed, there was a paragraph in the agreement which provided for that very situation—that, if something untoward occurred between two visits and the information had been given, the contractors would put the matter right, free of charge, if it were a matter of a small part being out of order, other-

wise they would charge the appropriate, fair price. *Ellis v. Fulham Borough Council* (1) which was relied on by counsel for the plaintiff on this point, was a case where the local authority acknowledged and recognised the danger and themselves put a notice up to guard against it, but their precautions were inadequate. I cannot think that the reasoning of that case can be applied to this.

In *Haseldine v. Daw & Son, Ltd.* (3), which concerned a lift in a block of flats, SCOTT, L.J., used these words ([1941] 3 All E.R. 168), speaking there of an invitor and invitee :

The invitor is bound to take that kind of care which a reasonably prudent man in his place would take, neither more nor less. The landlord of a block of flats, as occupier of the lifts, does not profess as such to be either an electrical or (as in this case) a hydraulic engineer. Having no technical skill, he cannot rely on his own judgment, and the duty of care towards his invitees requires him to obtain and follow good technical advice. If he did not, he would indeed be guilty of negligence. To hold him responsible for the misdeeds of his independent contractor would be to make him insure the safety of his lift. That duty can only arise out of contract, as in the case of an employer's duty towards his employed, which, in certain cases, may make him responsible for the structural fitness of the premises where they are to work.

GODDARD, L.J., said (*ibid.*, 180, 181) :

Accordingly, as, *vis-a-vis* [the landlord], the plaintiff was merely a licensee, the only duty which the former owed was not to expose him to, or to warn him of, a danger, of which he [the licensor], was aware . . . all the authorities are consistent on the point that the duty owed to a licensee is only to give warning of dangers of which the occupier actually knows. However, the judge has held that, as [the landlord] undertook the conveyance of the plaintiff in a moving vehicle, he owed him a higher duty. That he owed him a duty to exercise care in the actual working of the lift none will deny, but did he owe a duty to a licensee to exercise care to see that a lift which he believed to be safe and had no reason to think was in any way a source of danger was in fact safe ? I cannot think so.

GODDARD, L.J. then said (*ibid.*, 181, 182) :

. . . even assuming that the plaintiff is to be regarded as an invitee, I think that his claim . . . must fail. Towards an invitee the occupier has the duty of taking care that the premises are reasonably safe. I need not quote the classic passage from the judgment of WILLES, J., in *Indermaur v. Dames* (4), but he there points out that whether or not reasonable care has been taken is to be determined as a matter of fact. It seems to me that, by employing a first-class firm of lift engineers to make periodical inspections of the lift, adjust it and furnish reports upon it [the landlord] did all that a reasonable man could do towards seeing that the lift was safe, especially when it is remembered that he also had the advantage of quarterly inspections by the insurance company's engineer. However, it is said that, if the engineers were negligent, it cannot be said that the occupier has discharged his duty. With this I cannot agree. An occupier or any other person may have, either by contract or by law, such a degree of duty imposed upon him that he cannot discharge it by employing a contractor to do work for him, but, where the duty is to take care that the premises are safe, I cannot see how it can be discharged better than by the employment of competent contractors. Indeed, one may well ask how otherwise could the duty be discharged ?

In the present case the landlords admittedly employed a firm of engineers of the highest standing. Some criticism was levelled against them, but I need only say that, so far as I can see, these contractors carried out their duty efficiently and well, and, in all the circumstances, promptly. I can see no evidence that reasonable precautions for making this lift safe were not adopted by the landlords. I think, on the evidence in that respect, the landlords did all that they could reasonably be expected to do. That being so, so far as the lift is concerned, I find that there was no defect, and, therefore, on that part of the case as against the landlords, the plaintiff fails.

Counsel for the plaintiff had a further point which, at first sight, is impressive. On the view—and certainly it is the only view which can now be taken, so far as the evidence is concerned—that the gate, on the night of Nov. 14, was open (and not closed as the plaintiff says), so that it could be slid back, it is clear that that could only have been done by tampering or by interference—by the insertion of a finger and the use of a piece of wood. Now counsel for the plaintiff said : “ There should have been a light in the lift. The light would have made everything safe, because it would have shown with certainty, assuming it were burning, that the lift was there. Therefore, the landlords were negligent,

inasmuch as they failed to put a light in the lift." He says that the pleadings are wide enough to cover that matter. Counsel for the landlords said that there was no duty on the landlords to provide lights, and it is common ground that for a very long time there had been no light on the staircase or in the lift. It was a state of affairs with which the plaintiff was fully familiar. He did not expect any light. Counsel for the landlords referred me to *Huggett v. Miers* (5), in which there are many passages in the judgments of SIR GORELL BARNES, P., and FLETCHER MOULTON, L.J., which support the view that there was no duty towards the plaintiff imposed on the landlords to light the staircase, and, consequently, the action was not maintainable. In that case the defendant was the owner of a building, the different floors of which were let by him as separate offices to different tenants, the staircase by which access to them was obtained, not being let, but remaining in the legal possession of the defendant. The agreements for the letting of the offices respectively contained no provision with regard to the lighting of the staircase. The tenants had gas lights on the landings outside the entrances to their respective offices which lights were supplied with gas from their own meters. The practice was that each tenant, on leaving his office for the night, turned off his own light, but it did not appear that there was any agreement between the defendant and the tenants that they should light the staircase. The plaintiff, who was in the employ of one of the tenants, on coming down the staircase from his employer's offices at 8.15 one evening in March when, all the lights having been put out, the staircase was in darkness, failed to find his way out through the street door into the street, and, going further down the stairs towards the basement, fell through a door opening on a flagged courtyard at some distance above the level of the flagstones. This door was used for hoisting goods into and out of the building. In an action brought by the plaintiff against the defendant in respect of injuries resulting from the fall, it was held that there was no duty towards the plaintiff imposed on the defendant to light the staircase, and, consequently, the action was not maintainable.

The only other case to which I need refer is *Lucy v. Bawden* (6), where ATKIN, J., said ([1914] 2 K.B. 325) :

On principle it is difficult to see how an obligation could be imposed upon a landlord larger than the obligation to avoid traps. It is plain that he is, in the absence of express or implied agreement, not liable at all for the consequence of letting a house in a state of even dangerous disrepair. If he lets a loft approached by a ladder, a cellar approached by steep steps, or invites access to his premises over a plank, there seems no reason why the person accepting an invitation to use the ladder, the steps, or the plank, should, if injured by no hidden danger, be at liberty to complain that the access was not of a different and safer character. I can see no difference between the use of an unlighted staircase—*Huggett v. Miers* (5)—and the use of an unfenced staircase.

The submission made by counsel for the landlords was that, in the circumstances of this case, they were under no duty to put a light in the lift, and I accept that contention and that submission. I should like to add that, if I were wrong about this and there had been a duty on the landlords to light, then I think they took all reasonable steps to comply with it. Evidence was given here by Mrs. Haynes, the estate manager of Messrs. Waite & Waite (who were the landlords' agents for managing the property), and she said that there never had been any complaints about the light, but in August, 1940, there had been some correspondence between Messrs. Waite & Waite and the landlords about the system of lighting and wiring which had been in existence during the previous landlords' occupation. The suggestion was made that, as the wiring was in poor condition, there had better be new wiring for the electric light. That was on Aug. 6, 1940, although it was towards the end of June, 1940, only, that the landlords took over these premises. The wiring referred to in that letter was completed in September, 1940, but on Sept. 13, 1940, there was very considerable damage done to the windows by blast, through an air-raid bomb having fallen in the near vicinity, and, although the wiring was completed in September, 1940, the stage had not yet been reached when the actual lighting could be put in. Then the correspondence deals with the question of the black-out and there were negotiations about the black-out precautions necessary for the lighting. That was put in hand in October, but was not completed at the time of the accident. Finally, some difficulty about the meter was raised

with the Marylebone County Council, and this difficulty was not overcome until the motor was installed on Nov. 28, a fortnight after this unfortunate accident. I think it is fairly clear from the evidence of Mrs. Haynes that the landlords, the second defendants, were anxious and willing to do all that they reasonably could. Finally, I have come to the conclusion that the absence of a light in this lift did not in any way contribute to this accident. The plaintiff had been accustomed to the lift being in darkness, and to the staircase, basement and ground floor being in darkness, and was not misled at all by the fact that there was no light. His case was, not that there was danger because of some unauthorised interference, and, therefore, it was necessary to put a light in, so that he might know whether the lift was there and if the gate was open or not, but was: "You allowed me to meet with this accident, not because there was no light, but because I was enabled to open the gate. I stepped in without any fear because I relied on the fact that, when I opened the gate, the lift would be there, otherwise I could not open the gate." In all the circumstances, I think the case fails against the landlords, and there must be judgment for both defendants.

Judgment for defendants with costs.

Solicitors: *Lucien Fior* (for the plaintiff); *Berrymans* (for the first defendants); *William Charles Crocker* (for the landlords).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

NEWPORT BOROUGH COUNCIL *v.* MONMOUTHSHIRE COUNTY COUNCIL. MONMOUTHSHIRE COUNTY COUNCIL *v.* NEWPORT BOROUGH COUNCIL.

[HOUSE OF LORDS (Viscount Simon, Lord Wright, Lord Simonds, Lord du Parcq and Lord Normand), February 10, 11, 13, 14, 17, 18, May 16, 1947.]

Local Government—Alteration of area—Extension of county borough to include part of county area—Financial adjustments—Increased burden on county ratepayers—Method of assessing compensation—Arbitrator's duty—Interest on amount payable—Local Government Act, 1933 (c. 51), s. 152 (1) (b), sched. V, r. 1—Newport Extension Act, 1934 (c. lvii), s. 58.

By the Newport Extension Act, 1934, the boundary between the borough of Newport and the administrative county of Monmouth was altered by transferring to the former a piece of adjoining territory formerly included within the area of the latter. This necessitated certain adjustments between the two authorities, which, so far as not agreed, were to be determined by an arbitrator. One of the matters not agreed was that mentioned in s. 152 (1) (b) of the Local Government Act, 1933, *viz.*, provision for payment to the county council of such sum as seemed equitable in accordance with the rules contained in sched. V to the Act of 1933 in respect of any increase of burden which would properly be thrown on the ratepayers of that council in meeting the cost incurred in discharge of any of its functions. Rule 1 provides: "Regard shall be had to—(a) the difference between the burden on the ratepayers which will properly be incurred by the local authority in meeting the cost of executing any of their functions and the burden on the ratepayers which would properly have been incurred by the local authority in meeting such cost had no alteration of boundaries or other change taken place; (b) the length of time during which the increase of burden may be expected to continue: Provided that no alteration of income in consequence of an apportionment under the regulations made under s. 108 (1) (b) of the Local Government Act, 1929, shall be taken into account." The question for determination in the first appeal was: whether the cost incurred by the county council in the discharge of its functions was to be arrived at by taking into account the whole amount of the General Exchequer Grant to the unreduced county as it existed immediately before the transfer (as the borough council contended), or by taking the proportion of such General Exchequer Grant as bore the same relation to the whole as the rateable value of the reduced county bore to the rateable value of the unreduced county in the year

preceding the change (as the county council contended), or such other proportion as the arbitrator, having regard to all the circumstances of the case and in his discretion, thought equitable. The question in the second appeal was whether the arbitrator had power to award interest on any sum awarded to the county council in respect of the whole or part of the period between the appointed day on which the transfer was to take effect and the date of his award:—

A HELD: (i) (LORD WRIGHT and LORD SIMONDS *dissenting*): the arbitrator's duty was to fix such sum as seemed to him equitable having regard to the circumstances and the considerations indicated in the rules, but disregarding any alteration of income due to an apportionment referred to in the proviso to r. 1.

B (ii) as regards the adjustment for increase of burden the arbitrator's mandate in s. 152 (1) (b) of the Act of 1933 did not extend to authorise him to measure and award what it would be equitable to add for delay in payment, nor was he authorised to add interest for delay in respect of other items in the claim.

Decisions of the Court of Appeal, [1946] 2 All E.R. 313, *affirmed*.

[AS TO FINANCIAL ADJUSTMENTS ON ALTERATION OF AREAS, see HALSBURY, Hailsham Edn., Vol. 21, pp. 248-257, paras. 450-456; and FOR CASES, see DIGEST, Vol. 33, pp. 25-28, Nos. 113-132.]

C Cases referred to:

(1) *Bullington Rural District Council v. Oxford Corpn.*, [1936] 3 All E.R. 875; Digest Supp.

(2) *Southport Corpn. v. Lancashire County Council*, [1937] 2 All E.R. 626; [1937] 2 K.B. 589; 106 L.J.K.B. 609; 157 L.T. 63; 101 J.P. 398; Digest Supp.

(3) *Riches v. Westminster Bank, Ltd.*, [1943] 2 All E.R. 725; Digest Supp.

(4) *Swift v. Board of Trade*, [1925] A.C. 520; 94 L.J.K.B. 629; 133 L.T. 49; 25 Digest 138, 558.

D (5) *Caterham Urban District Council v. Godstone Rural District Council*, [1904] A.C. 171; 73 L.J.K.B. 589; 90 L.T. 653; *sub nom.*, *Re Godstone Rural District Council and Caterham Urban District Council*, 68 J.P. 429; 33 Digest 26, 124, H.L.; *reversg.*, S.C. *sub nom.* *Re Godstone Rural District Council and Caterham Urban District Council*, [1903] 1 K.B. 554, C.A.

E APPEALS from decisions of the Court of Appeal (LORD GREENE, M.R., MORTON and TUCKER, L.J.J.), dated June 5, 1946, and reported, [1946] 2 All E.R. 313, affirming decisions of ATKINSON, J., dated Dec. 19, 1945, and reported, [1946] 1 All E.R. 276.

NEWPORT BOROUGH COUNCIL v. MONMOUTHSHIRE COUNTY COUNCIL

F On the occasion of the alteration of areas brought about by the Newport Extension Act, 1934, which detached certain areas from the county of Monmouth and transferred them to the county borough of Newport, an adjustment was made by an arbitrator between the borough council and the county council. On this adjustment provision had to be made, pursuant to the Local Government Act, 1933, s. 152 (1) (b), for the increase of burden thrown on the ratepayers of the county. Schedule V to the Act contains rules for determining the sum to be paid in respect of this increased burden. Rule 1 provides: "Regard shall be had to—(a) the difference between the burden on the ratepayers which will properly be incurred by the local authority in meeting the cost of executing any of their functions and the burden on the ratepayers which would properly have been incurred by the local authority in meeting such cost had no alteration of boundaries or other change taken place; (b) the length of time during which the increase of burden may be expected to continue: Provided that no alteration of income in consequence of an apportionment under the regulations made under the Local Government Act, 1929, s. 108 (1) (b), shall be taken into account (1)." Rule 1 (a), in effect, directs the arbitrator to have regard to the difference between the burden

(1) By Local Government Act, 1929, s. 108: "(1) The Minister [of Health] may make regulations . . . (b) as to the manner in which the amounts of any grants payable under this Part of this Act [Exchequer Grants and other financial provisions] are to be adjusted if and so far as any adjustment is required in consequence of any . . . alterations of boundaries . . ."

as it "will be" and the burden as it "would have been." The expenditure in the unreduced area was £745,942; percentages of the total rate income of the unreduced county referable to the added area and the reduced area respectively were 4.432 per cent. and 95.568 per cent.; and the saving in expenditure amounted to £8,385. If the whole of the expenditure of £745,942 had fallen to be borne by the ratepayers, the result would have been as follows:—the "would have been" burden on the ratepayers in the area which subsequently became the "reduced area"—95.568 per cent. of £745,942; the "will be" burden on the same ratepayers—£745,942, less £8,385; and the difference would have represented the increase of burden due to the alteration in area. The difficulty arose owing to the fact that the county council had a source of income from the General Exchequer Grant which had to be taken into account before the burden on the ratepayers could be ascertained, and the proviso to r. 1 required that, in arriving at the burden, this grant was to be treated in an artificial way. It was common ground that, in ascertaining the increase of burden, a deduction from the expenditure, the cost of which would otherwise fall on the ratepayers, must be made in respect of the General Exchequer Grant. The dispute related to the manner in which these principles were to be applied in view of the terms of the proviso to r. 1. The method adopted by the county council was to ascertain, for the "would have been" burden, (i) the proportion (£15,767) of the Exchequer Grant (£355,774) referable to the added area, and (ii) the proportion (£17,293) of the rate leviable on the same area. These two sums (making together £33,060), were deducted from the total expenditure of £745,942. The resulting figure of £712,882 gave the portion of the total pre-alteration expenditure referable to the reduced area. The problem then was to find what the burden on the ratepayers in that area would have been. This was ascertained by attributing to that area its proportion of the Exchequer Grant (*viz.*, £355,744, less the £15,767, or £339,977) and deducting that from the £712,882, the resulting figure, £372,905, being the "would have been" burden on the ratepayers. The figure of £339,977 being the proportion of the Exchequer Grant referable to what became the reduced area was the crucial matter in the county council's method of calculation which was based on the view that the burden that "would have been" and the burden that "will be" thrown on the ratepayers in the reduced area could only be ascertained by attributing to that area its due proportion of the Exchequer Grant which operated to relieve the ratepayers in that area. In their calculation of the "will be" burden they deducted the same figure of £339,977 from the expenditure of the reduced area (*viz.*, £745,942, less the saving of £8,385) leaving £397,580 as the "will be" burden on the ratepayers in that area. The difference between that figure and £372,905, the figure of the "would have been" burden, was £24,675, and this was the annual increase of burden. The county borough proceeded on a different principle. Nowhere in its calculations did it arrive at a figure for the proportion of the General Exchequer Grant referable to the reduced area. It interpreted the proviso as forbidding the ascertainment of such a figure which, it said, would be equivalent to treating the amount of the grant as having been altered in consequence of the alteration of boundaries. The "income" referred to in the proviso was, it was argued, income of the county council, and the effect of the proviso was to require the whole of the pre-alteration grant to be treated as still the income of the county council, notwithstanding the alteration of areas. On this basis the amount of the grant available to relieve the burden on the ratepayers in the reduced area would be the whole of the pre-alteration grant, *viz.*, £355,744. Accordingly, in dealing with the figures they proceeded as follows:—To arrive at the "would have been" burden they treated the whole of the grant, *viz.*, £355,744 as referable to the unreduced area and deducted it from the £745,942, leaving £390,198 as the burden on the ratepayers for the unreduced area. They then deducted £17,293, *viz.*, 4.432 per cent. of the rate-borne portion of the £745,942 (*i.e.*, £745,942, less £355,744) and arrived at the same figure of £372,905 as the county council. The county council, however, made this deduction in two slices and the difference in method stood out when the "will be" calculation of the county borough was examined. They started by taking the figure of reduced expenditure for the reduced area, *viz.*, £745,942, less £8,385, giving

£737,557 in the same way as the county council. They then deducted the £355,744, leaving £381,813 as the "will be" burden on the ratepayers in the reduced area. Deducting £372,905 from this £381,813, they arrived at the figure of £8,908 as the increase of burden. The fact that they deducted the whole of the pre-alteration grant reflected their argument that after the alteration the whole grant must be treated as referable to the reduced area, not, as in the argument of the county council, 95.568 per cent. of it.

A The arbitrator stated a Special Case in which he raised the following questions:—

(i) was the proper deduction in respect of General Exchequer Grant to be arrived at by taking the whole amount of the General Exchequer Grant to the unreduced county as it existed immediately before the transfer (as the borough council contended), or by taking that proportion of such General Exchequer Grant as bore the same relation to the whole as the rateable value of the reduced county bore to the rateable value of the unreduced county in the year preceding the change (as the county council contended), or such other proportion as the arbitrator, having regard to all the circumstances of the case, thought in his discretion equitable? (ii) whether, he, the arbitrator, had power to award interest on any sum or sums he might award to the county council in respect of the period between the appointed day when the alteration took effect and the date of his award.

C ATKINSON, J., and the Court of Appeal held that the county council's contention on the first question raised was correct and that the arbitrator had no power to award interest. The borough council appealed on the first question and the county council on the second question.

Willink, K.C., Fitzgerald, K.C., and E. J. Rimmer for the borough council.
Sir Walter Monckton, K.C., Simes, K.C., and Harold B. Williams for the county council.

D The House took time for consideration.

May 16. The following opinions were delivered.

VISCOUNT SIMON: My Lords, this is an appeal from the Court of Appeal (LORD GREENE, M.R., MORTON and TUCKER, L.J.J.) which agreed (though on different grounds) with the conclusion of ATKINSON, J., in favour of the county council.

E The Newport Extension Act, 1934, altered the boundary between the Borough of Newport and the administrative County of Monmouthshire by transferring to the former a piece of adjoining territory formerly included within the area of the latter. The day appointed for the transfer was Apr. 1, 1935. This alteration of boundary called for certain adjustments between the borough council and the county council which, so far as not agreed, were by virtue of s. 58 of the Newport Extension Act, and of s. 151 (3) of the Local Government Act, 1933, to be determined by the award of a single arbitrator. One of the matters not agreed was that mentioned in s. 152 (1) (b) of the Local Government Act, 1933, which runs as follows:

G Provision shall, unless otherwise agreed, be made for the payment to a local authority [which includes a council of a county] of such sum as seems equitable, in accordance with the rules contained in the Fifth Schedule to this Act, in respect of any increase of burden which, as a consequence of any alteration of boundaries . . . will properly be thrown on the ratepayers of the area of that local authority in meeting the cost incurred by that local authority in the discharge of any of their functions.

By sched. V of the Act it is provided:

RULES FOR DETERMINING SUM TO BE PAID IN RESPECT OF INCREASE OF BURDEN ON RATEPAYERS—

H 1. Regard shall be had to—(a) the difference between the burden on the ratepayers which will properly be incurred by the local authority in meeting the cost of executing any of their functions and the burden on the ratepayers which would properly have been incurred by the local authority in meeting such cost had no alteration of boundaries or other change taken place; (b) the length of time during which the increase of burden may be expected to continue: Provided that no alteration of income in consequence of an apportionment under the regulations made under para. (b) of sub-s. (1) of s. 108 of the Local Government Act, 1929, shall be taken into account.

2. The sum payable to a local authority in respect of the increase of burden shall not exceed, or, if payable by instalments or by way of annuity, the capitalised value of the

instalments or annuity shall not exceed, the average annual increase of burden multiplied—(a) so far as that increase of burden is attributable to the cost of maintenance of roads, by twenty-one; and (b) in other cases, by fifteen.

3. Any sum payable in respect of the cost of the maintenance of county roads shall, unless otherwise agreed, be payable by way of annuity.

The question to be decided is raised in a Consultative Case stated by the arbitrator, Mr. Craig Henderson, K.C. As some discussion arose on the language in which the question was phrased, it was, at the suggestion of the House and with the agreement of the parties, reformulated as follows:

When a borough (like Newport) takes in a portion of the adjoining administrative county (like Monmouthshire) and an arbitrator is appointed (owing to absence of agreement) to fix the amount properly payable by Newport thus enlarged to the reduced county in respect of the increase of burden thrown by the transfer on the ratepayers of the reduced county in meeting the cost incurred by the latter in the discharge of any of its functions, is the proper deduction in respect of General Exchequer Grant to be arrived at by taking the whole amount of the General Exchequer Grant to the unreduced county as it existed immediately before the transfer (as the borough council contends), or by taking that proportion of such General Exchequer Grant as bears the same relation to the whole as the rateable value of the reduced county bore to the rateable value of the unreduced county in the year preceding the change (as the county council contends), or such other proportion as the arbitrator, having regard to all the other circumstances of the case, thinks in his discretion equitable?

In view of the fact that there has been much arithmetical addition and subtraction, based on precise figures, in the argument presented to this House—and indeed in the judgments which we have to review—I wish in the first place to emphasise that the arbitrator's task under the statute is to fix "such sum as seems equitable," and while he is not to "take into account" a certain "alteration of income" referred to in the proviso, his duty in other respects is not necessarily to be governed by exact calculations so much as to exercise a broad judgment under the rule that "regard shall be had" to the matters mentioned. He is to arrive at what he judges to be an equitable figure, and this primary consideration—applied within the statutory limits negative and positive—controls any arithmetical conclusion which he does not deem to be fair and reasonable.

With this preliminary observation, I address myself to the problem to be solved. What is called for is a comparison of two burdens on a body of ratepayers, each burden being estimated to arise in the future, one on the assumption that the alteration of boundary has taken place, and the other on the assumption that it has not. The contrast has been neatly described as between the "will be" burden and the "would have been" burden. The ratepayers in question are in both cases the ratepayers of what may be called the "reduced" county, *i.e.*, of so much of the county as is left after the transferred area is, actually or notionally, taken away from it. This is agreed to be the meaning of "the ratepayers" in para. 1 (a) of the schedule; it is implied in the agreed question; and it is necessarily so if we are to compare like with like. By the burden on these ratepayers is, of course, meant the net burden, *i.e.*, that part of the expenditure for general county purposes in the area of the "reduced" county which is left to be borne by them after taking credit for grants from central funds. Such grants take two forms, some being equivalent to a portion of approved expenditure for specific purposes, such as police, while the so-called "block-grant"—in statutory language the "General Exchequer Grant"—under the Local Government Act, 1929, does not depend on local expenditure, but is derived from an apportionment to each county or county borough out of a total sum annually provided by Parliament called the General Exchequer Contribution. This contribution is fixed for a period of years, and is then revised for a subsequent period. The apportionment (subject to the provision of an amount mentioned in s. 88 (1) (a) of the Act of 1929) is in proportion to the "weighted population" of the several areas, *i.e.*, its amount is affected by such considerations as the rateable value per head of population, the number of children in the area under five years of age, the extent of unemployment in the area, and the mileage of roads to be maintained. We are not concerned in the present case with the first form of grant, which has been suitably dealt with, but solely with the relief provided by General Exchequer Grant.

The best estimate available of the burden on the relevant ratepayers if there had been no alteration of boundaries does not appear to be a very difficult matter to arrive at, though, as the burden lies in the future, precision is impossible. Taking the unreduced county, the general county expenditure was partly met by the block grant and the balance is the burden borne by the ratepayers of the whole county. Since we are seeking to arrive at the burden on the ratepayers in the reduced area, it is necessary to take a part of this total which is proportionate to the reduction in rateable value. This gives a figure of annual burden to which the proper multiplier can be applied. Using the figures in the Case, the general county expenditure in the unreduced county for the year 1934-35 was £745,942; the income of the county authority derived from the block grant was £355,744; the burden on the ratepayers of the county was, therefore, £390,198. Of this sum £17,293 would fall on ratepayers in the area which is the subject of transfer, and £372,905 will, therefore, be a proper figure to take as the annual burden on the ratepayers of the reduced area if there had in fact been no alteration of boundaries.

Turning now to the estimate of the burden that will be incurred by the ratepayers in this area after the alteration of boundary takes place, the calculation, so far as it is a matter of arithmetic, must be based on similar elements. As the size of the county is reduced, the general county expenses will be diminished, but not necessarily diminished in proportion to the loss of area or of rateable value. In fact, the Case states that by reason of the reduction of area the general county expenses were reduced by £8,385 so that the "will be" expenditure to be met from rates and grant combined may be taken to be £737,557. The whole question of difficulty is to decide what is a proper figure of General Exchequer Grant to be subtracted from this last figure in order to estimate the "will be" burden on the relevant ratepayers. It is argued for the borough council that the proper figure to deduct from this reduced expenditure is the whole amount of the General Exchequer Grant to the unreduced county as it existed at the moment of transfer, *viz.*, £355,744. It is pointed out that the grant is the income of the county. It does not belong to any set of ratepayers but to the county authority itself. And the contention is that, at the date when the boundary is altered, and the area of the county thus reduced, the whole sum must still be treated as the income of the reduced county and that the total operates to reduce the burden which would otherwise fall on the ratepayers of the reduced area.

There are, however, two considerations which lead me to the conclusion that this argument should be rejected. First, these estimates are as to the future, and it is not the fact that after the change of boundary the county authority will continue to receive in the future the same grant as before. At any rate, it would be the purest coincidence if the same total continued to be paid. Upon the alteration of boundary taking place, regulations made under s. 108 of the Act of 1929 require an adjustment to be made in the grant previously payable to the county, having regard to the "weighted population" of the reduced area. This was done and the new figure was £344,487. The proviso to r. 1 of sched. V prohibits the arbitrator from taking the alteration from £355,744 to £344,487 into account, *i.e.*, his calculations are to be made without making use of the latter figure, but that is no sufficient reason for saying that he is required to attribute to the reduced county in the future a figure of income which it will never receive at all. The resulting position, as it seems to me, is that the arbitrator is left to determine, from the facts and figures known to him to which he must or may have regard, what is the equitable deduction to make on the score of grant relief from the assumed expenses of the reduced county. How that task should be discharged I will discuss a little later.

The second consideration is this. If the provisions of the statute require in every case the application of the arithmetical formula suggested by the borough council, there will be instances in which the result will be far from equitable, and may even become absurd. It would seem extraordinary if the position was that the greater the loss of area to the county the greater the advantage to its remaining ratepayers would be from an undiminished figure representing grant to the whole county before it suffered any diminution of area at all—a figure, moreover, that is greater than the deduction for grant in relief of such ratepayers in the "would have been" calculation. Consider

the situation if the size of a county is reduced to a half, or less than a half, of its original area by reason of the lost area being absorbed into an adjoining borough. The result of such an operation would be that the expenditure of the county would be very greatly reduced. If, nevertheless, against this reduced expenditure the statute requires to be set the whole amount of the grant awarded to the county before it was divided, the result might well be that the ratepayers would have to find nothing at all. I cannot think that such a result could be the intention of the words used by Parliament and this confirms my conclusion that the arbitrator, instead of being tied down by a rigid formula, has to make the deduction which is equitable in the circumstances. For myself, I should not be prepared to say that the right deduction to be made from the expenses of the reduced county is necessarily the proportion of the previous grant which corresponds to the reduction in rateable value. I do not think that the arbitrator would be exceeding his discretion if he was influenced in suitable cases by comparisons of population or of area. The whole thing is an estimate of what will happen in the future, and an estimate, moreover, of annual increase of burden to which the statutory multiplier is applied. But inasmuch as the previous grant which was income in the hands of the unreduced county had to be used in proportionate relief of ratepayers, it seems to me that the arbitrator would be well justified in treating such portion of the previous grant as corresponds to the reduction in rateable value as the appropriate set off against the expenditure of the reduced county. This is not to say that the grant belonged to the ratepayers: it did not. The grant is the income of the county council, but this income has to be used to reduce in due proportion the figure of the rate in the pound which the ratepayers are called on to pay.

For these reasons, I think the borough council's contention fails and the appeal should be dismissed, though I would propose to answer the question by saying that the arbitrator's duty is to fix such sum as seems to him equitable having regard to the circumstances and the considerations indicated in the rules but disregarding the figure of reapportionment referred to in the proviso. Subject to the exercise of this discretion, he would be justified in reaching the conclusion approved by the Court of Appeal. I move that this appeal be dismissed.

LORD WRIGHT: My Lords, this appeal raises a question on the construction of a few words in ss. 151 and 152 and sched. V to the Local Government Act, 1933. Those provisions (*inter alia*) define the mandate given to an arbitrator appointed to decide the differences which have arisen between the corporation of the County Borough of Newport and the county council of the County of Monmouth. The arbitrator Mr. Craig Henderson, K.C., was appointed under s. 151 above mentioned, to make an adjustment (*inter alia*) between the two councils of the financial relations between them in accordance with the section and with particular reference to the terms of s. 152 which requires that provision should be made for the payment to a local authority of such sum as seems

... equitable, in accordance with the rules contained in the Fifth Schedule to this Act, in respect of any increase of burden which, as a consequence of any alteration of boundaries or other change in relation to which the adjustment takes place, will properly be thrown on the ratepayers of the area of that local authority in meeting the cost incurred by that local authority in the discharge of any of their functions.

Schedule V which contains "Rules for determining sum to be paid in respect of increase of burden on ratepayers" for the guidance of the arbitrator prescribes that (1) regard shall be had to (a) the difference between the burden on the ratepayers which will properly be incurred by the local authority in meeting the cost of executing any of their functions and the burden on the ratepayers which would properly have been incurred by the local authority in meeting such cost had no alteration of boundaries or other change taken place; (b) the length of time during which the increase of burden may be expected to continue. It then goes on to set out the proviso in respect of which primarily the arbitrator has stated the Consultative Case now brought on appeal before your Lordships. The proviso is in these terms:

Provided that no alteration of income in consequence of an apportionment under the regulations made under para. (b) of sub-s. (1) of s. 108 of the Local Government Act, 1929, shall be taken into account.

The first question which the arbitrator referred to the decision of the court is :

Whether the contentions of the county council or the contentions of the borough council which he sets out are correct in law upon a true interpretation of the proviso . . . and, if neither of the said contentions be correct in law, what is the true meaning and effect of that proviso ?

To clarify the issue, it was agreed during the course of argument between the parties that one aspect of the questions sought to be raised in the Consultative

A Case might be formulated thus :

When a borough (like Newport) takes in a portion of the adjoining administrative county (like Monmouthshire) and an arbitrator is appointed (owing to absence of agreement) to fix the amount properly payable by Newport thus enlarged to the reduced county in respect of the increase of burden thrown by the transfer on the ratepayers of the reduced county in meeting the cost incurred by the latter in the discharge of any of its functions, is the proper deduction in respect of General Exchequer Grant to be arrived at by taking the whole amount of the General Exchequer Grant to the unreduced county as it existed immediately before the transfer (as the borough council contends), or by taking that proportion of such General Exchequer Grant as bears the same relation to the whole as the rateable value of the reduced county bore to the rateable value of the unreduced county in the year preceding the change (as the county council contends), or such other proportion as the arbitrator, having regard to all the other circumstances of the case, thinks in his discretion equitable.

C In effect, the substantial question is: What is the true construction of the proviso ? A second and separate question proposed in the Consultative Case, *viz.*, whether the arbitrator has power to order interest, forms the subject of the second appeal between the same parties, now before your Lordships.

D By the Newport Extension Act, 1934, which came into operation on Apr. 1, 1935, (which is referred to later as "the appointed day") the boundary of the County Borough of Newport was altered so as to include in addition to the then existing borough a certain parish and parts of two other parishes. These "added areas" had been a part of the Administrative County of Monmouth. The financial adjustments required to be made related to the addition of these added areas to the borough council and their subtraction from the county council. The county council put in a claim against the borough council which embodied the financial adjustment which the county council contended should be made to compensate the county council for the loss it had suffered by the transfer to the borough council of the added areas. The detailed claim amounted to £532,443 of which £510,066 represented what was claimed to be the increased burden thrown on the ratepayers of the county council, based on an annual increase of burden totalling £28,397, of which £24,675 was in respect of general county purposes and £3,722 in respect of special county purposes. There was also a claim for interest.

F The General Exchequer Grant to each county is apportioned by the Minister of Health out of the total sum voted by Parliament for the whole country in accordance with regulations made by the Minister under para. (b) of sub-s. (1) of s. 108 of the Local Government Act, 1929, which empowers the Minister to make regulations as to the manner in which grants payable under the Act are to be adjusted "if and so far as any such adjustment is required in consequence of any alterations . . . of boundaries taking effect on or after the appointed day."

G This General Exchequer Grant is to be periodically revised, first for a period of three years, then for a period of four years, and on any subsequent revision for a period of five years, in each case starting from the appointed day of each period. The county apportionment, as it is called, is determined by the Minister who is required to decide "in proportion to the weighted population," according to his discretion under the regulations but he must have regard to not merely the number of ratepayers, but also to the special requirements under the Act of certain sections of the people called the weighted population because of these special requirements. The General Grant was distinguished from the Special Grants made in respect of particular services. These Special Grants have been treated separately for purposes of this dispute. It is the General Exchequer Grant which is in question here in the Case Stated. That grant is for general county purposes, such as highways, public assistance and so forth.

H For the financial year 1935-36 which followed the alteration of boundaries,

the income received by the county council from the General Exchequer Grant was reduced by the Minister from £355,744 which was the income received in the financial year 1934-35 before the alteration of boundaries, to £344,487 which was to be the grant for the remainder of the fixed grant period. As in other years the grant went into the county fund and was used for general county purposes. The General Exchequer Grant, being thus available for general county purposes, went *pro tanto* to reduce the rate falling on the ratepayers individually. This effect is shown in the statement circulated to each ratepayer on the back of his demand note. Thus, in the specimen exhibited the total rate imposed is 12s. 3d. in the pound of which sum 4s. is met out of the Exchequer Grants leaving a rate in the pound of 8s. 3d. payable by the ratepayer. An alteration in the amount of the grant will accordingly alter the burden on the ratepayer. But the proviso enacts that any alteration of income made in consequence of change in boundaries as between local authorities under s. 108 of the Act of 1929, which is quoted above, is to be disregarded by the arbitrator in determining the difference in burden on the ratepayers consequent on the alteration of boundaries. The view that to disregard the Exchequer Grant was inconsistent with the arbitrator's duty to make an equitable adjustment has perhaps led the Court of Appeal to attempt to overcome what seems to them to be a want of equity and to interpret the words of the proviso as still capable of receiving effect. The court has held that the alteration of the General Exchequer Grant or Block Grant is to be apportioned on the basis of the ratepaying population in the reduced county as compared with the unreduced county. It is agreed (at least for purposes of this comparison and as an illustration) that 4.432 per cent. of the ratepayers in the unreduced county area were transferred from the county council and added to the borough council. The Court of Appeal held that the arbitrator should take this item into account in making his adjustment of the change in burdens consequential on the alteration of the boundaries. This might seem at first sight equitable. But it would in my opinion be directly in defiance of what appear to be the plain words of the proviso. I think it would also be inconsistent with the general scheme of the legislation and the true position. The problem which the arbitrator has to settle is to determine the difference in the burden on the ratepayers. He must ascertain that by way of an estimate of the future burden in the relevant period and on knowledge of the previous circumstances and his instructed forecast of the future course of events, always remembering that he is limited to the difference due to alteration of boundaries. This, however, is subject to what the proviso says is to be disregarded, namely, a particular alteration of the Block or General Exchequer Grant. What then is the reason for what may seem an arbitrary limitation, arbitrary because the burden on the ratepayers may be increased by a change in the General Exchequer Grant coming to the county and thus in fact increasing the burden on them individually? It is I think possible to suggest several reasons for what may seem anomalous. The General Exchequer or Block Grant comes to the county as an undifferentiated sum, based upon the decision of the Minister and not analysed by him so as to show to the county the component parts which he envisaged in arriving at his decision. It is in fact the result of the Government policy; the exact amount of the Block Grant assigned to the county will not generally depend on the number of ratepayers, because the ratepayers form only a portion of the population, the majority of whom are not ratepayers. And further the amount of the grant will naturally depend on the services which the Government desire to provide for, in particular the number of the population which come within the description of "weighted," that is, members of the population requiring special expenditure for the special benefit or services which Parliament has determined should be provided under its general policy. For these and similar reasons a counting of the ratepayers would be fallacious, and its result inequitable. The arbitrator could not know whether an alteration in the grant was due to an alteration in the boundaries or was for other reasons. These and other like considerations lead me to reject the view of the Court of Appeal that the Block Grant should be adjusted on a comparison of ratepaying population before and after the alteration of boundaries. *Post hoc* is not necessarily the same as *propter hoc*.

If effect is given to the words of the proviso and the alteration in the General Grant is ignored altogether the result will be in accordance with the proviso which will receive effect and the result will also in my opinion be logical. What the arbitrator has to decide is the difference in the burdens consequent on the alteration of boundaries; as he cannot tell whether the alteration of the General Exchequer Grant is due to that alteration, he cannot in any case bring that item in, because it is unknown on what considerations of policy or otherwise the change is based. Furthermore as a mere matter of construction I should construe "burden on the ratepayers" as meaning rateborne burden limited to so much of that burden falling on the ratepayers as is incurred in executing their functions. So far as that cost is borne by the Exchequer Grant it is not incurred by the ratepayers and may well be left out of account. All that the arbitrator has to decide is the difference in burden. If the arbitrator leaves the General Exchequer Grant out of his computation on both sides of the account, he will show the difference in the rateborne burden consequent on the alteration of the boundaries. In determining this difference the amount of the General Exchequer Grant will thus be seen to be irrelevant to the comparison.

I accordingly think that the question put by the arbitrator should be answered in favour of the borough council. I agree substantially with the contentions of the borough council. I have not dealt with any question of figures, though I have found the figures put in helpful in deciding the question of principle. My conclusion is that as it is only the difference which the arbitrator is required to estimate that figure will be found by ignoring altogether the alteration in the General Exchequer Grant or perhaps more conveniently by putting the grant as a figure on each side of the annual account. The result may appear arbitrary because it disregards an item of account which may affect the total expenditure of the county council, but it does not affect directly the annual difference of the rateborne burden. This is, in my opinion, as I have said, the figure which the arbitrator has to find. This conclusion renders it unnecessary to consider any further alternative. For myself, I should allow the appeal.

LORD SIMONDS: My Lords, it will, I think, in the end be found that the question in dispute between the parties to this appeal turns on a short point of construction but it is necessary to state the surrounding circumstances which have given rise to it.

By the Newport Extension Act, 1934, which came into operation on Apr. 1, 1935, the boundary of the County Borough of Newport was altered so as to include in the then existing borough certain parishes or parts of parishes which were before the alteration part of the Administrative County of Monmouth. I will refer to the area so included as "the added area." When it is important to distinguish between the county's area after and before the alteration I will refer to it as the "reduced" or the "unreduced" county as the case may be. Section 58 of this Act provided as follows:

(1) Where in consequence of this Act any adjustment of any property income debts liabilities or expenses or of any financial relations is required an adjustment shall be made between the councils or other authorities affected under and in accordance with ss. 151 and 152 of the Act of 1933 [meaning the Local Government Act, 1933] as if this Act were an order made under pt. VI of the Act of 1933.

The material parts of s. 151 and s. 152 of the Local Government Act, 1933, and sched. V thereto are as follows:

151.—(1) Any public bodies affected by any alteration of areas or authorities made by an order under this Part of this Act may from time to time make agreements for the purpose of adjusting any property, income, debts, liabilities and expenses (so far as affected by the alteration) of, and any financial relations between, the parties to the agreement.

(3) In default of an agreement as to any matter requiring adjustment, such adjustment shall be referred to the arbitration of a single arbitrator agreed upon by the parties, or in default of agreement appointed by the Minister, and the award of the arbitrator may provide for any matter for which an agreement might have provided.

152.—(1) On an adjustment under the last preceding section the following provisions shall have effect . . . (b) Provision shall, unless otherwise agreed, be made for the payment to a local authority of such sum as seems equitable, in accordance with the rules contained in the Fifth Schedule to this Act, in respect of any increase of burden which, as a consequence of any alteration of boundaries or other change in relation to which the

adjustment takes place, will properly be thrown on the ratepayers of the area of that local authority in meeting the cost incurred by that local authority in the discharge of any of their functions.

Sched. V provides :

RULES FOR DETERMINING SUM TO BE PAID IN RESPECT OF INCREASE OF BURDEN ON RATEPAYERS—

1.—Regard shall be had to—(a) the difference between the burden on the ratepayers which will properly be incurred by the local authority in meeting the cost of executing any of their functions and the burden on the ratepayers which would properly have been incurred by the local authority in meeting such cost had no alteration of boundaries or other change taken place; (b) the length of time during which the increase of burden may be expected to continue: Provided that no alteration of income in consequence of an apportionment under the regulations made under para. (b) of sub-s. (1) of s. 108 of the Local Government Act, 1929, shall be taken into account.

2.—The sum payable to a local authority in respect of the increase of burden shall not exceed, or, if payable by instalments or by way of annuity, the capitalised value of the instalments or annuity shall not exceed, the average annual increase of burden multiplied—(a) so far as that increase of burden is attributable to the cost of maintenance of roads, by twenty-one; and (b) in other cases, by fifteen.

3.—Any sum payable in respect of the cost of the maintenance of county roads shall, unless otherwise agreed, be payable by way of annuity.

Thus, it became necessary for the county council and the borough council to make agreements for the purpose of the prescribed adjustments, or, failing agreement, to have the matter referred to arbitration. They reached a large measure of agreement but upon two matters of pecuniary importance they failed to do so. These matters were accordingly referred to Mr. W. Craig Henderson, K.C., as arbitrator and he at the request of the parties stated a Case for the decision of the court.

Before I state the questions raised by the Special Case, I must recall certain relevant facts. In the financial year 1934-1935 the county council received an income by way of General Exchequer Grant of £355,744. This grant, which originated in the Local Government Act, 1929, is made out of moneys provided by Parliament as an annual contribution towards local government expenses in counties and county boroughs. This contribution, which is called "the General Exchequer Contribution" is made subject to periodical revisions at the end of fixed periods which are called "fixed grant periods." The same Act provides for apportionment of the General Exchequer Contribution among the several counties and county boroughs in the manner therein specified and for the setting aside out of the county apportionment of every county (other than the county of London) of certain sums as therein mentioned and for the residue being paid to the council of the county. This residuary sum is the "General Exchequer Grant." It is the income of the county council and applicable by it for general county purposes. I think it unnecessary to say anything more about it, except that the amount of the grant is in no way determined by the rateable value of the county. I have said that the county council in the year 1934-1935 thus received a grant of £355,744, and, since the grant is a contribution towards local government expenses, it follows that by that amount the burden which would otherwise fall upon the ratepayers was *pro tanto* reduced. This reduction can be arithmetically distributed as to £15,767 to the ratepayers in the added areas and as to £339,977 to those in the reduced county. I mention (but, observing the proviso to r. 1 to sched. V, mention only to forget it) that, consequent on the alteration of boundaries, this general Exchequer Grant was apportioned by the Minister of Health under the regulations made under para. (b) of sub-s. (1) of s. 108 of the Local Government Act, 1929, and that by this apportionment the income received by the county council from the General Exchequer Grant was reduced to £344,487 during the remainder of the current fixed grant period.

Having stated the income of the county council from the General Exchequer Grant, and reminded myself that I must forget its alteration, I can now state the first matter in dispute between the parties. It is simply whether in calculating the increase of burden which as a consequence of the alteration of boundaries will fall upon the ratepayers in the reduced county, (which is conveniently called the "will be burden" as distinguished from the "would have been" burden, *i.e.*, the burden that would have been theirs if there had been no

alteration) the sum to be deducted in respect of the income received by the county council by way of General Exchequer Grant should be £355,744 or £339,977. The rival contentions of the borough council and the county council are stated in the Case and the arbitrator by reference to them thus poses the first question for the decision of the court :

Whether . . . the contentions of the county council or the contentions of the borough council . . . are correct in law upon a true interpretation of the proviso to para. (1) of sched. V to the Local Government Act, 1933, and if neither of the said contentions be right in law, what is the true meaning and effect of that proviso ?

At the risk of repetition it is worth while restating the question in the terms which counsel for the parties agreed after some argument in this House. They were as follows :

When a borough (like Newport) takes in a portion of the adjoining administrative county (like Monmouthshire) and an arbitrator is appointed (owing to absence of agreement) to fix the amount properly payable by Newport thus enlarged to the reduced county in respect of the increase of burden thrown by the transfer on the ratepayers of the reduced county in meeting the cost incurred by the latter in the discharge of any of its functions, is the proper deduction in respect of General Exchequer Grant to be arrived at by taking the whole amount of the General Exchequer Grant to the unreduced county as it existed immediately before the transfer (as the borough council contends), or by taking that proportion of such General Exchequer Grant as bears the same relation to the whole as the rateable value of the reduced county bore to the rateable value of the unreduced county in the year preceding the change (as the county council contends), or such other proportion as the arbitrator, having regard to all the other circumstances of the case, in his discretion thinks equitable ?

My Lords, I cannot see any justification for the county council's contention. The task of the arbitrator appears to me a simple one. To ascertain the difference between the "would have been" and "will be" burdens he must first find what those burdens respectively are. The "would-have-been" burden presents no difficulty. Three factors enter into the calculation, (a) the expenditure by the local authority ; (b) the income of the local authority, and (c) the balancing figure which represents the amount which the ratepayers have to find, or, in other words, the "burden on the ratepayers." This last figure has itself to be divided between the ratepayers in the added area and those in the reduced county. For it is only the burden on these latter ratepayers that has to be considered. Concrete form can be given to this calculation by reference to the figures used in the case. Thus the "would have been" expenditure is assumed to be £745,942 : the income, i.e., the General Exchequer Grant, is assumed to be £355,744 : the burden upon all the ratepayers would be the difference between those figures, i.e., £390,198. But of this sum £17,293 would be borne by the ratepayers of the added area, so that the "burden upon the ratepayers" to be considered by the arbitrator will be £372,905.

Next, the arbitrator must find the "will be" burden. The same factors come into the calculation. First, the expenditure by the local authority. Here it will probably appear that the reduction of the county area will effect some saving. Thus in this case it is estimated that there will be a saving of £8,385. The "will be" expenditure is therefore reduced from £745,942 to £737,557. Then the income of the reduced county is to be ascertained. Here there is no room for speculation. That income (so far as it is derived from General Exchequer Grant) will remain the same during the remainder of the current fixed grant period unless it is altered. But it is just at this point that the county council as it appears to me, fall into error. The income being the income of the county and of no one else, they yet treat it as if it were the income of the ratepayers and as if it were distributable between the added area and the reduced county according to rateable value. Thus such expressions as the amount of grant "referable to the added area" were commonly used by counsel for the county council and are to be found in the judgment of LORD GREENE, M.R. I find no authority for this in the language of the rule. I repeat that, to ascertain the "will be" burden, the arbitrator must find the income of the reduced county and there is no reason why he should ignore a fact which he knows, viz., that the income will be £355,744 until it is altered and substitute a figure, which is itself based on a fundamental fallacy, viz., that any part of it was ever referable to any part of the county area. It was not

and is not. The whole of it is the income of the county. Having thus found the "will be" expenditure (£737,557) and the "will be" income (£355,744) of the reduced county, the arbitrator will deduct the one from the other and find the "will be" burden to be £381,813, *i.e.*, greater by £8,908 than the "would have been" burden.

My Lords, I hope that I have not over-simplified what appears to me a very simple case. But as soon as it is appreciated that the General Exchequer Grant is not the less the income of the county because the ratepayers are by that fact spared a call upon their pockets which is necessarily proportionate to the rateable value of their hereditaments, and that it will remain the income of the county notwithstanding that there may be an alteration of boundary unless and until it is altered, and that no actual or possible alteration of income in consequence of an apportionment by the Minister is to be taken into account, that is really the end of the elaborate case made by the county council.

There is, however, one aspect of the case upon which I must say something more. The income of the reduced county, so far as it consists of General Exchequer Grant, may be altered during the current fixed grant period by an apportionment made by the Minister. This alteration must be ignored. But, it is said, this is not the only possible alteration of such income, for in the next fixed grant period a second alteration may be made. Indeed, we know that it was. Ought not this possibility to be taken into account by the arbitrator in fixing his equitable sum? My Lords, the short answer is that it should not, because the only thing which the arbitrator has to consider is an increase of burden due to an alteration of boundaries. The apportionment by the Minister to which the proviso relates is directly due to that fact. That is why it had to be specifically mentioned if it was to be excluded from consideration. But the alteration made in the next fixed grant period (which would itself be an alteration of the sum apportioned by the Minister) might be due to a number of factors other than the alteration of boundaries, that factor having already been provided for by the Minister's apportionment. Therefore, such subsequent alteration is not a matter for the arbitrator to consider.

This appeal should, therefore, in my opinion, be allowed and the first question posed by the arbitrator answered by saying that the contentions of the borough council are correct in law upon a true interpretation of the proviso in question.

LORD DU PARCQ (read by LORD NORMAND): My Lords, without restating the question which has been propounded for your Lordships' consideration, I will at once address myself to it. If there were no General Exchequer Grant it would be easy to see how the burden on the ratepayers of the reduced county was likely to be affected by the alteration of boundaries. I will use the figures which have been adopted hypothetically by both sides. Before the severance the total expenditure of the unreduced county was £745,942. If there had been no grant, the burden on those of the ratepayers who are now left within the reduced county would have been £712,882. In future the estimated expenditure of the county will be less than £745,942, but less only by £8,385—*i.e.*, it will be reduced to £737,557. This would leave an additional burden of £24,675 to be borne by the ratepayers of the reduced county by reason of the alteration of boundaries. The same result is, of course, arrived at by deducting the estimated saving of £8,385 from the sum of £33,060 which represents the rates lost to the reduced county by reason of the amputation which it has suffered. We know, however, that the total burden on the ratepayers of the unreduced county was alleviated by the grant and that the total burden on the ratepayers of the reduced county will be lightened by a revised grant. How do these facts affect the calculation which the arbitrator is called upon to make? The grant is, of course, part of the income of the county, but its relevance to the present inquiry is that it reduces the burden on the ratepayers. The General Exchequer Grant is so apportioned as to compensate ratepayers for abnormally heavy burdens which have been put upon them because of circumstances which exist in the areas in which they are rated, because *e.g.*, of an unusually high degree of unemployment or exceptionally heavy liabilities for road upkeep. Thus the grant apportioned to a particular area is proportionate to the needs of that area, and when it is revised it will (on the assumption that the amount of the Exchequer contribution is unaltered) go up or down according as those needs

become greater or less. When there is an alteration of boundaries there is a new apportionment of the grant as between the areas affected by the change. When the county of Monmouth was reduced and the borough of Newport was enlarged, the new claims of the reduced county and the enlarged borough to the compensation which the grant affords obviously were based on new sets of facts and figures. The Minister, surveying the altered scene, had to make a new adjustment. He might (and, as we know, did) come to the conclusion that, in order
A to do justice between the two sets of ratepayers, the sum to be allotted to the reduced county must be less in total amount than that previously allotted to the unreduced county. To that extent the income of the county will be reduced.

The legislature has thought it prudent to warn the arbitrator that when he weighs in the scales the "would have been" and the "will be" burdens, he must not take into account any alteration made in the grant in consequence of the Minister's new apportionment, whether by way of increase or decrease.
B The reason for this warning is plain. If the arbitrator sought to compensate the ratepayers for a reduction in the grant, he would be giving back to them what the Minister has, in justice, taken away. If he regarded them as profiting by an increase in the grant, and so weighed the increase in the scales against them, he would be depriving them of what the Minister has thought it right to give them.

C So far, there is no dispute between the parties. The controversy begins when the borough council say that the arbitrator must assume that the grant to the reduced county will be the same in amount as the grant which was made to the unreduced county. They would read the negative provision that "no alteration of income in consequence of an apportionment . . . shall be taken into account" as if it were equivalent to a positive provision that the arbitrator must make his calculations on the footing that the amount allotted to the reduced county
D will remain the same as that which was allotted to the unreduced county.

My Lords, I do not read the proviso as giving any such direction to the arbitrator, nor do I find anything in the Act which compels him to make the assumption which the borough council would have him make. If he were compelled to assume that there had been no change in the amount of the grant to the county, he would be upsetting the Minister's adjustment of the balance just as surely as if he did what the proviso in terms forbids him to do. A simple
E illustration will, I think, show this. Let it be assumed that a particularly necessitous area has been severed from a county, with the result that in the reduced county there is a relatively low number of unemployed persons in proportion to the population, whereas in the unreduced county the proportion of unemployment was high. Assume further that in all other respects the county was equally grant-worthy (I borrow a word that was coined, I think, by one

F of the learned counsel) before and after the severance. The result would be that the reduced county must receive a relatively lower grant than the unreduced county received. It would be manifestly wrong to say that the ratepayers of the reduced county had suffered by the change. They are getting what their present needs entitle them to get just as they got in the past what their previous needs entitled them to get. There is no addition to their burden by reason of the reduction in the grant: it is reduced in order that the burden

G upon them may, so far as is possible, remain unchanged. If however the arbitrator is forced to make the false assumption that the ratepayers will continue to get the benefit of the higher grant which the unreduced county received, he will be compelled to do them an injustice, because he will be assuming that the "will be" burden is to be reduced to an extent to which it will certainly not be reduced, and will thus be weighing the scales unfairly against them. Since the arbitrator's duty is to arrive at a sum which "seems equitable," it
H cannot have been the intention of Parliament that he should be compelled to do an injustice which, be it observed, it would not be the business of the Minister to remedy.

Before coming to a final conclusion on this matter, I had the advantage of reading the opinion which LORD NORMAND is about to deliver. I have found it illuminating, and I agree with his view that the arbitrator would act fairly if he left the grant out of his calculation altogether. It is used as a means of redressing inequalities, and, if properly adjusted, will redress them, and do no more than redress them, however much it may be altered in consequence of an

alteration of boundaries. The method adopted by the Court of Appeal reaches the same result, as LORD NORMAND points out, by treating a proportion of the unaltered grant as referable to the ratepayers of the reduced county. I agree that this is not a strictly accurate way of stating the position. The inaccuracy is however a matter of language rather than of substance. The borough council's method of calculation, on the other hand, seems to me to be fundamentally unsound, and to be incompatible with the manifest intention of the legislature. It follows, in my opinion, that the arbitrator must be precluded from adopting it. It is not necessary, however, that he should adopt any particular arithmetical formula, provided that he founds his estimate on correct principles, and I concur in the motion proposed by my noble and learned friend on the Woolsack.

LORD NORMAND: My Lords, I agree that the appeal should be disposed of as proposed by the noble and learned Viscount on the Woolsack. Since the facts and the statutory provision have been sufficiently stated I will not take up time by repeating them.

The first question is: What is the nature of the arbitrator's duty under the statute? This question was not raised in the courts below and it is unfortunate that we do not have their opinions upon it. I think, however, that the answer is clear beyond reasonable doubt, and that the arbitrator's duty under ss. 151 and 152 (1) (b) and the rules in sched. V of the Local Government Act, 1933, is to award to the county which is suffering the severance the payment from the annexing borough of such a sum as he in his discretion thinks equitable having regard to all the circumstances including the increase of burden which will be thrown on the ratepayers of the reduced county as a consequence of the alteration of boundaries. I refer to the expression "such sum as seems equitable" in s. 152 (1) (b) and to the expression "regard shall be had to" in r. 1 of sched. V, both of which seem to me to be free of ambiguity. It is clear too that the cost of executing the reduced county's functions after the alteration of boundaries and the length of time during which the increase of burden may be expected to continue (r. 1 (b)) are at best matters of approximate estimate, and that the average increase of annual burden (r. 2), which appears to mean normal annual increase of burden, is to some extent a matter of speculation. What is required of the arbitrator, therefore, is the fair exercise of a wise discretion rather than arithmetical calculations.

It is, nevertheless, necessary that the arbitrator should know what are the factors to which he must have regard under r. 1 of sched. V, though the effect, if any, which he may decide to give to them is subject to his discretion. The borough council maintain that the arbitrator, in assessing the increase of burden which will be thrown on the ratepayers of the reduced county as the result of the change of boundaries, must take account of the General Exchequer Grant and must assume that during all the years after severance, to which he is directed by r. 2 to have regard, the county will continue to receive the same sum as General Exchequer Grant as that which it received immediately before the severance. The county council, on the other hand, maintain that the Exchequer Grant should be altogether ignored, or (what comes arithmetically to the same thing) that the arbitrator should assume that the county will receive after the date of severance only such proportion of the pre-severance General Exchequer Grant as the rateable value of the reduced county bears to the rateable value of the county before severance. I must, however, here interpose the criticism that the assumption that the county after severance will receive a proportion of the pre-severance General Exchequer Grant does violence to the true nature of such a grant. For it is a grant to the county council and part of its income and is in no sense apportionable between different parts of the county.

If, for the purpose of assessing "the increase of burden" under s. 152 (1) (b) and the rules of sched. V, it were necessary to know what the reduced county's General Exchequer Grant will be after severance there would be no difficulty. The figure has been adjusted under the provisions of s. 152 (1) (a) and the regulations therein mentioned and it would only be necessary to use the adjusted figure. But the proviso to r. 1 of sched. V expressly forbids the arbitrator to take into account any alteration of the county council's income in consequence of an apportionment made under the regulations mentioned in s. 152 (1) (a). When the case was before the Court of Appeal it seems to

have been thought that the proviso imposed an artificial prohibition on the arbitrator, but the parties are now agreed, I think rightly, that the proviso merely warns the arbitrator off ground which is not properly within his sphere. It is an express admonition that the adjustment of General Exchequer Grant which is made at severance is irrelevant, and it is not the capricious exclusion from consideration of a relevant factor. The adjustment is irrelevant because it is not related to the "increased burden" nor to the loss of rateable value

A in the severed area, and in so far as the arbitrator might take account of it in assessing the compensation to the county for "the increased burden" he would to that extent be nullifying the effect of the adjustment. The prohibition in the proviso ought not, in my opinion, to be extended by implication beyond the limits expressed in it, nor should it be construed as implying a positive direction to take account of the pre-severance income of the county council, including the General Exchequer Grant, as if it were to be received

B unaltered in amount after the severance. The relevance or irrelevance to the arbitrator's task of the pre-severance General Exchequer Grant must depend on other statutory provisions and particularly on the terms of r. 1 (a) of sched. V. But in construing that rule it is proper and necessary to bear in mind the terms of the proviso. The first thing that the arbitrator must do under the rule is to find what the burden of the ratepayers in the reduced county will be, but he must in doing so not take into account the Exchequer Grant which

C will be paid to the county after severance. The question then arises on what grounds of logic is it permitted to take into account an Exchequer Grant which the county will not receive in the relevant period? To put the point less abstractly, how can the arbitrator, in having regard to what will be, take account of a grant which he knows will not be received? The statute might compel the arbitrator to an illogical inclusion of what he knows to be unreal and fictitious in a calculation which aims at being real, or as real as anything

D in the future can be said to be real. But I do not find in the rule nor elsewhere in the statute any warrant for this departure from logic which the borough council demands. It is not only illogical to include in a calculation of what will be something that will not be, but it is also irrational to assume that a county which has suffered severance of territory will retain the whole of its pre-severance General Exchequer Grant, with the consequence that, if the

E severed area is sufficiently large and however high its rateable value may be in comparison with the rateable value of the rest of the county, the General Exchequer Grant to be received by the county council will exceed the expenditure of the reduced county, and the reduced county ratepayers will find that their burden has been extinguished. I therefore reject the contention for the borough council that the arbitrator must calculate the burden which

F will be borne by the ratepayers on the assumption that the pre-severance General Exchequer Grant will continue to be received after severance. In the calculation of the burden which would have been borne by the ratepayers, if there had been no alteration of boundaries it is again necessary, since like must be compared with like, that an arbitrator should not assume the continuance of the pre-severance General Exchequer Grant. In my opinion the arbitrator's mandate requires him to perform the very simple operation of

G finding the difference between the burden of the ratepayers in the reduced area in the post-severance period and the burden which they would have borne in the same period if there had been no severance, and in doing so not to assume any figure, neither the real figure, nor a fictitious figure, for post-severance General Exchequer Grant. LORD GREENE, M.R., has shown in his judgment ([1946] 2 All E.R. 317), one simple way in which this can be done, and he arrived at the same result as that at which he finally arrived by assuming

H that after severance the county council would receive a reduced proportion of the pre-severance General Exchequer Grant. But it may be repeated here that the arbitrator is not to allow himself to become the victim of arithmetic. He has been given a broad and rather a blunt axe with instructions to exercise a wise and fair discretion in using it, and he must do his best with the clumsy instrument which the legislature has put into his hands.

There was some discussion whether the arbitrator could legitimately have regard to the fact that about two years after severance a new fixed grant period would begin and a new General Exchequer Grant would be assigned to the

county. I think that this point is not included in the question agreed to by the parties. In my opinion, however, it would be erroneous to take this later adjustment of General Exchequer Grant into account. Any new adjustment after the adjustment made at severance is not related even remotely to "the increase of burden" caused by the severance and any such later adjustment would be based upon considerations which had emerged after the adjustment made at severance.

Appeal dismissed.

MONMOUTHSHIRE COUNTY COUNCIL *v.* NEWPORT BOROUGH COUNCIL

VISCOUNT SIMON : My Lords, the Newport Extension Act, 1934, transferred to the borough of Newport an area previously forming part of the administrative county of Monmouthshire and the appointed day on which the transfer took effect was Apr. 1, 1935. In view of this alteration of boundaries an adjustment of "property income debts liabilities or expenses or of any financial relations" (s. 58 of the Act) was required, and since these included matters on which the two local authorities did not agree, an arbitrator was appointed to make an award. It is not disputed that a proper adjustment will require the award of a net amount to be paid by the borough to the county. This appeal concerns the second and third questions raised in the Consultative Case stated for the opinion of the court by the arbitrator. Of these two questions the first is :

Whether I have power to award interest on any sum or sums I may award to the county council—(a) in respect of the period between the appointed day and the date of my award, or (b) in respect of any, and if so what, part of that period.

A further question is formulated which only arises if the first question is answered in the affirmative.

The way in which the question arises is best seen by examining the county council's summary of its claim, which was delivered in Nov. 1938. The claim amounted, in round figures, to a sum of £539,000 gross, against which is set off about £7,000 admittedly due on certain items of adjustment to the borough, thus leaving a net sum of £532,000 as an annual figure claimed by the county council. The main head of claim was for adjustment in respect of increase of burden (the proper calculation of which is the subject of the previous appeal), but there are also two smaller heads in respect of continuing liabilities and of capital liabilities. To the total of £532,000 the county council claim that the arbitrator should add interest on this sum at 4 per cent. per annum from the appointed day to date of payment. The argument for the county council is that, whereas the figure fixed by the arbitrator in place of the £532,000 claimed would be the proper figure to take if payment was made on the appointed day, this amount becomes inadequate if payment is made long afterwards, unless the arbitrator has a discretion to add a further sum to compensate for the interval during which the county council has had to wait for payment. The county council admits (as the question implies) that the arbitrator is not bound to add this compensation, for the delay, or some part of it, may be due to the claimant's fault, but they urge that the arbitrator has this discretion, and points to the fact that the largest item to be quantified is such "as seems equitable."

Like the Court of Appeal, I cannot accept this view. As regards the adjustment for increase of burden, s. 152 (1) (b) of the Local Government Act, 1933, provides that on such an adjustment :

Provision shall, unless otherwise agreed, be made for the payment to a local authority of such sum as seems equitable, in accordance with the rules contained in the Fifth Schedule to this Act, in respect of any increase of burden which, as a consequence of any alteration of boundaries or other change in relation to which the adjustment takes place, will properly be thrown on the ratepayers

of the reduced area which is now the county. The equitable sum to be fixed in order to reach the adjustment in respect of increase of burden on ratepayers is, therefore, to be arrived at by considering what increase of burden may be brought about "as a consequence of any alteration of boundaries or other change in relation to which the adjustment takes place." The alteration of boundaries takes place on the appointed day. To arrive at this figure (which involves the difficult task of estimating the difference between what will be the result of the change of boundaries to ratepayers in the reduced area and what would

have been in the future the financial situation in that area if there had been no change), the arbitrator must fix what he regards as equitable in view of the change which takes place on the appointed day. His mandate does not extend to authorise him to measure and award what it would be equitable to add for delay in payment. That is quite another matter. If the county has any grievance on that score, any remedy (if one exists) must be found elsewhere than in the arbitrator's award. This view of the matter seems clearly to emerge

A from an examination of the statutory terms of reference. As regards items in the claim other than that of adjustment in respect of increase of burden, the arbitrator, in my opinion, is not authorised to add a rate of interest for delay. It may be that in some instances the county would by another process get a further amount because the settlement prescribed by the arbitrator is not in fact carried out till long after the appointed day, but this relief would not in any case be provided in the arbitrator's award. For example, if before the boundaries were altered

B the two authorities shared expenses or profits of a joint enterprise in a certain proportion and if the arbitrator awarded that this proportion should be varied as at the appointed day, I should suppose that the authority which from the appointed day to the date of putting the award into force had borne too much would be entitled to have this rectified in taking the final account. But the rectification would be arrived at, not by calculating a rate of interest, but by

C applying the adjustment decided in the arbitrator's award as from the appointed day.

It is argued for the county council that sub-s. (3) of s. 151 of the Local Government Act, 1933, which section is also imported into s. 58 of the Newport Extension Act as a guide for the carrying out of the adjustment, authorises the arbitrator, when the adjustment is not agreed, to "provide for any matter for which an agreement might have provided." Local bodies, when agreeing an adjusting

D figure, must not infrequently conceded to the receiving party an amount for interest in view of delay in payment : see *e.g.*, the agreed adjustment in *Bullington R.D.C. v. Oxford Corpn.* (1) ; *Southport Corpn. v. Lancashire County Council* (2). Hence, it is suggested, the arbitrator has equally wide powers. But when the local bodies agree that interest should be paid, this is apart from the powers contained in s. 151, and the arbitrator's authority extends only to matters which, if agreed, might be settled under the statute.

E There is, as it appears to me, a shorter road by which to reach the conclusion that the arbitrator cannot add interest in the way proposed by the county council in its summary of claim. The figure of claim in that summary, or any figure substituted by the arbitrator for it, is (at any rate for the most part) a figure of annual loss. So far as increase of burden is concerned, it is certainly a figure for the year. What the arbitrator would award as due to the county would not be this figure itself but this figure to be paid by way of annuity,

F or the capitalised value of the annuity, subject to the ceiling prescribed by r. 2. It would therefore be plainly wrong to add to this annual figure interest at 4 per cent. and to direct an annuity to be paid on this higher basis or the capitalised value of such annuity, for the suggested addition of interest is only in respect of a period of delay in payment at the beginning. Once the arbitrator has fixed the sum, whether as an annuity for so many years or as a figure of capital,

G the county can sue for it, and, if payment was delayed after the due amount had been ascertained, interest might be added under the Law Reform (Miscellaneous Provisions) Act, 1934. In neither event does the element of loss falling on the council by reason of delay in payment arise as a consequence of the alteration of boundaries. I move that this appeal be dismissed.

H LORD WRIGHT : My Lords, the subject of the second appeal to which the parties are the same two councils as in the first appeal was included in the same Special Case and heard before the courts below and before your Lordships immediately after the principal matters dealt with. It raises the question whether the arbitrator has power to award interest in addition to whatever capital sum he awards.

There was very great delay in the proceedings between the parties. The Newport Extension Act was passed in 1934. Under it the appointed day was Apr. 1, 1935, when the Act came into force. The claim of the county council was not delivered until Nov., 1938. It was not until June 7, 1943, that the

arbitrator was appointed by the agreement of that date between the parties. The Special Case was dated Oct. 11, 1945. The judgment of the learned judge was delivered on Dec. 19, 1945, and of the Court of Appeal on June 5, 1946. Your Lordships have been engaged in hearing this appeal in Feb., 1947. The sum claimed was very large. If interest were given for a sum less than the amount claimed, it still would be a very large sum, which LORD GREENE, M.R., when giving the judgment of the court, said would be more than a quarter of a million pounds. It is not suggested that responsibility for this delay rests on either party. It would certainly be a great hardship if when the award is finally made the weight of a very heavy claim for interest should be added to the principal sum. In addition it has been questioned if to raise any such sum would be within the powers of the borough. But however that may be and however grave such consequences could be, they could not furnish a ground against the allowance of interest if to allow interest were within the arbitrator's competence, and he thought it proper so to do. Both courts below have decided against the claim for interest. A

The question was stated by the arbitrator in the following alternatives as a question of law : B

(2) Whether I have power to order interest to be paid on any sum I may award to the county council for any (and if so at what rate) interest to the date of my award.

(3) If I have power to award interest whether that interest is to be taken into account for the purpose of para. (2) of sched. V to the Local Government Act, 1933. C

The issue whether he has power to award interest can only be determined by examining the language used by the legislature with reference to the matter. I agree with both courts below and with (as I understand) all your Lordships that the authority or mandate given to the arbitrator by the legislature does not expressly or by implication include this power. The arbitrator's power is defined by s. 58 of the Newport Extension Act, 1934, and s. 151 (3) and sched. V of the Local Government Act, 1933, the terms of which are fully before your Lordships. There is no express mention of interest in these enactments. They provide for a financial adjustment which may be settled by agreement, but, in default of an agreement as to any matter requiring adjustment, it is provided that such adjustment shall be referred to the arbitration of a single arbitrator and the award of the arbitrator may provide for any matter for which an agreement might have provided. But the governing section defining the scope of the financial adjustment is s. 152 of the Act of 1933. This, as appears from the language of the section already quoted in this opinion, is to adjust the amount of the increase of burden which in consequence of the alteration of boundaries will properly be thrown on the ratepayers of the area of the local authority in meeting the cost incurred by that local authority in the discharge of their functions. This limitation is made even clearer by sched. V and particularly by r. 2 of the schedule which provides that the sum payable by the local authority in respect of the increase of burden shall not exceed the average annual increase of burden or its capitalised value if payable by instalments. D E

In my opinion, this precise definition of the mandate thus given to the arbitrator excludes the idea of a power to award interest in addition to his determination of the increase of burden. The English common law as to interest has very recently been discussed by your Lordships in *Riches v. Westminster Bank* (3). In that case this House discussed the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3, which enlarged the powers of "any court of record for the recovery of any debt or damages" so as to include in the sum for which judgment is given interest and repealed ss. 28 and 29 of the Civil Procedure Act, 1833. The mere language of the new Act makes it clear that it cannot apply to an award under the provisions of the Local Government Act here in question. There is here no question of debt or damages, nor is the decision that of a court of record. The judgment of this House in *Swift v. Board of Trade* (4), which was cited in this appeal was a different case. It dealt with the power of a statutory arbitrator to allow interest on the compensation for goods requisitioned in wartime under the Defence of the Realm Regulations. Such a power was negated by this House. Much of what was said by their Lordships in that case does not apply to a case like the present, in particular because the Act of 1934 just mentioned had not F G H

then been enacted. But LORD SUMNER ([1925] A.C. 323) stated the principle to be that unless the regulation itself authorises the allowance of interest none can be given. He pointed out that there was no debt due and no wrong done, there was nothing to which to attach an allowance of interest. He concluded :

To give interest is really to give additional compensation for being the victim of war legislation, and this subject of compensation is not within the regulation.

A *Mutatis mutandis*, the principle so stated applies to the present case. Indeed the reasons here for denying the discretion of the statutory arbitrator to award interest are stronger than those indicated by LORD SUMNER. Even though the county council was not the victim of wartime legislation it and the borough council were both subjected to the provisions of ss. 151 and 152 and to the statutory arbitration, with its inevitable delay in determining the proper sum of compensation. It may be enough to say here that no express power is given to the arbitrator to award interest. But the matter is to my mind concluded by the form of the mandate to which I have adverted. On the footing that interest was outside the scope of the arbitrator's authority that defect could not be cured by the agreement of the parties which in a case like this could not enlarge the statutory jurisdiction.

C To meet these objections it has been strenuously contended that loss of interest which was unavoidable under the circumstances was an integral and essential element in the equitable estimate of the increase of burden consequent on the alteration of boundaries and as such had to be taken into account, like any other element of cost. But it cannot be correctly regarded as part of the increase of cost to the county council in executing its functions. It is indeed outside that subject of computation. Interest is collateral, because it is in essence a special payment to compensate the creditor for being deprived of the use of the money during the delay between the due date and the eventual payment. It is the appointed day which the arbitrator must regard, as the due date for fixing the compensation. The delay in payment is subsequent and incidental. But the fundamental objection is that the arbitrator's mandate does not extend to the award of interest. That legal limitation excludes the equitable considerations, at the best uncertain and open to conflicting equities, which the county council seeks to introduce.

E I have not been helped by any of the other cases cited. The issue should, in my opinion, be decided on the basis of the particular instruments to which I have referred. I should answer the question (2) in the negative. Question (3) does not arise since it presupposes an affirmative answer to (2). Of course, the question as to interest from the date of the award is a different matter. It is naturally not raised in the case. I should dismiss the appeal.

F LORD SIMONDS : My Lords, the relevant facts have been sufficiently stated in the other appeal between these parties. Here the short question stated by the arbitrator is, in his own words :

Whether I have power to award interest on any sum or sums I may award to the county council—(a) in respect of the period between the appointed day and the date of my award, or (b) in respect of any, and if so what, part of that period.

G A further question arises if the question is answered in the affirmative. It does not arise in the view which your Lordships take.

H It is necessary to distinguish that part of the sum to be awarded which arises from an adjustment in respect of increase of burden from that part which arises from an adjustment of other "property, income, debts, liabilities and expenses (so far as affected by the alteration) of, and any financial relations between, the parties to the agreement." I quote the language of s. 151 (1) of the Local Government Act, 1933. It is in regard to the former part only (which forms by far the larger portion of the claim) that the specific directions contained in s. 152 (1) (b) of the Act and in sched. V to the Act apply. It appears to me that the answer to this question must rest on the true construction of the relevant sections. I find that so clear that I do not think it necessary to refer to the adventitious fact (if it be a fact) that the borough council has no statutory power to raise by way of loan the very large sum which might be awarded by way of interest.

As a matter of construction, there must be found in the section a power

express or implied given to the arbitrator to award interest. Upon this part of the case I would respectfully adopt the language of LORD GREENE, M.R. ([1946] 2 All E.R. 322, 323). I agree with him in thinking that the decision of this House in *Swift & Co. v. The Board of Trade* (4), is conclusive. No express power is to be found in the section and there is nothing from which such a power can or ought to be implied. It was urged that, so far as the awarded sum consisted of an adjustment in respect of an increase of burden, it was the duty of the arbitrator to ascertain under s. 152 (1) (b) "such sum as seems equitable, etc." and that he could not satisfactorily perform that duty unless he could award interest for delay in payment after the appointed day, when *ex hypothesi*, the burden was increased. But this argument ignores that what the arbitrator has to do is to find the equitable sum as at the appointed day. Having done so, he has accomplished his task. He has neither the right nor the duty then to consider whether there has been delay and, if so, whose fault that delay was, and upon that footing to award interest. Then it was contended, and this argument extended, I think, to the whole of the awarded sum, that the arbitrator could award whatever the parties could agree, and that the parties could in the adjustment of their "financial relations" agree to the payment of interest on a capital sum. I will assume that the first part of this contention is correct, that, what the parties could agree, the arbitrator could award. But the "financial relations" to be adjusted are the relations existing before and at the appointed day: see per LORD DAVEY in *Caterham U.D.C. v. Godstone R.D.C.* (5) ([1904] A.C. 174). An agreement for payment of interest after the appointed day is not an adjustment of financial relations as at that day. If it is competent for a local authority to agree to pay such interest (a question which I do not think it necessary to decide) the power to do so does not arise under the sections in question but extraneously. And if it does not arise under the sections, then the arbitrator has no power to award interest on any sum which he may award to the county council. This appeal must, in my opinion, be dismissed.

LORD NORMAND: My Lords, I have been asked by LORD DU PARCQ to state on his behalf that he has had an opportunity of reading in print the speech which was delivered by my noble and learned friend on the Woolsack and that he agrees with it and has nothing to add. My Lords, I also agree with it, and I have nothing to add.

Appeal dismissed.

Solicitors: *Torr & Co.*, agents for *Vernon Lawrence*, Newport, Mon. (for the county council); *Rees & Freres*, agents for *T. Mervyn Jones*, Newport, Mon. (for the borough council).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

PRATT v. NORTH WEST NORFOLK ASSESSMENT COMMITTEE AND OTHERS.

[HOUSE OF LORDS (Viscount Simon, Lord Wright, Lord Simonds, Lord Uthwatt, Lord Normand), March 13, 17, 18, May 16, 1947.]

Rates and Rating—Valuation list—Revaluation—Validity of large-scale revaluation—Proposals by county valuation committee to increase large proportion of assessments in area—Systematic examination of all assessments with a view to revaluation—Rating and Valuation Act, 1925 (c. 90), s. 37 (1).

In Dec., 1940, the respondent county valuation committee, being of opinion that the general level of existing assessments in its rating area was too low, made proposals to increase the assessments of between 40 and 50 houses, and in Nov., 1941, these proposals were approved by the assessment committee. Between Dec., 1941, and Dec., 1942, the valuation committee made proposals relating to 577 hereditaments, the assessments in respect of which, with few exceptions, were increased by the assessment committee. In addition to these proposals, 618 further hereditaments were inspected on behalf of the valuation committee, and systematic inspection was continuing of all hereditaments. One of the proposals allowed by the assessment committee was that the gross value of a hereditament belonging to the appellant should be increased from £14 to £20 and the rateable

value from £8 to £12. In making this and all other proposals, the valuation committee were purporting to act under the Rating and Valuation Act, 1925, s. 37, which provides "(1) Any person (including the county valuation committee and any local authority) who is aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force, or by the inclusion therein or omission therefrom of any matter . . . or otherwise with respect to the list, may make in manner provided by this section a proposal for the amendment of the list . . ."

HELD: the proposal to increase the appellant's assessment was within the plain meaning of s. 37, and, although it might well be that the legislature did not contemplate the making of wholesale proposals as a normal operation of the section, it was impossible to find anything in the Act which rendered such proposals illegal.

Per LORD UTHWATT: A proposal for an amendment of a specific entry is not altered in character by reason that it forms part of a series of cases calling for alterations in value due to an identical or general cause, and, however numerous the amendments, the valuation list retains its character as the current valuation list.

Decision of the Court of Appeal ([1946] 1 All E.R. 4) *affirmed*.

Camberwell Assessment Committee v. Ellis ([1900] A.C. 510) *distinguished*.

R. v. Worthing Borough Council and Horsham and Worthing Assessment Committee, Ex p. Burgess ([1937] 2 All E.R. 681) *discussed*.

[AS TO AMENDMENT OF VALUATION LISTS, see HALSBURY, Hailsham Edn., Vol. 27, pp. 484-488, para. 913; and FOR CASES, see DIGEST Supp., Rates and Rating, Nos. 1147a-1161a.]

Cases referred to:

- (1) *Camberwell Assessment Committee v. Ellis*, [1900] A.C. 510; 69 L.J.Q.B. 828; 83 L.T. 201; 65 J.P. 132; 38 Digest 642, 1601.
- (2) *R. v. Worthing Borough Council and Horsham and Worthing Assessment Committee, Ex p. Burgess*, [1937] 2 All E.R. 681; 106 L.J.K.B. 810; *sub nom. R. v. Horsham and Worthing Assessment Committee, Ex p. Burgess*, [1937] 2 K.B. 408; 157 L.T. 41; Digest Supp.
- (3) *Murphy Radio, Ltd. v. Welwyn Garden City Rating Authority*, [1943] 2 All E.R. 16; 168 L.T. 427; 107 J.P. 115; Digest Supp.

APPEAL by the ratepayer from a decision of the Court of Appeal, reported at [1946] 1 All E.R. 4, reversing a decision of the Divisional Court, reported at [1945] 2 All E.R. 78.

The matter came before the Divisional Court on a Special Case stated by Norfolk Quarter Sessions by consent of the parties. The Divisional Court held that the county valuation committee had no power to use the provisions for amendment of the valuation list in the Rating and Valuation Act, 1925, s. 37, to bring into existence a new valuation list, but the Court of Appeal held that, even assuming that the county valuation committee was, in fact, engaged in an operation resulting in the alteration of all the assessments in their area, that operation, if carried out within the powers conferred by s. 37, was lawful. The facts appear in the opinion of LORD SIMONDS.

Beney, K.C., and *Dare* for the appellant.

Simes, K.C., and *H.B. Williams* for the respondents.

The House took time for consideration.

May 16. The following opinions were delivered.

VISCOUNT SIMON: My Lords, I have had the advantage of reading in print the opinion which has been prepared in this appeal by LORD SIMONDS. He has covered the whole ground, and I agree with his reasoning and conclusions. In these circumstances I need do no more than move that the appeal be dismissed with costs.

LORD WRIGHT: My Lords, I also concur.

LORD SIMONDS: My Lords, the question for your Lordships' decision is whether the North West Norfolk Assessment Committee (whom I will call "the first respondent") were correct in allowing a proposal by the county valuation committee for the county of Norfolk (whom I will call "the second

respondent") dated Aug. 17, 1942, to amend the current valuation list for the parish of Heacham in the Docking rural rating area in the county of Norfolk by raising the gross value of a certain hereditament belonging to and occupied by the appellant from £14 to £20 and the rateable value from £8 to £12. This question, which the Court of Appeal has answered in the affirmative, reversing the decision of the King's Bench Division, came before the court on a Special Case stated for its opinion under the provisions of the Quarter Sessions Act, 1849, s. 11, commonly known as Baines's Act. It appears from the preamble to the Special Case that the dispute thus arose. The second respondent having made the proposal to which I have already referred, the appellant objected to it in writing on Dec. 8, 1942. His notice of objection is annexed to the Special Case, but the grounds of objection are not there stated. On Dec. 18, 1942, the first respondent heard the proposal and objection and determined to raise the value of the appellant's hereditament in accordance with the proposal. The appellant on Jan. 5, 1943, gave due notice of appeal against this determination to the court of quarter sessions of the county of Norfolk. I think it convenient at this stage to state the grounds of appeal as they were there set out. They were:

(1) Since the passing of the Rating and Valuation (Postponement of Valuations) Act, 1940, there has been a re-valuation of the greater part of Heacham and proposals numbering 407 have been made which have been heard and determined by the assessment committee and further valuations are in progress with a view to further proposals being made. Although these are individually called proposals the result is in fact a revaluation of the whole or greater part of the parish revising the basis for the area and as such it is bad in law and *ultra vires*.

(2) The gross value as determined by the said assessment committee is not in accordance with the definition of gross value contained in the Rating and Valuation Act, 1925, s. 68.

The first of these grounds has persisted and is, in substance, the question that your Lordships now have to consider. The second of them has disappeared.

Notice of appeal having thus been given, the Special Case was stated by consent of the parties and by order of COHEN, J., pursuant to the provisions of Baines's Act. Its terms were settled by agreement between the parties and their advisers. I take the following facts from the Special Case. The parish of Heacham and the parishes of Snettisham, Dersingham and Ingoldisthorpe are part of the rating area consisting of 29 parishes for which the Docking Rural District Council (which I will call "the rating authority") is the rating authority. The first respondent is the assessment committee for an area which includes this rating area and the second respondent is the county valuation committee for the county of Norfolk established pursuant to the Rating and Valuation Act, 1925, s. 18, to which I shall refer as "the Act of 1925." Section 19 of the Act of 1925 had provided that a new valuation list should be made for every rating area, so as to come into force on Apr. 1, 1928, or on Apr. 1, 1929, and a second new valuation list should be made so as to come into force for every such area on Apr. 1, 1932, 1933 or 1934, and that thereafter new valuation lists should be made from time to time so that the interval between the dates on which one valuation list and the next succeeding valuation list respectively came into force should be a period of 5 years. But by the Rating and Valuation (Postponement of Valuations) Act, 1938, s. 1, the third new valuation list was directed to be made so as to come into force on Apr. 1, 1941: and by the Rating and Valuation (Postponement of Valuations) Act, 1940, s. 1 (3), the making of the third new valuation list was further indefinitely postponed by the substitution in the Act of 1938 of a reference to Apr. 1, in the "prescribed year" for the reference to Apr. 1, 1941. By reason of these provisions the second new valuation list for the Docking rural rating area, which came into force on Apr. 1, 1934, was the valuation list in force at all material times.

The total number of hereditaments in the said rating area is 6,410 of which number the four parishes specifically referred to contain respectively:—Heacham parish, 980; Snettisham parish, 669; Dersingham parish, 591; Ingoldisthorpe parish, 137—2,377. Each of the said parishes appears in a separate division of the valuation list in accordance with s. 21 (2) of the Act of 1925. On Aug. 26, 1940, the rating authority made proposals to increase the assessments of certain houses in the parish of Ingoldisthorpe. In or about

the month of Dec., 1940, the second respondent, being of opinion that the general level of the existing assessments in the said rating area was too low, made proposals to increase the assessments of 22 houses in Ingoldisthorpe, 17 in Heacham and 5 in Dersingham, in respect of which houses and 5 others in Ingoldisthorpe the rating authority had already made proposals to increase the assessments but at lower figures. The first respondent on Nov. 14, 1941, approved the proposals of the second respondent. Between Dec., 1941, and Dec., 1942, the second respondent made proposals relating to 577 hereditaments (including that which is the subject of this appeal) which were situated in the respective parishes as follows:—Heacham, 409; Snettisham, 82; Dersingham, 33; Ingoldisthorpe, 53—577. The assessments of all these hereditaments, with the exception of eight, two of which stand adjourned, were increased by the first respondent. In addition to making the proposals referred to above the acting county valuation officer on behalf of the second respondent prior to Dec., 1942, inspected 618 further hereditaments in the said parishes, as follows:—Heacham, 87; Snettisham, 172; Dersingham, 359—618. No proposals in respect of these hereditaments had been made pending the result of this appeal except that on Mar. 8, 1944, eight further proposals were made by the second respondent to increase the gross and rateable values of certain hereditaments in the parish of Heacham. The said proposals were approved by the first respondent on Mar. 31, 1944. On July 20, 1942, the following minute was entered by the Docking Rural District Council in their minute books:

Proposals by county valuation officer.—A further list of proposals made by the county valuation officer acting on behalf of the Norfolk County Council was before the rating committee. Arising from this matter the Heacham parish representative stated there was considerable concern in the parish regarding what appeared to be the omission or delay by the acting county valuation officer in submitting proposals regarding the larger properties and it is recommended that Mr. Chapman be requested to give his observations on this matter.

The said Chapman was the acting county valuation officer.

On Sept. 11, 1942, the said acting county valuation officer wrote to the Docking Rural District Council a letter in which he stated:

There are a small number of larger properties which have not yet been dealt with by me as I have not had time to do so, but I have endeavoured throughout to value all properties without regard to size. Any properties which have been omitted will be revalued in the near future and proposals made if necessary.

In Dec., 1942, the acting county valuation officer on behalf of the second-named respondents was actively continuing a systematic inspection and revaluation of all the hereditaments in the said rating area with a view to the making of further proposals so as to raise the general level of the existing assessments in the said rating area.

The Special Case then sets out the contentions of the parties, that of the appellant being in effect the contention which had already appeared in the notice of appeal to quarter sessions and that of the respondents being in effect that the second respondent had no power or duty to prepare a new valuation list and were not in fact doing so but were acting in exercise of their statutory duty under s. 18 of the Act of 1925 to take such steps as they thought fit for promoting uniformity in the principles and practice of valuation and of their statutory powers under s. 37 of the same Act to make proposals for the amendment of the valuation list. The contention of the appellant found favour with the Divisional Court, consisting of LEWIS, OLIVER and BIRKETT, JJ., whose unanimous judgment was delivered by BIRKETT, J. It was their opinion that the true view of the matters in controversy was that because a new valuation list, due in 1939 in the ordinary course of events, could not be brought into being and such a list was thought to be most desirable, the methods employed were designed to bring about the same end; that what could only be done under s. 19 of the Act of 1925 was sought to be done under s. 37 of that Act; that that was not a proper method of dealing with the position and had no sanction in law; and that, accordingly, the proposal against which the appellant appealed was not a valid and legal proposal. The Court of Appeal were unanimous in reversing this decision, holding that what was done by the respondents was authorised by the plain language of s. 37 of the Act of 1925 and that the present appellant's argument involved a rewriting

of that section for which there was no justification.

My Lords, in my opinion, the view of the Court of Appeal is to be preferred. The MASTER OF THE ROLLS has dealt exhaustively and, as I think, conclusively with the construction of the Act of 1925, but your Lordships were pressed by counsel for the appellant with a decision of this House in *Camberwell Assessment Committee v. Ellis* (1), with which the MASTER OF THE ROLLS did not explicitly deal. That was a case which was decided upon another Act of Parliament, the Valuation (Metropolis) Act, 1869, ss. 46 and 47 of which contain provisions bearing some resemblance to those of s. 37 of the Act of 1925. Upon those sections it was determined by this House that to justify an alteration of the quinquennial valuation of a hereditament in the metropolis (which was made under that Act) by a supplemental or provisional valuation it must be shown that the cause of the alteration in its annual value was one directly affecting that particular hereditament and that it was not enough merely to show that since the last quinquennial valuation there had been throughout the metropolis a general rise in the annual value of the class of property to which the particular hereditament belonged. My Lords, that is a binding authority upon the meaning of those sections, but, if I may say so with the greatest respect to the learned judges of the King's Bench Division, I get little assistance from it in the construction of the relevant sections, and in particular s. 37, of the Act of 1925. I do not doubt that that is why the learned MASTER OF THE ROLLS did not deal with it.

The Act of 1925, which does not extend to the administrative county of London, appears to me to be unambiguous in its terms so far as relates to the present question. It is a comprehensive Act, as its title indicates :

An Act to simplify and amend the law with respect to the making and collection of rates by the consolidation of rates and otherwise, to promote uniformity in the valuation of property for the purpose of rates, to amend the law with respect to the valuation of machinery and certain other classes of properties, and for other purposes incidental to or connected with the matters aforesaid.

In the construction of an Act with such an avowed purpose the judicial interpretation of similar, but in some respects markedly different, language in an analogous statute can have relatively little weight with your Lordships. I examine very briefly the Act of 1925. Part I of the Act establishes the rating authorities in every rating area and provides for the making and levying of rates and for the issue of precepts. About this part of the Act I need say no more. Part II of the Act deals with "Valuation." First it establishes "assessment areas" and an "assessment committee" for each area. Then by s. 18 it provides for the establishment in every county of a committee of the county council to be called "the county valuation committee," whose duty it is to take such steps as they think fit (*inter alia*) "for promoting uniformity in the principles and practice of valuation" and whose right it is either alone or in conjunction with any rating authority, assessment committee or other county valuation committee to appear as a party to any objection or appeal under that part of the Act. Section 19, to which I have referred at an earlier stage of this opinion, provides for the making of valuation lists, and for their duration. Section 25 and the following sections contain elaborate provisions for the preparation of such lists. I think it necessary only to note that under s. 26 any person including the county valuation committee and any local authority :

... aggrieved by the incorrectness or unfairness of any matter in the draft list, or by the insertion therein or omission therefrom of any matter ... or otherwise with respect to the list ...

may lodge an objection in the manner prescribed. Section 27 provides for consideration of objections by the assessment committee and for their revision of the draft list, s. 28 for its final approval, and s. 31 and the following sections for appeals to quarter sessions. The list having now been settled and being in force for the statutory period, next comes the section which is all important to this case. Section 37 (1) provides :

Any person (including the county valuation committee and any local authority) who is aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force, or by the inclusion therein or omission therefrom of any matter ... or otherwise with respect to the list, may make in manner provided by this section a proposal for the amendment of the list ...

The question is whether the "proposal" made by the second respondent in this case was such a proposal as the section authorised. Two things are immediately apparent—first, that the language of the section could not be wider, and, second, that it is an exact repetition of s. 26. It is clear beyond all controversy that whatever might be a matter of "objection" under the earlier section may be a matter of "proposal" under the later one. If this is so, it could only be a compelling context which would justify some limitation being imposed upon the natural meaning of the words in question. I can find no such context. Whether the proposal stands alone or is one of many, whether the factors which affect the value of a particular hereditament affect the value of other hereditaments in a greater or less degree or not at all, appear to me to be considerations wholly irrelevant to the issue. The only question is whether the proposal falls within the plain meaning of s. 37. I agree with the MASTER OF THE ROLLS that it is only by re-writing the section that it could be excluded. Nor, as I think, is there any force in the argument that, if "proposals" are on a sufficiently large scale, the result may be substantially the same as would follow from a new valuation list and that such a result is intended to be effected only by the procedure under s. 19 of the Act of 1925. It may well be that the legislature did not contemplate wholesale proposals just as it did not contemplate the postponement of quinquennial valuations, but I agree with the Court of Appeal that it is impossible to find anything in the Act which renders such proposals illegal.

My Lords, I have already indicated that in my opinion the *Camberwell* (1) case, which was decided under the Act of 1869, does not assist your Lordships in the construction of the Act of 1925 and I do not think it necessary or useful to examine the manifold differences between the two Acts. But I should perhaps refer to *R. v. Horsham and Worthing Assessment Committee* (2). That was a case decided under the Act of 1925, in which a county valuation committee notified a borough rating authority in the county that in the opinion of the committee the quinquennial valuation list for the borough, which had recently come into force, was not in accordance with the Act of 1925 in the matter of gross values. After due consideration the rating authority made many thousands of proposals for the amendment of the valuation list and a large number of objections fell to be decided by the assessment committee. It was sought to quash their decision overruling an objection to one such proposal upon a number of grounds, including (a) that no such proposal for the amendment of a valuation list could lawfully be made under s. 37 of the Act of 1925, and (b) that s. 37 did not empower the rating authority to make a general revaluation of their district to take effect during the currency of a quinquennial valuation list. These are in effect the grounds upon which the appeal now before the House is supported. The Divisional Court upheld the decision of the assessment committee and in the course of his judgment LORD HEWART, C.J., distinguished the *Camberwell* (1) case, emphasising that the court was dealing with a different statute and different circumstances. In the same case SINGLETON, J., observing on the duties imposed upon the county valuation committee, said that, if it became necessary for them to lodge proposals in order to promote uniformity, they would clearly be within their rights whether it was one proposal or many thousands of proposals. So far I entirely agree with this decision. But I observe that in a later passage SINGLETON, J., says that, if something was done which was in fact the making of a new list, it might well be said to be contrary to the spirit of the Act, and in particular to s. 19. I have some doubt what is intended by this observation. I cannot assent to it, if it means that any limitation is to be imposed upon the power of the county valuation committee to make as many proposals as it thinks desirable. On the contrary I think that, so long as any particular proposal is (to use the words of TUCKER, L.J.) "within the four corners of s. 37," it is a lawful proposal which may lawfully be entertained, although similar proposals may be so numerous that few entries on the current valuation list will remain unaltered. The contrary view is, I think, expressed by STABLE, J., in *Murphy Radio Ltd. v. Welwyn Garden City Rating Authority* (3), and I agree with the MASTER OF THE ROLLS that the passage which he cites from the judgment of that learned judge cannot be supported. Since the passages that I have quoted from the last two cases cited appear to reflect and to be founded on certain observations made in this House in the

Camberwell case, I would conclude by repeating that that decision rested, as their Lordships in that case were careful to emphasise, upon the statute and the attendant facts there under consideration and cannot be taken as a guide in the construction of s. 37 of the Act of 1925. I would dismiss the appeal.

LORD UTHWATT: My Lords, the specific contentions of the appellant are two in number. His first contention is that it is not permissible for the county valuation committee, or, indeed, anyone else, to use the machinery provided by the Rating and Valuation Act, 1925, s. 37, to produce in substance a new valuation list. His second contention is linked with the first contention and is that s. 37 cannot be invoked where those seeking to alter an existing assessment rely on a general change in values happening since the making of the current valuation list as distinct (to use the language of the appellant's printed case) "from a specific change in or affecting or some addition to the hereditaments in question." The agreed Case is not in all respects clear, and it may be doubted whether the facts there stated permit the raising of the second contention in the precise form in which it was put, but the respondents were content that any obscurities in the Case should be resolved in favour of the appellant and took the stand that s. 37 could be used whenever the value attributed to the hereditament in the valuation list was incorrect, the multitude of cases and the cause of error being in their submission immaterial.

The contentions of the appellant obviously find their origin in the decision of this House in *Camberwell Assessment Committee v. Ellis* (1). The matter there in issue was the proper function of a supplemental list made under the Valuation (Metropolis) Act, 1869, s. 46. The decision relates only to the proper construction of that section read in light of the Act as a whole. The observations made in that case as to the respective areas of the quinquennial valuation lists, supplemental lists, and provisional lists referred to in that Act are based only upon the construction of the Act and particularly upon the reference to "cause" contained in s. 47. In the Act of 1925 there is no reference to "cause" and, in my opinion, nothing in *Camberwell Assessment Committee v. Ellis* (1) affords any guide to the proper construction of the Act here under consideration.

Section 37 of the Act of 1925 is perfectly general in its terms. Verbally it contains nothing upon which the appellant can rest his contentions and nothing which negatives the broad proposition submitted by the respondents. A consideration of the Act as a whole may, however, compel the conclusion that as a matter of construction a gloss should be put upon the section having the effect of limiting its apparently universal application, or it may compel the conclusion that resort to the machinery of the section is an abuse and not a legitimate use, if incorrectness in the subsisting valuations is widespread or is due to some general cause. The relevant portions of the Act must therefore be examined. The scheme of the Act is that a new valuation list must be made for every rating area at five-yearly intervals and each such valuation list (subject to the provisions of the Act including the provisions relating to alterations and additions) is to remain in force until superseded by a new valuation list (s. 19). Section 37 is directed to the making of amendments to the current valuation list. Where pursuant to the section a new value is attributed to a hereditament, the matter is carried through by an alteration of or addition to the valuation list (see s. 37 (9)). The additions and alterations so made are not pendants to the valuation list but part of it. Amendments as to value, however numerous, do not result in a new valuation list, but only to new values in the current list. It is to the valuation list so added to or altered that statutory force is given. The procedure to be followed on the making of a new valuation list is set out in s. 25 *et seq.* For present purposes it is sufficient to point out that the classes of persons who may make proposals under s. 37 for the amendment of the valuation list are the same as the classes of persons who on the making of a new valuation list may under s. 26 make objections to the draft valuation list, and that the matters falling for consideration on a proposal under s. 37 are described in the same language as the matters falling for consideration on an objection under s. 26. Textually (subject to one necessary alteration) the relevant language of s. 26 is repeated in s. 37. It is clear that all matters relating to value are open under s. 26, and a limited

construction can, therefore, be attributed to s. 37 only on the ground that an amendment of an existing entry, and not the making of an original entry, is under consideration. The value attributed to any hereditament in the valuation list as for the time being in force is conclusive evidence of the value for every rate (s. 20). Rate is defined by s. 68 to include general rates, special rates and sums raised by precepts. All rating areas in the county are, therefore, interested in the value attributed to any particular hereditament in any rating area and disparity between the standards of values for the time being in force in different areas is of serious moment.

Section 18 contains a matter of particular importance for the purpose in hand. Provision is there made for the setting up of county valuation committees which are to include representatives of each assessment area in the county. The functions of these committees are set out in sub-s. (2). It is to be their duty to take such steps as they think fit for promoting uniformity in the principles and practice of valuation and assisting rating authorities and assessment committees in the performance of their functions under pt. II of the Act. A committee as such is not pecuniarily interested in the proceeds of any rate, but is included both in s. 37 (which relates to the revision of the valuation list) and in s. 26 (which relates to the draft valuation list) among the persons who may be aggrieved by any matter in the draft list or the valuation list. There is thus afforded to a committee, as well during the life of the valuation list as at its birth, the opportunity of carrying out its statutory duty of promoting uniformity in the practice of valuation in the county.

That, so far as is here relevant, is the general scheme of the Act. I can see nothing in it upon which to found a conclusion that as a matter of construction a limitation should be put upon the general language of s. 37 or that resort to machinery provided by that section would be an abuse if all the hereditaments in a particular rating area were involved and the cause of incorrectness perfectly general. On the question of construction the identity of the language used in s. 37 with that used in s. 26 precludes any such limitation as that contended for by the appellant. A proposal for an amendment of a specific entry is not altered in character by reason that it forms part of a series of cases calling for alterations in value due to an identical or general cause, and, however numerous the amendments, the valuation list retains its character as the current valuation list.

On the other point, nothing turns on the circumstance that in this case it is the county valuation committee that has made the proposal under review, but the circumstance that under the section the county valuation committee is given the right to make proposals for the amendment of the list to my mind concludes this part of the case against the appellant. Acceptance of the appellant's contention involves the conclusion that the committee is restricted

during the quinquennium to confining its attention to matters of minor import. Surely the contrary is the case. The obvious inference is that its right to make proposals was intended to march with the due performance of its statutory duty. The more general the inaccuracy of the subsisting valuations in a particular rating area—whether it be due to original incorrectness in the valuation list or to causes operating since its making—and the more general the cause, the more appropriate indeed would appear to be intervention by the committee.

I cannot, therefore, see that the Act, in its general intentment, precludes resort being made to s. 37 where incorrectness is widespread and the cause of the incorrectness is general. Alterations on a wholesale scale may not have been in direct contemplation as a normal operation of the section, but it is impossible to say that such alterations are foreign to the purpose it serves. I would dismiss the appeal.

LORD NORMAND : My Lords, I find myself in complete agreement with the judgment which has been delivered by LORD SIMONDS, to which I can add nothing.

Appeal dismissed.

Solicitors : *Metcalf, Copeman & Pettefar* (for the appellant) ; *Vizard, Oldham, Crowder & Cash* (for the respondents).

[*Reported by C. St. J. NICHOLSON, Esq., Barrister-at-Law.*]

R. v. RECORDER OF LEICESTER, *Ex parte* WOOD.
[KING'S BENCH DIVISION (Lord Goddard, C.J., Singleton and Oliver, JJ.),
May 13, 1947.]

Crown Practice—Certiorari—When order granted—Fraud—Perjury.

At the hearing of an appeal before a recorder against a bastardy order made by justices the appellant gave material evidence which was believed and the appeal was allowed. The evidence was wholly untrue and the appellant was subsequently convicted of perjury. On a motion for an order of *certiorari* to bring up and quash the order of the recorder :—

HELD: the order was obtained by fraud and perjury and *certiorari* would go to quash it.

SEMBLE: (*per* LORD GODDARD, C.J.): *Certiorari* will lie if perjury has been committed by a respondent to an appeal.

Cases referred to:

(1) *R. v. Gillyard* (1848), 12 Q.B. 527; 12 J.P. 456; 16 Digest 443, 3088.

(2) *R. v. Alleyne* (1854), 4 E. & B. 186; Dears C.C. 505; 24 L.T.O.S. 107.

(3) *Colonial Bank of Australasia v. Willan* (1874), L.R. 5 P.C. 417; 16 Digest 440, 3060.

APPLICATION for *certiorari* to quash a decision of the Recorder of Leicester, allowing an appeal against an order of the Leicester justices adjudging one Dennis Draper to be the putative father of the applicant's child.

E. Ling Mallison for the applicant. The respondent did not appear.

LORD GODDARD, C.J.: In this case counsel moves for an order of *certiorari* to bring up and quash an order of the Recorder of Leicester who allowed an appeal by one, Dennis Draper, against an order in bastardy made against him by the justices of the city of Leicester. On the hearing of the appeal before the recorder Draper gave evidence which the recorder believed, but later it turned out that it was wholly untrue and Draper was convicted at Birmingham Assizes of perjury and sentenced to 21 months imprisonment, which he is now serving. It is clear that he committed perjury with regard to a most material fact. The only question on which this court requires to be satisfied was whether or not *certiorari* is the remedy. It is a remedy of a peculiar character and there is a great deal of authority as to when it will and when it will not lie.

The leading case for the present purpose appears to be *R. v. Gillyard* (1), decided in 1848, where, it is interesting to observe, the Attorney-General himself obtained a rule to quash a conviction of a man on the ground that the proceedings were fraudulent in that a charge had been made by the prosecutor which he knew to be untrue and had made to exculpate himself. The court held that where a decision of an inferior court resulting in a conviction had been obtained by fraud *certiorari* was a remedy which was open to the subject who had been convicted, and the rule was made absolute and the conviction quashed. That seems to have been followed in other cases: see *R. v. Alleyne* (2), and in *Colonial Bank of Australasia v. Willan* (3), the Judicial Committee obviously admitted the principle that, if the court was satisfied that there had been fraud in the proceedings, the remedy of *certiorari* would lie.

In this case there can be no doubt there was the grossest fraud on the part of Draper. It is not necessary to consider whether *certiorari* would lie if the perjury had been committed by a respondent to an appeal, though I am inclined to think it would. In these circumstances I think the order for *certiorari* must go, and the order of the recorder in the bastardy proceedings must be quashed, with costs.

SINGLETON, J.: I agree. In the words of ERLE, J. in *R. v. Gillyard* (1), (12 Q.B. 530):

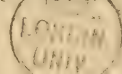
This court has authority to correct all irregularities in the proceedings of inferior tribunals, which in this case have been resorted to for the purpose of fraud. In quashing this conviction, we are exercising the most salutary jurisdiction which this court can exercise.

So, in the present case the order of the inferior court was obtained by fraud and perjury. So far as I know, this procedure is the only one which can be adopted to put right the wrong which has been done.

OLIVER, J.: I agree.

Order accordingly.

Solicitors: Wilberforce Allen & Bryant, agents for Bertram F. Chapman, Leicester (for the applicant). [Reported by F. A. AMIES, Esq., Barrister-at-Law].



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